MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

September 24, 2020 through November 24, 2020

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOLUME 334
FIRST EDITION

THOMSON REUTERS®

2023

The paper used in this publication meets the minimum requirements of American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1984.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
CHRISTOPHER M. MURRAY	2021
Chief Judge Pro Tem	
JANE M. BECKERING	2025
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2025
JANE E. MARKEY	2021
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2021
ANICA LETICA	2021
JAMES R. REDFORD	2021

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
BRIDGET M. McCORMACK	2021
Chief Justice Pro Tem	
DAVID F. VIVIANO	2025
Justices	
STEPHEN J. MARKMAN	2021
BRIAN K. ZAHRA	2023
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

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

KAREN A. KOSTBADE

State Court Administrator

THOMAS P. BOYD

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

TABLE OF CASES REPORTED

COURT OF APPEALS CASES

GRIFFIN v TRUMBULL INSURANCE COMPANY

Docket No. 344272. Submitted February 5, 2020, at Detroit. Decided September 24, 2020, at 9:00 a.m. Reversed in part and remanded 509 Mich ___ (2022).

Willie Griffin filed a complaint in the Wayne Circuit Court against Trumbull Insurance Company seeking, *inter alia*, personal protection insurance (PIP) benefits and asking the court to order the Michigan Assigned Claims Plan (MACP) to assign his claim to an insurer. In May 2016, Griffin was injured in a motorcycle crash while avoiding a truck that had merged into his lane. The truck driver's name, telephone number, and residential address were recorded by the police in the incident report. Five days after the crash, Griffin's counsel sent a letter to the truck driver informing him that Griffin intended to take legal action and asking the truck driver to forward the letter to his insurance company. Griffin also informed his insurer, Trumbull, about the crash, but Trumbull refused to pay him any PIP benefits. Trumbull attempted to locate the truck driver, but closed its investigation of the incident after its attempts were unsuccessful. In April 2017, Griffin retained a company to identify the truck driver's insurance provider, but the company was not able to identify the insurer. Griffin took no further steps to attempt to communicate with the truck driver or to identify the driver's insurer or the truck's insurer before filing his complaint. In September or October 2017, Trumbull hired an investigator to serve the truck driver with a subpoena. The investigator was able to locate the truck driver and to serve him with the subpoena, and the truck driver later appeared at a deposition. The truck driver testified that he was driving a truck for his former employer at the time of the crash, and on the basis of his testimony, it was determined that Harleysville Insurance Company was the insurer of the truck at the time of the crash. Trumbull moved for summary disposition, arguing that it was not liable for PIP benefits because Harleysville was the highest-priority insurer. The MACP also moved for summary disposition on the basis that Griffin was insured by Trumbull at the time of the crash. The trial court, Susan L. Hubbard, J., granted summary disposition for both Trumbull and the MACP. The court concluded that Harleysville could have been identified within one year of the

crash if Griffin had acted with reasonable diligence and that summary disposition for the MACP was appropriate because there was no dispute between two or more insurers and Harleysville was identifiable as the highest-priority insurer. Griffin's motion for reconsideration was denied by the trial court, and he appealed.

The Court of Appeals *held*:

1. The no-fault act, MCL 500.3101 *et seq*., establishes the order in which potential insurers are responsible for paying PIP benefits, MCL 500.3114, and also limits the liability of insurers by limiting the amount of benefits recoverable under the act to losses occurring no more than one year before an action is brought, MCL 500.3145(1). As a practical matter, then, a plaintiff has one year from the date of the injury to identify the highest-priority insurer as established by MCL 500.3114. If the highest-priority insurer is identifiable within that time, then only that insurer is liable for the plaintiff's PIP benefits. But if the highest-priority insurer cannot be identified, the general rule under *Frierson v West American Ins Co*, 261 Mich App 732 (2004), is that the injured party must seek PIP benefits from his or her own insurer. *Frierson* did not hold that the general rule applies only if a higher-priority insurer could not be identified within a reasonable time or through reasonable efforts and did not take into consideration the effort required to identify a higher-priority insurer. Therefore, in this case, the general rule does not apply because Harleysville was identifiable, so Griffin cannot collect PIP benefits from Trumbull. Although the trial court erred to the extent that it considered whether Griffin could have identified Harleysville with reasonable diligence, its ultimate conclusion was correct.

2. The Legislature provided that when there does not appear to be any applicable PIP coverage, an injured person may obtain benefits through the MACP. Under MCL 500.3172(3), a claim will be assigned to the MACP if the obligation to provide PIP benefits cannot be ascertained because of a dispute between two or more insurers. Griffin argued that MCL 500.3172(3) was applicable in this case because of a purported dispute between Harleysville and Trumbull. However, Harleysville was not involved in this case, and no evidence was presented to show that Harleysville refused to pay PIP benefits to Griffin. Consequently, even though Harleysville was the highest-priority insurer in this case and Trumbull argued for that reason that it was not liable to pay Griffin PIP benefits, there was no dispute between two or more insurers because Harleysville was not a party to or involved in this case.

3. Griffin asked the trial court to sanction Trumbull pursuant to MCR 1.109(E)(5) for failing to affirmatively disclose its failure to locate the truck driver. He argued that Trumbull's failure to inform the court, coupled with its argument that Griffin could have identified the truck driver's insurer with reasonable diligence, was dishonest. However, Griffin's argument was not supported by the record. In arguing that it was entitled to summary disposition, Trumbull did not claim that it had not tried to identify the insurer of the truck or that it would be easy to do so. Rather, Trumbull asserted that the insurer could be identified with reasonable diligence, relying on the facts that Griffin had failed to learn the insurer's identity and that it had secured the truck driver's presence at a deposition with just one subpoena. There was no indication in the record that Trumbull misled Griffin by being dishonest, or that Trumbull misled the trial court regarding its efforts to locate the truck driver or identify his insurer. Moreover, Trumbull's efforts to contact the truck driver were irrelevant: under *Frierson*, Trumbull would only be liable for Griffin's PIP benefits if the truck driver's insurer could not be identified. Because Harleysville was identified, prior efforts to identify Harleysville or contact the truck driver were irrelevant. Therefore, Trumbull should not have been sanctioned.

Affirmed.

RONAYNE KRAUSE, P.J., concurring in part and dissenting in part, agreed with the analysis and disposition of the majority regarding Griffin's claims against the MACP, but did not agree that Trumbull was entitled to summary disposition. Judge RONAYNE KRAUSE agreed that *Frierson* set forth a conditional test, i.e., if the highest-priority insurer cannot be identified, then the general rule that an injured party must look to his or her own insurer is applicable. However, *Frierson* did not provide any authority as to how a court should determine whether an insurer is identifiable and opined that the majority opinion created an "absolute impossibility" standard in interpreting *Frierson*. Such a standard would contravene the purpose of the no-fault act by requiring no-fault claimants to prove that a higher-priority insurer is unavailable. Judge RONAYNE KRAUSE would have left it to the Legislature or the Supreme Court to create a standard for determining when a highest-priority insurer cannot be identified, but stated that a standard that required claimants to act with due diligence in looking for the highest-priority insurer would be consistent with the purposes of the no-fault act. Judge RONAYNE KRAUSE would have held that to the extent that Griffin was obligated to search for a higher-priority insurer as a precondition to receiving no-fault

benefits from his default-priority insurer, the record established that Griffin had exercised the requisite amount of diligence in carrying out that search.

INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — IDENTIFICATION OF HIGHER-PRIORITY INSURERS.

Under the no-fault act, MCL 500.3101 *et seq*., a plaintiff seeking personal protection insurance (PIP) benefits has one year to identify the highest-priority insurer as established by MCL 500.3114; under *Frierson v West American Ins Co*, 261 Mich App 732 (2004), if the highest-priority insurer is identified within one year, it is solely responsible for the plaintiff's PIP benefits, but if it is not identified, the general rule that the injured person must seek PIP benefits from their own insurer applies; *Frierson* does not require that a higher-priority insurer must be identified within a *reasonable* time or through *reasonable* efforts.

Steven A. Hicks for Willie Griffin.

Secrest Wardle (by *Sidney A. Klinger*) for Trumbull Insurance Company.

Anselmi Mierzejewski Ruth & Sowle PC (by *Mark L. Nawrocki*) for the Michigan Assigned Claims Plan.

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

TUKEL, J. Plaintiff appeals as of right the trial court's order granting summary disposition to defendants Trumbull Insurance Company and the Michigan Assigned Claims Plan (MACP). The trial court held that Trumbull was not the highest-priority no-fault insurer for purposes of plaintiff's claim for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., and that the MACP was not required to assign an insurer to pay PIP benefits to plaintiff because another insurer, Harleysville Insurance Company, was the highest-priority insurer. We affirm.

I. UNDERLYING FACTS

In May 2016, plaintiff was driving his motorcycle when a truck merged into plaintiff's lane. Plaintiff crashed while attempting to avoid the truck, but the truck did not actually make physical contact with plaintiff. The truck driver's name, telephone number, and residential address were recorded in the police report of the incident. Five days after the crash, plaintiff's attorney sent a letter to the truck driver informing him that plaintiff intended to take legal action. The letter asked the truck driver to forward the letter to his insurance company, but did not ask the truck driver to contact plaintiff or his attorney in any way. Plaintiff additionally informed Trumbull, the insurer of his motor vehicles, of his accident, but Trumbull refused to pay plaintiff any PIP benefits. Rather, Trumbull attempted to locate the truck driver, but despite multiple telephone calls and visits to the truck driver's residence, Trumbull's attempts to contact the truck driver were unsuccessful. Trumbull then closed its investigation without having made contact with the truck driver.

In April 2017, 11 months after the accident, plaintiff retained MEA Research Services, Inc., Ltd., a Dallas, Texas company, to attempt to identify the truck driver's insurance provider. MEA Research Services was unsuccessful and informed plaintiff that it could not identify any insurance provider for the truck driver. Plaintiff failed to take any additional actions to communicate with the truck driver or to identify his insurance provider or the insurance provider of the truck that the truck driver was operating on the day of the accident. Plaintiff then filed a complaint in April 2017 seeking, in relevant part, PIP benefits from

Trumbull and asking the court to order the MACP to assign his claim to an insurer.

In September or October of 2017, Trumbull hired an investigator to serve the truck driver with a subpoena. The investigator found the truck driver and gave him the subpoena. The truck driver appeared for a deposition within one month and, in his deposition, stated that he was driving a work truck for his former employer on the day of the accident. On the basis of this information, it was determined that the insurer of the truck at the time of the accident was Harleysville.[1]

After identifying Harleysville as the highest-priority insurer under MCL 500.3114(5),[2] Trumbull moved for summary disposition under MCR 2.116(C)(10) and argued that it was not required to pay any PIP benefits to plaintiff because Harleysville was the highest-priority insurer. The MACP also filed a motion for summary disposition under MCR 2.116(C)(10) and

---

[1] The parties agree that Harleysville is the highest-priority insurer.

[2] At the time of plaintiff's injury, MCL 500.3114(5), as amended by 2002 PA 38, stated:

> A person suffering accidental bodily injury arising from a motor vehicle accident which shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

The 2002 amendment worked no change regarding the priorities.

argued that plaintiff's claim against it should be dismissed because plaintiff was insured by Trumbull at the time of the accident. Plaintiff opposed both motions, but following a hearing and supplemental briefing the trial court granted summary disposition to Trumbull and the MACP.

In granting Trumbull's motion, the trial court determined that Harleysville could have been identified within one year of the accident if plaintiff had acted with "reasonable diligence." The trial court emphasized that plaintiff had sent only one letter to the truck driver, a letter that did not even ask him for any information, but instead suggested that he contact his own insurance company. The trial court also stated that MEA Research Services' search was limited to any personal automobile insurer the truck driver may have had. Finally, the trial court highlighted that Trumbull ultimately was able, with a subpoena, to secure the truck driver's participation in a deposition, something plaintiff had never even tried. Therefore, the trial court ruled, Trumbull was not the highest-priority insurer. The trial court additionally granted summary disposition to the MACP because there was no dispute between two or more insurers and Harleysville was identifiable as the highest-priority insurer.

Plaintiff then moved for reconsideration, and the trial court denied plaintiff's motion. This appeal followed.

II. STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) "by consider-

ing the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). Summary disposition is appropriate "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). "Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient." *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016).

The moving party has the initial burden to support its claim with documentary evidence, but once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *American Federation of State, Co, & Muni Employees v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Finally, "[i]ssues of statutory interpretation are reviewed de novo." *Riverview v Sibley Limestone*, 270 Mich App 627, 630;

716 NW2d 615 (2006). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011) (citations omitted).

III. ANALYSIS

A. IDENTIFICATION OF HARLEYSVILLE

Plaintiff argues that the trial court's ruling that Harleysville was identifiable as the highest-priority insurer had plaintiff acted with reasonable diligence, and therefore that plaintiff's claim against Trumbull must be dismissed, was erroneous. We disagree.

When interpreting the no-fault act, "[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." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (quotation marks and citation omitted). Furthermore, "[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). Therefore, while courts interpreting the no-fault act must give every word in the statute its plain and ordinary meaning in light of the larger statutory scheme, *Driver*, 490 Mich at 247, courts also must construe provisions of the no-fault act in favor of its insured beneficiaries, *Frierson*, 261 Mich App at 734.

The no-fault act establishes the order in which potential insurers are responsible for paying PIP benefits. See MCL 500.3114. The no-fault act also limits

the liability of insurers through MCL 500.3145(1), commonly referred to as the one-year-back rule. "The one-year-back rule is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought." *Joseph*, 491 Mich at 203. Thus, as a practical matter, a plaintiff has one year from the date of his or her injury to identify the highest-priority insurer as established by MCL 500.3114, because only the highest-priority insurer is liable for a plaintiff's PIP benefits. If the highest-priority insurer is identifiable within that time, then only that insurer is liable for a plaintiff's PIP benefits. See MCL 500.3114; 500.3145(1). But "when an insurer that would be liable under one of the exceptions in MCL 500.3114(1) cannot be identified, the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Frierson*, 261 Mich App at 738.

Plaintiff relies heavily on *Borgess Med Ctr v Resto*, 273 Mich App 558, 585; 730 NW2d 738 (2007),[3] and *Frierson* to argue that lower-priority insurers are responsible for the payment of benefits when higher-priority insurers cannot be identified. In *Borgess Med Ctr*, 273 Mich App at 585 (WHITE, J., concurring), the "[d]efendant indisputably insured the owner of the occupied vehicle, and no insurer in a higher priority was identified," so the defendant was liable for the plaintiff's PIP benefits. *Borgess* does not include any discussion of whether a higher-priority insurer could have been identified.

---

[3] The Michigan Supreme Court vacated the majority opinion of this Court in *Borgess Med Ctr*, 273 Mich App 558, but affirmed this Court's judgment "for the reasons stated in the concurring opinion." *Borgess Med Ctr v Resto*, 482 Mich 946 (2008). Plaintiff asks this Court to rely on the majority decision; for the reasons stated later, we decline to do so.

In *Frierson*, the highest-priority insurer could not be identified because the plaintiff was a passenger on a motorcycle when an unidentified motor vehicle turned into the plaintiff's lane, causing the operator of the motorcycle the plaintiff was riding on to crash while attempting to avoid hitting the oncoming motor vehicle. *Frierson*, 261 Mich App at 733. "The police were unable to locate the motor vehicle and there [was] no information regarding the vehicle, its driver, or its insurance." *Id*. Consequently, the identity of the driver of the motor vehicle that caused the motorcycle crash was not identifiable and "the parties agree[d] that the insurers listed in subsections a to d of MCL 500.3114(5) either [did] not exist or [could not] be identified." *Id*. at 737. In light of the impossibility of identifying an insurer under MCL 500.3114(5), the *Frierson* Court held that "when an insurer that would be liable under one of the exceptions in MCL 500.3114(1) *cannot be identified*, the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Id*. at 738 (emphasis added). Thus, under *Frierson*, the general rule that an injured party's own insurer is liable for PIP benefits only applies if a higher-priority insurer under MCL 500.3114 *cannot be identified*.[4]

Frierson did not hold that the general rule applies if a higher-priority insurer could not be identified within a reasonable time or through reasonable efforts. Rather, *Frierson* simply holds that the general rule applies if a higher-priority insurer *cannot be identified*. Therefore, *Frierson* calls for a binary analysis that

[4] The exceptions to MCL 500.3114(1) referred to in *Frierson*, 261 Mich App at 738, create rules of priority for specific circumstances, such as MCL 500.3114(5), which establishes priority for accidents involving motorcycles. See MCL 500.3114(1), (2), (3), and (5).

asks only whether a higher-priority insurer is identifiable. In this case, Harleysville was a higher-priority insurer than Trumbull, and the undisputed facts establish that Harleysville could have been, and in fact actually was, identified. *Frierson* does not take into consideration the effort required to identify a higher-priority insurer such as Harleysville. In light of the simple fact that Harleysville was identifiable, the general rule does not apply and plaintiff cannot collect PIP benefits from Trumbull, because Harleysville was a higher-priority insurer. See *Frierson*, 261 Mich App at 738. Consequently, while the trial court erred to the extent it considered whether Harleysville could have been identified with "reasonable diligence," the trial court still reached the right result for the wrong reason. Accordingly, the trial court's decision to grant summary disposition to Trumbull is affirmed. See *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) ("[T]his Court will not reverse where the trial court reached the right result for the wrong reason.").

B. PLAINTIFF'S CLAIMS AGAINST THE MACP

Plaintiff argues that because this case involved a priority dispute between two insurers, the MACP should have assigned an insurer to pay plaintiff's PIP benefits. We disagree.

When plaintiff sued the MACP, he alleged that, in the event Trumbull was not responsible for paying his claim for PIP benefits, there was a priority dispute that required the MACP to assign his claim. As discussed earlier, a plaintiff seeking PIP benefits ordinarily must turn to the plaintiff's own insurer or an insurer of one of the vehicles or drivers involved in the accident. However, "[e]ven when there does not appear to be any

applicable PIP coverage, the Legislature provided that an injured person could obtain PIP benefits through the MACP." *Spectrum Health Hosps v Mich Assigned Claims Plan*, 330 Mich App 21, 32; 944 NW2d 412 (2019), citing MCL 500.3172(1). Thus, "[a]ll self-insurers or insurers writing insurance as provided by the no-fault insurance act are required to participate in the MACP, with the associated costs being 'allocated fairly among insurers and self-insurers.' " *Id*., quoting MCL 500.3171(2). With this comprehensive scheme,

> the Legislature ensured that every person injured in a motor vehicle accident would have access to PIP benefits unless one of the limited exclusions in the no-fault act applies, and the losses suffered by uninsured persons injured in motor vehicle accidents could be indirectly passed on to the owners and registrants of motor vehicles through insurance premiums. [*Spectrum Health*, 330 Mich App at 32.]

Specifically, MCL 500.3172(3), as amended by 2012 PA 204,[5] provides, in relevant part, that a claim will be assigned to the MACP "[i]f the obligation to provide personal protection insurance benefits cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss . . . ."

Plaintiff argues that Subsection (3) applies in light of the purported dispute between Trumbull and Harleysville regarding PIP coverage for plaintiff. The no-fault act does not define "dispute." "All words and phrases shall be construed and understood according to the common and approved usage of the language;

[5] MCL 500.3172 has since been amended by 2019 PA 21. The current version of MCL 500.3172 did not become effective until June 11, 2019, after the events at issue in this case. Consequently, the former version of MCL 500.3172 applies in this case.

but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. "We may consult dictionary definitions to give words their common and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011) (citation omitted).

The word "dispute" may be defined as "to engage in argument: DEBATE," "to struggle against: OPPOSE," and "to contend over." *Merriam-Webster's Collegiate Dictionary* (11th ed). Harleysville has not taken any part in this case and no evidence has been presented showing that Harleysville refused to provide plaintiff with PIP benefits. Consequently, even though Harleysville is undoubtedly the highest-priority insurer in this case and Trumbull argues that Harleysville, not Trumbull, should provide plaintiff with PIP benefits, there is no "dispute" in this case "between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss." MCL 500.3172(3), as amended by 2012 PA 204. As applicable here, any disagreement between Harleysville and Trumbull is purely academic and theoretical, as no claim ever was made against Harleysville. Harleysville has not actually disagreed—and given its status as a nonparty, it could not disagree—with Trumbull's argument in this case that Harleysville is the highest-priority insurer and that it should provide PIP benefits to plaintiff. Accordingly, because there is not an actual dispute between two or more insurers, applying the clear and unambiguous language of MCL 500.3172(3) as written, we conclude that Subsection (3) simply does not apply to the facts and circumstances of this case. Ac-

cordingly, the trial court correctly dismissed plaintiff's claim against the MACP.

C. SANCTIONS

Plaintiff argues that the trial court should have sanctioned Trumbull for failing to affirmatively disclose its failure to locate the truck driver. We disagree.

An issue raised in the trial court and pursued on appeal is preserved even if the trial court failed to address or decide the issue. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 182-183; 521 NW2d 499 (1994). Plaintiff raised this issue at the trial court level, but the trial court failed to address or decide this issue. Nevertheless, "[t]his Court may address the issue because it concerns a legal question and all of the facts necessary for its resolution are present." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 751 n 40; 880 NW2d 280 (2015). We choose to do so here.

Plaintiff requested sanctions pursuant to what is now MCR 1.109(E)(5),[6] which states:

> The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

[6] MCR 2.114, the court rule relied on by plaintiff below, was repealed, effective as of September 1, 2018. 501 Mich cliii-cliv (2018). The subrule previously found at MCR 2.114(D) is currently located at MCR 1.109(E).

> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The following subrule, MCR 1.109(E)(6), states:

> If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Finally, MCR 1.109(E)(7) also provides for sanctions if "a party plead[s] a frivolous claim or defense."

Plaintiff points to the failure of Trumbull's counsel to affirmatively inform the trial court that it had unsuccessfully attempted to contact the truck driver before plaintiff filed this lawsuit. According to plaintiff, the failure of Trumbull's counsel to inform the court, coupled with its argument that plaintiff could have identified the truck driver's insurer with reasonable diligence, "clearly violate[d] the duty to be candid" and was, in fact, "dishonest." Plaintiff's argument fails for two reasons: (1) plaintiff's argument is not supported by the record, and (2) under *Frierson*, Trumbull's previous failed attempts to contact the truck driver and identify Harleysville are not relevant because Harleysville was eventually identified.

First, plaintiff's argument is not supported by the record. Trumbull's summary-disposition argument was that it was not the highest-priority insurer. To support that argument, Trumbull asserted that plaintiff could have discovered the truck's insurer with reasonable diligence. Trumbull never argued, however, that it did not try to identify the insurer or that

identifying the insurer would be easy. Instead, Trumbull simply asserted that plaintiff could have done it with reasonable diligence. In doing so, Trumbull relied on plaintiff's lack of effort in attempting to learn the insurer's identity and its own ability to obtain the truck driver's presence at a deposition with just one subpoena. While Trumbull's earlier efforts to contact the truck driver, including sending several letters, making a few phone calls, and visiting his home multiple times, may well have been relevant (more so to plaintiff's responsive arguments than defendant's position), plaintiff's assertion that the trial court was misled by Trumbull's "dishonesty" does not reflect the briefing below. Moreover, contrary to plaintiff's assertion that "defense counsel still declined to inform the trial court that its investigation was also unsuccessful" even when pressed by the trial court, the record reflects that Trumbull's counsel intentionally declined to comment on Trumbull's efforts to identify the truck's insurer, stating that he "worried that if [he] g[o]t too far into that, [he was] going down a path that subjects [his] client to basically looking like they didn't do enough, when they didn't have to" undertake any efforts to identify the truck driver's insurer, an assertion plaintiff has not opposed with any legal authority. Therefore, Trumbull did not mislead the trial court.

Second, Trumbull's failed efforts to contact the truck driver were irrelevant. As discussed earlier, under *Frierson*, 261 Mich App at 738, Trumbull would only be liable for plaintiff's PIP benefits if Harleysville could not be identified. But Harleysville was identified. Given this fact, prior efforts to identify Harleysville or to contact the truck driver were frankly irrelevant to this binary analysis. Consequently, Trumbull should not have been sanctioned.

IV. CONCLUSION

We affirm. Trumbull and MACP, as the prevailing parties, may tax costs pursuant to MCR 7.219.

K. F. KELLY, J., concurred with TUKEL, J.

RONAYNE KRAUSE, P.J. (*concurring in part and dissenting in part*). The majority accurately and fairly recites the factual background in this matter and the general legal principles applicable to this matter, so I will not repeat them. Furthermore, I concur entirely with the majority's analysis and disposition of plaintiff's claims against the Michigan Assigned Claims Plan (MACP). I respectfully disagree with some of the majority's analysis of *Frierson v West American Ins Co*, 261 Mich App 732; 683 NW2d 695 (2004), and I respectfully draw a different conclusion regarding plaintiff's diligence and whether Harleysville was "identifiable" within the meaning of the no-fault act, MCL 500.3101 *et seq*. I would reverse the trial court's dismissal as to Trumbull, and under the circumstances, I would decline to address the issue of sanctions without prejudice with the possibility of plaintiff raising the issue again on remand.

Initially, I agree with the majority that *Frierson* sets forth a conditional test: *if* a higher-priority insurer "cannot be identified," *then* the "general rule" regarding insurer priority applies. See *Frierson*, 261 Mich App at 738. However, I disagree that *Frierson* provides any authority, guidance, or insight into what it means to be "identifiable." In *Frierson*, the parties simply agreed that no higher-priority insurer could be identified. *Id*. at 737. No actual analysis was undertaken. Indeed, if the Court had addressed whether any party made adequate efforts to locate a higher-priority in-

surer, that analysis would have been dicta. Additionally, the Court in *Frierson* was faced with a question of whether the injured plaintiff's own insurer or the MACP[1] was liable for payment of benefits, *not* whether the plaintiff should receive benefits or receive nothing. The holding in *Frierson* was based on the purpose of the no-fault act as described by our Supreme Court: to ensure that persons injured in motor vehicle accidents receive benefits and to impose primary responsibility for paying those benefits on the person's own insurer by default. *Id*. at 737-738, citing *Parks v Detroit Auto Inter-Ins Exch*, 426 Mich 191, 204; 393 NW2d 833 (1986). *Frierson* did not create or identify an "absolute impossibility" standard, it merely applied longstanding legal principles to a situation in which identifying another insurer happened to be absolutely impossible.

"When interpreting the meaning of a statute, our primary goal is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). However, the no-fault act does not expressly specify how to address situations in which a higher-priority insurer is presumed to exist but has not been identified. To the extent construction of a statute is necessary, we must strive "to prevent absurd results, injustice, or prejudice to the public interest." *Rafferty v Markovitz*, 461 Mich 265, 270; 602 NW2d 367 (1999). Any such construction must be consistent with the underlying legislative purpose of the no-fault act and must liberally favor "the persons who are its intended beneficiaries." *Frierson*, 261 Mich App at 734 (quotation marks and citation omitted).

---

[1] Strictly speaking, the MACP's predecessor, the Michigan Assigned Claims Facility.

Our Supreme Court has explained that "[t]he no-fault act was intended to minimize uncertainties and to provide a relatively simple means of compensating those injured in automobile accidents." *Parks*, 426 Mich at 207. Furthermore, the no-fault act

> was offered as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. [*Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978).]

The no-fault system was, in part, specifically designed to ensure prompt reimbursement to injured persons, especially those lacking in substantial financial means, and to avoid the need for litigation. *Id*. at 621-623.

Here, the majority crafts an "absolute impossibility" standard out of whole cloth. No such standard was created or applied in *Frierson*, and such a standard contravenes the purposes of the no-fault act. No-fault claimants are not required to prove that a higher-priority insurer is unavailable, and insurers of default priority may not delay or refuse to pay a claim. *Borgess Med Ctr v Resto*, 273 Mich App 558, 568-576; 730 NW2d 738 (2007), vacated on other grounds and judgment and concurring opinion affirmed 482 Mich 946 (2008).[2] If

[2] Our Supreme Court vacated the majority opinion in *Borgess* but nevertheless affirmed this Court "for the reasons stated in the concurring opinion." *Borgess Med Ctr*, 482 Mich at 946. The concurring opinion disagreed with the majority as to a single issue: whether there was a legal distinction between a "claimant" and a "person suffering accidental bodily injury" under MCL 500.3114(4). *Borgess*, 273 Mich App at 585 (WHITE, J., concurring). That distinction had been cited by the majority as only one alternative basis for its holding. *Id*. at 571-572. Peremptory orders from our Supreme Court constitute binding precedent to the

any standard for determining when or how a higher-priority insurer "cannot be identified" is to be crafted, it would ideally come from the Legislature or from our Supreme Court. However, were this Court to create a standard nonetheless, it would be most consistent with the purposes of the no-fault act to require a claimant to exercise due diligence to look for a higher-priority insurer. The due-diligence standard is a familiar one, and it "means undertaking reasonable, good-faith measures under the circumstances, not necessarily undertaking everything possible." *Ickes v Korte*, 331 Mich App 436, 443; 951 NW2d 699 (2020). Such a standard would at least not undermine the purposes of the no-fault act.

That being said, Trumbull argues that plaintiff could have done more to identify the insurer of the truck driver, Gilbert Gonzalez. That is true. However, it would also be true of almost every plaintiff who tries unsuccessfully to identify an insurer. Thus, diligence is not evaluated on the basis of whether a person could have done more, but rather whether that person did enough. *Id*. at 443 n 3. Plaintiff points out that any costs invested into discovering Gonzalez's insurer

---

extent they can be understood, even if only by reference to other opinions. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018). By necessary implication, our Supreme Court left intact the *Borgess* majority's holding, with which the concurrence clearly agreed, that it would contravene the purpose of the no-fault act and settled caselaw for an injured person's own insurer, i.e., the insurer of default priority, to refuse to pay benefits because the claimant had not disproved the availability of a higher-priority insurer. *Borgess*, 273 Mich App at 572-573. I would agree with the *Borgess* majority in any event, but even if I did not, I conclude that we are bound to follow it by MCR 7.215(C)(2) and MCR 7.215(J)(1). The majority accurately observes that there was no discussion in *Borgess* of whether a higher-priority insurer could have been identified, but based on its conclusion that the claimant was not obligated to do so, no such discussion would have been warranted and has no relevance.

would be costs not recoupable from any benefits ultimately paid. I agree with plaintiff that the goals of the no-fault act would be thwarted by requiring claimants to expend a significant portion of their benefits simply seeking to obtain those benefits in the first place.

Furthermore, Trumbull conducted its own search for a higher-priority insurer. I do not wish to suggest that Trumbull either was or was not obligated to undertake that search. Nevertheless, presuming Trumbull had no such obligation, a party that acts gratuitously must still act non-negligently. *Hart v Ludwig*, 347 Mich 559, 563-565; 79 NW2d 895 (1956). Under the circumstances, the relationship between an insured and his own insurer imposed upon Trumbull a requirement to carry out that investigation competently and thoroughly. See *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660-661; 822 NW2d 190 (2012); see also *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205-206; 544 NW2d 727 (1996). Trumbull's assumed obligation means its inability to identify Harleysville should be conclusive as to whether Harleysville *was* able to be identified within one year of the accident. It is not clear whether Trumbull specifically informed plaintiff that it was searching for a higher-priority insurer, but it did promptly advise plaintiff that it was investigating his claim for coverage, and it apparently told plaintiff at some point before the suit was commenced that it had not been able to find a higher-priority insurer. Any reasonable person would be expected to place some reliance on that investigation, and that reliance does not display a lack of diligence.

Trumbull accurately notes that if plaintiff had commenced the instant lawsuit earlier, he would have gained the power of subpoena. Indeed, when Gonzalez was eventually subpoenaed, Harleysville was rapidly

identified. It is somewhat speculative whether Gonzalez would have responded to an earlier subpoena, given his apparent refusal to discuss the matter with anyone while he was still employed by the owner of the truck that he was driving at the time of the accident. More importantly, however, Trumbull's argument contravenes the purpose of the no-fault act. Creating a duty for injured persons to commence suit against their own insurer immediately after an accident as a matter of course will drastically increase litigation and costs to injured persons and insurers, obliterate any hope of fulfilling the no-fault act's purpose of making benefit payments simple and straightforward, usurp the Legislature's power to create limitations periods, clog court dockets, and otherwise recreate problems the no-fault act was intended to solve. It is blatantly against public policy to punish a party for failing to seek litigation as a first resort or failing to file a suit earlier when the suit was actually timely filed.

I would hold that to the extent plaintiff was obligated to search for a higher-priority insurer as a precondition to receiving no-fault benefits from his insurer of default priority, plaintiff exercised the requisite due diligence in carrying out that search. I would therefore reverse the dismissal of plaintiff's claims against Trumbull.

NEW COVERT GENERATING COMPANY, LLC v TOWNSHIP OF COVERT

Docket Nos. 348720 and 348721. Submitted August 6, 2020, at Lansing. Decided September 24, 2020, at 9:05 a.m. Leave to appeal denied 507 Mich 932 (2021).

Petitioner, New Covert Generating Company, LLC (New Covert Generating), challenged the tax assessments of respondent, Covert Township (the Township), regarding New Covert Generating's real and personal property for the years 2010 through 2016 in the Tax Tribunal. In December 2012, the State Tax Commission (the Commission) granted New Covert Generating's classification appeal for the years 2010 and 2011, ordering the Township to create a separate personal-property parcel for its turbines and generators and to classify that parcel as industrial personal property. The classification change entitled New Covert Generating to receive the state education tax and school operating millage exemptions to its personal property other than its turbine property. New Covert Generating challenged the 2011 and 2012 assessments on the ground that the taxing authorities failed to take into consideration the state education tax and school operating millage exemptions for nonturbine personal property. The Tax Tribunal issued an opinion setting the true cash value of the parcels for 2010 and 2011. In an unpublished per curiam opinion issued on August 4, 2015 (Docket No. 320877), the Court of Appeals, O'CONNELL, P.J., and OWENS and M. J. KELLY, JJ., affirmed the Tax Tribunal's decision regarding the assessments for 2010 and 2011 and concluded that, under MCL 205.735a, New Covert Generating properly invoked the Tax Tribunal's jurisdiction without filing statements of assessable property, explaining that the statutory requirement that the petitioner file a statement of assessable property applied only to appeals in which the petitioner appealed directly to the Tax Tribunal without first protesting the assessment before the board of review. In May 2016, New Covert Generating filed a petition challenging the assessments of its property for 2016. The Tax Tribunal consolidated all the appeals involving tax claims for years 2012 through 2015 into one appeal. Van Buren County (the County) moved to intervene, and the Tax Tribunal granted the motion. In February 2017, New Covert Generating moved for

partial summary disposition in the consolidated appeals and the appeal involving the 2016 tax year, asking the Tax Tribunal to interpret the meaning of the term "turbine" as used in MCL 211.903(3)(b) and MCL 380.1211(10)(e)(*ii*), which excluded "turbines" from the industrial personal property that was otherwise exempt from the state education tax and the school operating millage. The Tax Tribunal held that the term "turbine," as used in MCL 211.903 and MCL 380.1211, referred to a single piece of equipment: a rotary engine activated by the reaction or impulse or both of a current of fluid such as water, steam, or air. Thus, the trial court granted partial summary disposition to New Covert Generating. Assertedly on the basis of several discovery disputes, the Township and the County moved for summary disposition on October 25, 2017. They argued that New Covert Generating did not have standing to challenge the assessments because it was not a "party in interest" as that phrase is used in MCL 205.735a(6). The Township and the County filed a second motion for summary disposition in November 2017, asserting that New Covert Generating was uncollectible and had no standing. The Tax Tribunal denied that motion for summary disposition, stating that it was undisputed that New Covert Generating owned the property at issue. The Tax Tribunal also concluded that the Township and the County violated MCR 2.114—now MCR 1.109(E)—by submitting a motion that was not grounded in fact or law because the Township and the County ignored the holding in *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565 (2014), and improperly attempted to distinguish it. Accordingly, the Tax Tribunal awarded New Covert Generating costs and fees. In June 2018, the Township and the County again moved for summary disposition on the ground that the Tax Tribunal lacked jurisdiction. In July 2018, the Tax Tribunal denied the outstanding motions for summary disposition by the Township and the County. In that same month, the Tax Tribunal held a contested hearing to determine the true cash value and taxable values of the parcels at issue in the appeal for the 2016 tax year. In January 2019, the parties entered a stipulated judgment establishing the true cash values, assessed values, and taxable values for all the parcels involved in the tax appeals for tax years 2012 through 2015. The Tax Tribunal subsequently issued its February 8, 2019 final opinion and judgment establishing the true cash value and taxable values for the parcels at issue in the appeal for the 2016 tax year. At the same time, the Tax Tribunal entered its order awarding costs and fees as a sanction for the Township and the County's motions for summary disposition in the appeals involving the 2012 through 2015 tax years. In Docket No. 348720, the Township and the County appealed the Tax Tribunal's opinion

and judgment setting the true cash value of the personal property at issue for tax year 2016 and the Tax Tribunal's order imposing sanctions for the filing of frivolous motions. On cross-appeal in Docket No. 348720, New Covert Generating appealed the Tax Tribunal's opinion and judgment setting the true cash value of the personal property for tax year 2016. In Docket No. 348721, the Township and the County appealed the Tax Tribunal's orders imposing sanctions arising from motions filed in the dispute over tax years 2012 through 2015.

The Court of Appeals *held*:

1. The Tax Tribunal did not commit an error of law when it concluded that it had jurisdiction over the appeals. The Legislature provided for the Tax Tribunal's subject-matter jurisdiction under MCL 205.731, and MCL 205.731 does not limit the Tax Tribunal's jurisdiction on the basis of prerequisites to the assertion of jurisdiction. Rather, the prerequisites to the assertion of jurisdiction appear under MCL 205.735 for appeals commenced before January 1, 2007, and under MCL 205.735a for appeals commenced after December 31, 2006. MCL 205.735a(4)(b) addresses the prerequisites applicable to the Tax Tribunal's acquisition of jurisdiction under an exception to the rule stated in MCL 205.735a(3). MCL 205.735a(3) provides that the Tax Tribunal acquires jurisdiction to hear appeals that have first been protested to the board of review without imposing any such requirement. That is, if a petitioner first protested to the board of review, the Tax Tribunal would subsequently acquire jurisdiction under MCL 205.735a(3) without any need to resort to any of the permissive exceptions provided under MCL 205.735a(4). Therefore, given the statutory scheme as a whole and interpreting the statute in context, MCL 205.735a(4)(b) plainly authorizes, but does not require, a taxpayer to appeal directly to the Tax Tribunal if the taxpayer filed a statement of assessable property. In this case, it was undisputed that New Covert Generating protested the assessments and exemptions before the board of review for each petition. Consequently, the Tax Tribunal acquired jurisdiction of the appeals consistently with MCL 205.735a(3) after a timely petition under MCL 205.735a(6). For these reasons, the Tax Tribunal did not commit an error of law when it determined that it had acquired jurisdiction over the appeals.

2. The Tax Tribunal also did not commit an error of law or adopt wrong principles when it concluded that New Covert Generating was a party in interest capable of invoking its jurisdiction. In this case, it was undisputed that New Covert Generating was the actual owner of the real and personal property that had been

assessed. Therefore, it was plainly a party in interest under both the original understanding of that phrase and the broadened construction of that phrase outlined in *Spartan Stores*, 307 Mich App 565, which held that the phrase "party in interest" referred more broadly to any person who held any property interest in the assessed property. New Covert Generating was the record owner of the assessed property and therefore was necessarily a party in interest within the meaning of MCL 205.735a(6). The Township and the County's argument that it would be absurd to allow a so-called "shell" corporation to invoke the Tax Tribunal's jurisdiction was rejected. Although the undisputed evidence showed that New Covert Generating outsourced its operations and management to related entities, it was also undisputed that New Covert Generating actually owned the real and personal property at issue, which was worth hundreds of millions of dollars. Given the value of these properties, New Covert Generating had a powerful incentive to comply with the tax laws and to adhere to the Tax Tribunal's orders and judgments in order to protect its property from liens, foreclosure, or seizure. The Tax Tribunal additionally had the authority under MCL 205.732(c) to penalize New Covert Generating for discovery violations occasioned by its failure or refusal to authorize or to cause the entities with whom it contracts to provide relevant discovery, should the taxing authorities be unable to get the discovery directly from those contracting entities. Accordingly, there was no basis for concluding that New Covert Generating committed discovery violations that prevented a fair hearing.

3. The Tax Tribunal did not commit an error of law when it gave the term "turbine" its ordinary meaning. The Legislature chose to exclude turbines from the definition of industrial personal property, which, in effect, excluded turbines from the exemption from taxation for industrial personal property. Under both MCL 211.903(3)(b) and MCL 380.1211(10)(e)(*ii*), industrial personal property as defined under MCL 211.34c does not include a turbine powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale. The Legislature did not define the term "turbine"; therefore, the Tax Tribunal properly looked to a dictionary for the ordinary meaning of the term, which it defined as a machine or engine that is rotated by moving fluids. The Legislature provided that only those turbines that were "powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale" were excluded from the exemption. Contrary to the contention of the Township and the County before the Tax Tribunal and on appeal, this qualifying language did not expand the ordinary meaning of the term "turbine." Although the limiting language

refers to the generation of electricity, the qualifying language cannot be understood to expand the ordinary understanding of the term "turbine" to encompass property that would be needed to enable the turbine to generate electricity. Applying the only reasonable construction, it was evident that the limiting language was intended only to limit the type of turbine that was excluded from the definition of industrial personal property—it was not intended to expand the types of property excluded from the definition of industrial personal property. Further, those statutes only establish which industrial personal property was excluded from the exemption; they do not establish the manner for calculating the taxable value of the property excluded from the exemption. MCL 211.903 and MCL 380.1211, when read in harmony, necessarily require the valuation of the turbine in relation to the value of a functioning whole—that is, the value of the turbine must be ascertained as part of the value of the plant that "powered" the turbine by "gas" or "steam" for the primary purpose of generating electricity for sale on the market because only turbines powered in this way are excluded from the definition of industrial personal property. When proper valuation techniques are applied, the value of the turbine as a component of a functioning power plant will comply with the requirement of uniformity in taxation because similarly situated taxpayers will be assessed according to the value of the turbine as a component of a functioning whole. The Tax Tribunal did not commit an error of law when it interpreted the statutes to apply to a machine or engine rotated by fluid that was powered by—in relevant part—gas or steam and with a primary purpose of generating electricity. Accordingly, it did not commit an error of law when it concluded that the term did not apply to ancillary equipment necessary to enable the turbine to generate electricity. Finally, the Tax Tribunal also did not commit an error of law when it determined that the value of the turbines at issue had to be ascertained by reference to their value as a component part of a functioning power plant.

4. There was competent, material, and substantial evidence to support the Tax Tribunal's resolution of the amount of any adjustment to the baseline estimated replacement cost for a new plant to reflect the fact that the existing plant did not include a switchyard. Therefore, the Tax Tribunal did not commit an error of law by resolving that dispute in New Covert Generating's favor. Additionally, the Tax Tribunal did not commit an error of law or adopt a wrong principle by deducting the value of nontaxable assets. Expert testimony confirmed that power plants like New Covert Generating frequently have valuable intangible assets in the form of contractual rights and that 3% of total value was a

commonly used estimate for the value of the intangible property. The Tax Tribunal further did not commit an error of law when it accepted Duff & Phelps's handling of the disputed calculation regarding working capital; there was competent evidence to support either position, and therefore it was for the Tax Tribunal to resolve. The Tax Tribunal's decision to accept Duff & Phelps's estimate for the cost to finance a new construction project was also supported by competent, material, and substantial evidence on the whole record; the Tax Tribunal found that Duff & Phelps's approach better conformed to the uniformity requirement and resulted in a more reasonable approximation of the base cost for a new plant. Finally, the Tax Tribunal did not commit an error of law when it determined that the data from a 2016 Annual Energy Outlook report was relevant to the findings of fact necessary to calculate the replacement cost of New Covert Generating's plant on December 31, 2015, as opposed to the data from a 2013 report.

5. There was record support for the Tax Tribunal's decision to include entrepreneurial profit in the base cost of the cost to develop a new power plant. The Tax Tribunal accepted Concentric's assessment of the cost of equity that an investor would expect to receive for developing a merchant electric generator. In doing so, it impliedly adopted Concentric's underlying rationale and data, which it could do to satisfy its duty to state the facts consistent with MCL 205.751(1). Although Duff & Phelps presented testimony to undermine Concentric's position regarding the inclusion of owner's profit, expert testimony and Concentric's appraisal were sufficient—notwithstanding the contrary evidence—to permit a reasonable mind to find that the base cost of a new plant should include the costs associated with the equity investors' expected return and that a reasonably approximate proxy group would expect a return of about 5%. Therefore, because there was competent, material, and substantial evidence to support its findings and conclusions, the Tax Tribunal did not commit an error of law when it included owner's profit in the cost of a new plant.

6. There was competent, material, and substantial evidence to support the Tax Tribunal's decision to exclude any deductions for costs associated with the Segreto switchyard. The testimony and evidence supported a finding that the costs associated with the PJM Interconnection, which included the Segreto switchyard, had already been paid by the valuation date. Accordingly, there was evidence that a purchaser would not have to account for those costs when purchasing the plant. Rather, the purchaser would value the plant on the basis of the completed interconnection project. Consequently, the Tax Tribunal did not commit an error of law when it

chose not to deduct any amount from the value of New Covert Generating on the basis of the interconnection project.

7. The Township and the County filed two motions that the Tax Tribunal determined warranted sanctions: the October 2017 motion concerning New Covert Generating's status as a party in interest and the June 2018 motion arguing that the Tax Tribunal lacked jurisdiction because New Covert Generating had not filed statements of assessable property. The Township and the County ignored the actual holdings in *Spartan Stores* and did not examine the actual language of the statute; examining those arguments, there was no basis in fact or law for the motion. Because it is well settled that courts respect the separate existence of an artificial entity except in certain exceptional cases, the Tax Tribunal had no choice but to respect New Covert Generating's separate existence. And because the Township and the County's motion premised on New Covert Generating's status as a party in interest was not well grounded in fact or law, the Tax Tribunal had to apply an appropriate sanction for the filing of the October 2017 motion. In the June 2018 motion, the Township and the County argued that a taxpayer could not invoke the Tax Tribunal's jurisdiction without first filing statements of assessable property and that New Covert Generating's filings were inadequate to meet what they believed was required under MCL 205.735a(4)(b) to invoke the Tax Tribunal's jurisdiction. The Township and the County's preferred construction—although implausible—was not so implausible that counsel could not advocate for that position without running afoul of the applicable court rule. Therefore, the Tax Tribunal erred to the extent that it determined that the motion was not well grounded in fact or law. The Tax Tribunal also erred to the extent that it relied on counsel's purportedly inconsistent positions in different cases involving different parties. Counsel had every right to advance the lawful objectives of his clients by every reasonably available means permitted by law, even if that position was inconsistent with the position that counsel advanced on behalf of a different client. Therefore, the trial court clearly erred when it determined that the filing of the June 2018 motion for summary disposition was not well grounded in fact or law. Nevertheless, that was not the only basis for the Tax Tribunal's decision to impose sanctions. Counsel had used motions for immediate consideration in a way that compelled New Covert Generating to respond within seven days. The Tax Tribunal also cited counsel's conduct in other litigation—which suggested that counsel was familiar with the holding in *Spartan Stores*—and stated that counsel used allegations of fact and innuendo to cast New Covert Generating in a bad light. The Tax Tribunal determined that the June 2018 motion was

frivolous and that it was imposed for an improper purpose. Based on the entire record, the Tax Tribunal's findings for both motions were not clearly erroneous. Although the Tax Tribunal clearly erred in determining that the June 2018 motion for summary disposition was not well grounded in fact and law, it could still properly impose sanctions based on its finding that the motion was filed for an improper purpose.

Affirmed.

1. TAXATION — TAX TRIBUNAL — ACQUISITION OF JURISDICTION.

MCL 205.735a(4)(b) addresses the prerequisites applicable to the Tax Tribunal's acquisition of jurisdiction under an exception to the rule stated in MCL 205.735a(3); MCL 205.735a(4)(b) plainly authorizes, but does not require, a taxpayer to appeal directly to the Tax Tribunal if the taxpayer filed a statement of assessable property.

2. TAXATION — INDUSTRIAL PERSONAL PROPERTY EXCLUSIONS — WORDS AND PHRASES — "TURBINE" — VALUATION OF A TURBINE.

Under both MCL 211.903(3)(b) and MCL 380.1211(10)(e)(*ii*), industrial personal property as defined under MCL 211.34c does not include a turbine powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale; a "turbine" is defined as a machine or engine that is rotated by moving fluids; MCL 211.903 and MCL 380.1211, when read in harmony, necessarily require the valuation of the turbine in relation to the value of a functioning whole—that is, the value of the turbine must be ascertained as part of the value of the plant that powered the turbine by gas or steam for the primary purpose of generating electricity for sale on the market because only turbines powered in this way are excluded from the definition of industrial personal property.

Howard & Howard Attorneys PLLC (by *Patrick M. McCarthy*, *Rodger A. Kershner*, *Mary C. Dirkes*, and *Michael O. Fawaz*) for New Covert Generating Company, LLC.

Foster, Swift, Collins & Smith, PC (by *Jack L. Van Coevering* and *Thomas K. Dillon*) and *Knotek Law Office, PLC* (by *M. Brian Knotek*) for Covert Township and Van Buren County.

Amicus Curiae:

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *Robert E. Thall*) for the Michigan Townships Association and the Michigan Municipal League.

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

PER CURIAM. This dispute involves the tax assessed on an electric power plant owned by petitioner, New Covert Generating Company, LLC (New Covert Generating). In Docket No. 348720, respondents, Covert Township (the Township) and Van Buren County (the County), appeal by right the Tax Tribunal's opinion and judgment setting the true cash value of the personal property at issue for tax year 2016 and the Tax Tribunal's order imposing sanctions for the filing of frivolous motions. On cross-appeal in Docket No. 348720, New Covert Generating appeals by right the Tax Tribunal's opinion and judgment setting the true cash value of the personal property for tax year 2016. In Docket No. 348721, the Township and the County appeal by right the Tax Tribunal's orders imposing sanctions arising from motions filed in the dispute over tax years 2012 through 2015. We affirm.

I. STATEMENT OF FACTS

The present appeal involves a long-running dispute between New Covert Generating and the local taxing authorities regarding the proper assessed value of New Covert Generating's industrial personal property and the proper application of any tax exemptions applicable to the property. New Covert Generating owns real property in Covert Township, which is in Van Buren County. The property has been improved with a natural-gas-fired combined-cycle facility and related equipment.

Such power plants have two kinds of turbines: combustion turbines and steam turbines. A generator converts the rotational energy of the turbines into electricity. New Covert Generating is not a utility—it is a merchant generator of electricity that sells electricity on the open market. New Covert Generating transitioned from selling in the Midcontinent Independent System Operator (MISO) market to the PJM Interconnection (PJM) by June 2016 to increase profits and work at a higher capacity. New Covert Generating had to build a new switchyard, the Segreto switchyard, to make this transition.

II. PROCEDURAL HISTORY

A. CHALLENGES TO PROPERTY ASSESSMENTS

New Covert Generating has challenged the assessments of its real and personal property for the years 2010 through 2016. In December 2012, the State Tax Commission (the Commission) granted New Covert Generating's classification appeal for the years 2010 and 2011, ordering the Township to create a separate personal-property parcel for the turbines and generators and to classify that parcel as industrial personal property. The classification change entitled New Covert Generating to receive the state education tax and school operating millage exemptions to its personal property other than its turbine property. But in January 2013, New Covert Generating challenged the 2011 and 2012 assessments on the ground that the taxing authorities failed to take into consideration the state education tax and school operating millage exemptions for nonturbine personal property.

In May 2013, the Tax Tribunal issued its opinion setting the true cash value of the parcels for 2010 and

2011, and New Covert Generating petitioned the Tax Tribunal to require the taxing authorities to modify the assessed values for 2013 using the values established by the Tax Tribunal for 2011 with appropriate adjustments.

In February 2014, New Covert Generating filed a new petition with the Tax Tribunal regarding its 2011 tax assessments by the Township and the County. New Covert Generating stated that the Township had assessed its real property at $193,970,800 and its personal property at $6,552,240 for 2011. It noted that it had appealed to the Commission the Township's decision to classify its turbines, generators, and other machinery as real property. The Commission, it wrote, had since granted the appeal and ordered the Township to create a separate personal-property parcel for the turbines and generators. It also ordered the Township to classify the property as industrial personal property. New Covert Generating alleged that the County thereafter issued a new tax bill for 2011 that reallocated most of the value previously classified as real property to the new personal-property parcel created for the turbine personal property, which was not entitled to tax exemptions. The new assessments provided:

Parcel Number	**Tax Year**	**Actual Value/State Equalized Value**	**Taxable Value**
80-07-004-003-03 Real Property	2011	$8,016,600	$8,016,600
80-07-900-084-00 Personal Property	2011	$6,663,600	$6,663,600
80-07-900-084-01 Turbine Property	2011	$185,842,800	$185,842,800

New Covert Generating alleged that the County lacked the authority to make the changes and stated that, after the changes, the Commission modified its order and required the Township to assess the "turbines" alone under the new parcel—parcel 80-07-900-084-01—and to move the other personal property from the real-property parcel to the original personal-property parcel number, which was parcel 80-07-900-084-00. New Covert Generating alleged that the actions by the Township and the County did not constitute a final decision, ruling, or determination not already subject to the Tax Tribunal's jurisdiction, but it nevertheless stated that it was appealing the reclassification in its petition as a precautionary measure.

This Court issued an opinion affirming the Tax Tribunal's decision regarding the assessments for 2010 and 2011. See *New Covert Generating Co v Covert Twp*, unpublished per curiam opinion of the Court of Appeals, issued August 4, 2015 (Docket No. 320877). In that decision we recognized that the Township had initially taxed two separate parcels owned by New Covert Generating: one tax parcel for its industrial personal property and another for its real property. *Id*. at 1. However, we recognized that the Commission ordered the Township to establish a separate tax parcel for New Covert Generating's industrial personal property that constituted turbines beginning with the 2011 tax year. *Id*. at 1 n 1. The Court stated that the Commission ordered the Township to create the separate parcel because turbines were not exempt property. *Id*. at 12-13. The case proceeded to trial before the Tax Tribunal, and the Tax Tribunal ultimately set the true cash value of the property at $179,100,000 for 2010 and at $228,400,000 for 2011. *Id*. at 2.

The Township also argued, in part, that the Tax Tribunal did not have jurisdiction to consider New

Covert Generating's petition because New Covert Generating did not file statements of assessable property in 2010 and 2011. *Id*. This Court concluded that, under MCL 205.735a, New Covert Generating properly invoked the Tax Tribunal's jurisdiction without filing the statements, explaining that the statutory requirement that the petitioner file a statement of assessable property applied only to appeals in which the petitioner appealed directly to the Tax Tribunal without first protesting the assessment before the board of review. *Id*. at 4. Because New Covert Generating had filed a protest before the board for the 2011 assessment, it could properly appeal that assessment to the Tax Tribunal without filing a statement of assessable property. *Id*. at 5. Although New Covert Generating did not protest the 2010 assessment to the board, this Court concluded that New Covert Generating complied with the requirement that it file a statement of assessable property by filing the Commission's Form 4175. *Id*. For these reasons, the Court concluded that the Tax Tribunal had jurisdiction to consider the dispute. *Id*. at 6.

This Court also reviewed the Township's challenges to the Tax Tribunal's findings and determined that the Tax Tribunal did not make any errors that warranted relief. *Id*. at 6-8. Finally, this Court declined to interpret the meaning of the term "turbine" because the tax exemption at issue did not become effective until December 31, 2011. *Id*. at 13. Accordingly, it did not apply to the tax years at issue. *Id*.

In May 2016, New Covert Generating filed a petition challenging the assessments of its property for 2016. The Tax Tribunal thereafter consolidated all the appeals involving tax claims for years 2012 through 2015 into one appeal and ultimately granted the County's motion to intervene.

B. MOTIONS FOR SUMMARY DISPOSITION

In February 2017, New Covert Generating moved for partial summary disposition in the consolidated appeals and the appeal involving the 2016 tax year, asking the Tax Tribunal to interpret the meaning of the term "turbine" as used in MCL 211.903(3)(b) and MCL 380.1211(10)(e)(*ii*), which excluded "turbines" from the industrial personal property that was otherwise exempt from the state education tax and the school operating millage. New Covert Generating stated that the Township had taken the position that the term applied to turbines and all the machinery attached to the turbine that was needed to generate electricity. New Covert Generating argued that the term properly applied to a single machine—a rotor with vines or blades—and it asked the Tax Tribunal to declare that that was the proper understanding of the term.

To determine the proper interpretation of the term "turbine," the Tax Tribunal found it noteworthy that the Legislature had demonstrated its ability to identify energy systems involving turbines in other statutes but chose not to define the term to include an energy system in the statutes at issue. Thus, the Tax Tribunal rejected the Township's contention that the term applied broadly "to include all parts necessary to generate electricity." Relying on a dictionary definition, the Tax Tribunal held that the term "turbine," as used in MCL 211.903 and MCL 380.1211, referred to a single piece of equipment: a rotary engine activated by the reaction or impulse or both of a current of fluid such as water, steam, or air. Thus, the trial court granted partial summary disposition to New Covert Generating.

Assertedly on the basis of several discovery disputes, the Township and the County moved for summary disposition on October 25, 2017. They argued that New

Covert Generating did not have standing to challenge the assessments because it was not a "party in interest" as that phrase is used in MCL 205.735a(6); rather, the evidence showed that New Covert Generating was allegedly a "shell entity," given that it had no employees, did not possess any records, and did not operate any businesses. New Covert Generating had claimed that it had no ability to respond to discovery, but the entities that actually operated the plant claimed that they did not have to respond to discovery requests because the Tax Tribunal had no jurisdiction over them. The Township and the County filed a second motion for summary disposition in November 2017, asserting that New Covert Generating was uncollectible and had no standing.

The Tax Tribunal denied that motion for summary disposition, stating that it was undisputed that New Covert Generating owned the property at issue. Accordingly, it was a party in interest as defined in *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565; 861 NW2d 347 (2014). The Tax Tribunal also concluded that the Township and the County violated MCR 2.114—now MCR 1.109(E)—by submitting a motion that was not grounded in fact or law because the Township and the County ignored the holding in *Spartan Stores* and improperly attempted to distinguish it. Accordingly, the Tax Tribunal awarded New Covert Generating costs and fees.

New Covert Generating submitted a bill of costs and fees in the amount of approximately $26,000. After the Township and the County objected, the Tax Tribunal held an evidentiary hearing on the reasonableness of New Covert Generating's bill of costs but withheld its decision until entry of its final order and judgment resolving the appeals.

In June 2018, the Township and the County again moved for summary disposition on the ground that the

Tax Tribunal lacked jurisdiction. They argued that the Commission requires electric-generating facilities to file three different statements of assessable property and, although New Covert Generating filed the three forms, the filings were improper because two of the forms were filed under protest and inserted $0 as the value of the property, which was inaccurate. Additionally, under MCL 205.735a(4)(b), they argued that New Covert Generating could not invoke the Tax Tribunal's jurisdiction without filing accurate statements of assessable property, which it did not do.

New Covert Generating responded that the motion was patently frivolous because the Township and the County had asserted the same argument in the 2010 and 2011 proceedings, and both the Tax Tribunal and this Court rejected that argument. It was undisputed that New Covert Generating had filed the required forms for each of the years at issue and that it had protested to the board for each of the years except 2013. New Covert Generating asserted that the Township and the County knew that their motion was meritless; accordingly, New Covert Generating requested sanctions.

In July 2018, the Tax Tribunal denied the outstanding motions for summary disposition by the Township and the County. The Tax Tribunal rejected the Township and the County's argument that it had to order New Covert Generating to pay its taxes before it could consider New Covert Generating's appeals. It also recognized that this Court had already rejected the contention that the Tax Tribunal lacked jurisdiction because New Covert Generating failed to file the properly filled-out forms. The Tax Tribunal further opined that the timing and nature of the motion raised concerns that the Township and the County made it for an improper

purpose or knew that it was frivolous. However, the Tax Tribunal held that issue in abeyance pending resolution of the underlying tax disputes.

C. THE CONTESTED HEARING

In July 2018, the Tax Tribunal held a contested hearing to determine the true cash value and taxable values of the parcels at issue in the appeal for the 2016 tax year.[1] Edward VanderVries and Laureen Birdsall testified regarding the 2016 assessment of New Covert Generating's property—$660 million—but they allocated 3% of that total to real property, which left a value of $638 million for the personal property.

The managing director of Duff & Phelps, hired by New Covert Generating to appraise the plant, testified that there was enough data to support the use of all three valuation approaches for New Covert Generating's plant: income, cost, and sales. On the basis of these three approaches, New Covert Generating's property was worth $408 million. The Township and the County presented their rebuttal case before presenting testimony and evidence concerning their valuation of New Covert Generating's plant. Their experts reviewed the Duff & Phelps appraisal and felt that there were several errors and inaccuracies in each of the three valuation approaches.

D. POSTHEARING JUDGMENTS

In January 2019, the parties entered a stipulated judgment establishing the true cash values, assessed

[1] New Covert Generating's parent company sold New Covert Generating along with other holding companies to another entity in 2015. The transfer constituted an uncapping event, which led to the revaluation of the property as of December 31, 2015. See MCL 211.27a(3).

values, and taxable values for all the parcels involved in the tax appeals for tax years 2012 through 2015. They also stipulated the amount of refund owing to New Covert Generating for those tax years. The Tax Tribunal entered the stipulated judgment as a partial consent judgment. The Tax Tribunal left the appeal open to consider the costs and fees to be awarded as a sanction.

The Tax Tribunal subsequently issued its February 8, 2019 final opinion and judgment establishing the true cash value and taxable values for the parcels at issue in the appeal for the 2016 tax year. The Tax Tribunal found that the parties' experts agreed that the assessor's value ($1,342,800) for the land was accurate, as was the value of the exempt pollution-control assets ($46,320,249). The Tax Tribunal found that the assessment presented by the Township and the County was not supported by substantial, competent, or material evidence and that while New Covert Generating's appraisal was not without its flaws, it did constitute substantial, competent, and material evidence sufficient to clear the low hurdle of the burden going forward with the evidence. For that reason, the Tax Tribunal rejected the Township and the County's request for a directed verdict.

Turning to the parties' appraisals, the Tax Tribunal generally found that the appraisal by Duff & Phelps (New Covert Generating's expert) was more reliable than the appraisal by Concentric (the appraiser for the Township and the County). The Tax Tribunal agreed that the sales approach employed by Duff & Phelps was flawed but accepted the cost approach as a reliable approach in valuing the property. The Tax Tribunal explained that the only alternative to purchasing an existing plant would be to purchase a new plant. In looking at the cost approach, the Tax Tribunal found

that Duff & Phelps's use of the 2016 Annual Energy Outlook report was relevant to determining the cost of a new plant on December 31, 2015. The Tax Tribunal found that the costs associated with the construction of a new plant stated in the 2016 Annual Energy Outlook report included the cost of a switchyard; accordingly, the Tax Tribunal agreed with Duff & Phelps's conclusion that the cost of a switchyard had to be deducted when determining the replacement cost.

The Tax Tribunal did agree with two criticisms of Duff & Phelps's cost approach. It determined that it was reasonable to include owner's profit in the cost to build a new plant. The Tax Tribunal also did not agree with Duff & Phelps's decision to deduct the cost of the Segreto switchyard with regard to each of its valuation approaches. On the basis of these changes, the Tax Tribunal revised the cost value calculated by Duff & Phelps from $423,000,000 to $510,000,000.

The Tax Tribunal next discussed Duff & Phelps's income approach. It found that Duff & Phelps's capacity factor of 65% was more accurate than Concentric's capacity factor of 87%. The Tax Tribunal accepted Duff & Phelps's use of the capital-asset pricing model when calculating the discount rate but did not agree that it was inappropriate for Duff & Phelps to subtract the value of New Covert Generating's intangibles at an estimated 3%. According to the Tax Tribunal, Duff & Phelps should not have deducted the costs associated with the Segreto switchyard when determining value using the income approach. For that reason, the Tax Tribunal added $59 million back to the value to reach a modified value of $509,000,000 for the income approach.

In the end, the Tax Tribunal concluded by weighing the two approaches equally and finding that the true

cash value of all the property was $509,500,000. The Tax Tribunal then turned to the proper allocation of the value.

The Tax Tribunal employed Duff & Phelps's method for determining the value of the real property, which was to subtract the agreed value of the land, multiply the remainder by 3% to calculate the value of the improved land, and then add the land value back to that total to get a real estate value of $16,587,516. The total value of the personal property would then be $492,912,484. After determining the value of the personal property, the Tax Tribunal subtracted the agreed value of the tax-exempt pollution-control property, which was $31,960,972. The remaining value of the personal property was $460,951,512.

The Tax Tribunal did not agree with Duff & Phelps's allocation of the remaining value between the turbine personal-property parcel and the nonturbine personal-property parcel. The Tax Tribunal determined that the law required it to value the turbine property as installed. It determined that 46% of the value ought to be assigned to the turbine parcel, which resulted in a value of $212,037,696 for that parcel.

At the same time it entered its final opinion and judgment for the 2016 tax year, the Tax Tribunal entered its order awarding costs and fees as a sanction for the Township and the County's motions for summary disposition in the appeals involving the 2012 through 2015 tax years. The Tax Tribunal found that the litigation conduct of the County's counsel called into question whether the motions were interposed for an improper purpose. Specifically, the Township and the County filed six motions for summary disposition and a request for immediate consideration, and despite counsel being familiar with *Spartan Stores*, he argued in direct con-

travention of its holding. The Tax Tribunal concluded that the Township and the County had attempted to cast New Covert Generating in a bad light.

The Tax Tribunal similarly found that the June 2018 motion was frivolous, reasoning that that motion was completely unfounded and made for an improper purpose because it was identical to motions previously filed and resolved, and those parties failed to acknowledge that the issue had been decided previously by the Tax Tribunal and this Court. Their failure to cite the previous opinion led the Tax Tribunal to conclude that the motion was frivolous and imposed for an improper purpose.

The Tax Tribunal found that $17,955 of the fees that New Covert Generating requested for responding to the motion of October 2017 was reasonable. It ordered the signatory of that motion to pay half the fees. The Tax Tribunal ordered a hearing to determine what fees would be reasonable for the filing of the June 2018 motion. After the hearings, the Tax Tribunal entered an order for sanctions arising from the June 2018 motion, rejected the Township and the County's request for a hearing, and instead granted relief on its earlier findings after a hearing to set the hourly rate. It then considered the bill of costs and dramatically reduced it because it felt that the hours billed were unreasonable given that the basis for the motion had been previously rejected. The Tax Tribunal found that $5,580 of the fees was reasonable. It ordered that 50% be attributed to each docket and ordered the signatories to the motion to jointly pay the sanction.[2]

---

[2] The Tax Tribunal also entered an order granting New Covert Generating's motion to correct errata. It corrected the values attributed to the personal-property parcels and corrected a misstatement in the opinion. This order resolved the last pending claim and closed the

III. INVOKING THE TAX TRIBUNAL'S JURISDICTION

The Tax Tribunal did not commit an error of law when it concluded that it had jurisdiction over the appeals.

This Court's review of agency decisions involving property-tax valuations is quite limited: "In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation." Const 1963, art 6, § 28. Because these claims of error involve whether the Tax Tribunal properly interpreted and applied the statutes governing its jurisdiction, this Court's review is limited to determining whether the Tax Tribunal committed an error of law in its interpretation and application of the statutes. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). This Court reviews de novo whether the Tax Tribunal erred as a matter of law when interpreting and applying statutes. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016). Agency interpretations of a statute are entitled to "respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008).

Whether a tribunal had subject-matter jurisdiction may be raised at any time, even for the first time on appeal. See *Midwest Energy Coop v Mich Pub Serv Comm*, 268 Mich App 521, 523; 708 NW2d 147 (2005). This Court also reviews de novo as a question of law

appeal for the 2016 tax year, but the order noted that the Tax Tribunal still had to resolve the outstanding motions for reconsideration.

whether this Court has subject-matter jurisdiction. *Id*.; *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

A. APPELLATE JURISDICTION

As a preliminary matter, we note that part of the appeal in Docket No. 348721 was previously dismissed with regard to the claims involving the March 11, 2019 order. This Court ordered that the appeal involving the February 8, 2019 order remain pending. See *New Covert Generating Co, LLC v Covert Twp*, unpublished order of the Court of Appeals, entered May 14, 2019 (Docket No. 348721). What has not been decided is whether this Court lacked jurisdiction to consider whether statements of assessable property must be filed to invoke jurisdiction or whether New Covert Generating was a party in interest because the Township and the County did not timely appeal the consent judgment. We do so now.

This Court's jurisdiction to hear an appeal of right is determined by application of the court rules. See *Chen*, 284 Mich App at 192. This Court generally has jurisdiction over an appeal of right from a final judgment or order of the circuit court or of the Court of Claims, as defined under MCR 7.202(6). See MCR 7.203(A)(1). This Court also has jurisdiction to hear appeals of right from a "judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." MCR 7.203(A)(2). The Legislature provided that the Tax Tribunal is "the final agency for the administration of property tax laws." MCL 205.753(1). And the Legislature further provided that a party has an appeal by right in this Court from a "final order or decision of the tribunal," which "may be taken by

filing an appeal in accordance with the Michigan court rules after the entry of the order or decision appealed from or after denial of a motion for rehearing timely filed." MCL 205.753(2). Accordingly, an aggrieved party must file a claim of appeal within 21 days of the entry of a final judgment or order. See MCR 7.203(A)(2); MCR 7.204(A)(1)(a).

Because the consent judgment disposed of all the claims and adjudicated all the rights and liabilities of all the parties for the disputes involving tax years 2012 through 2015, it was a final judgment as to those petitions. See MCR 7.202(6)(a)(*i*). We have jurisdiction to consider the first two issues raised in Docket No. 348721 to the extent that those claims involve the Tax Tribunal's authority to enter the order compelling the payment of attorney fees because the Township and the County timely appealed that order. To the extent that the Township and the County have impliedly challenged the consent judgment by arguing that the Tax Tribunal should not have denied their motions for summary disposition, this Court treats the case as if leave to appeal had been granted. See, e.g., *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 200 n 1; 536 NW2d 784 (1995).

New Covert Generating also argues that this Court cannot consider any challenge to the consent judgment because a party may not assert an error with regard to a judgment to which that party consented. See *Dora v Lesinski*, 351 Mich 579, 582; 88 NW2d 592 (1958). However, a party may raise a challenge to subject-matter jurisdiction at any time, and the parties cannot confer subject-matter jurisdiction on the Tax Tribunal by their conduct or through waiver. See, e.g., *Paulson v Secretary of State*, 154 Mich App 626,

630-631; 398 NW2d 477 (1986).[3] Accordingly, the Township and the County may challenge the Tax Tribunal's exercise of subject-matter jurisdiction even though they did not reserve the right to appeal on that ground in the consent judgment. *Id*.

B. INVOKING THE TAX TRIBUNAL'S JURISDICTION

The Township and the County argue that under MCL 205.735a(4)(b), which applies to disputes involving industrial personal property, the filing of a properly completed statement of assessable property is always a prerequisite to invoking the Tax Tribunal's jurisdiction—whether as a direct appeal or as an appeal after protest to the board. They assert that MCL 205.735a(4)(b) requires this result because the conditional clause at the end of the first sentence in Subsection (4)(b) applies equally to a protest before the board and a direct appeal to the Tax Tribunal. Moreover, they argue that the failure to comply with that condition deprives the Tax Tribunal of subject-matter jurisdiction and, for that reason, the prerequisites cannot be waived or forfeited.

1. SUBJECT-MATTER JURISDICTION OR PROCEDURAL PREREQUISITE

Subject-matter jurisdiction involves a court or tribunal's abstract power to try a case of the kind or character of the one pending. *Petersen Fin, LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018). The Legislature provided for the Tax Tribunal's subject-matter jurisdiction under MCL 205.731. *Hillsdale Co*

[3] This Court is not required to follow the rule of law established by an opinion of this Court published before November 1, 1990. See MCR 7.215(J)(1). However, under traditional principles of stare decisis, pre-1990 decisions continue to have precedential effect. MCR 7.215(C)(2).

Senior Servs, Inc v Hillsdale Co, 494 Mich 46, 52-53; 832 NW2d 728 (2013). That statute provides:

> The [Tax Tribunal] has exclusive and original jurisdiction over all of the following:
>
> (a) A proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state.
>
> (b) A proceeding for a refund or redetermination of a tax levied under the property tax laws of this state.
>
> (c) Mediation of a proceeding described in subdivision (a) or (b) before the tribunal.
>
> (d) Certification of a mediator in a tax dispute described in subdivision (c).
>
> (e) Any other proceeding provided by law. [MCL 205.731.]

MCL 205.731 does not limit the Tax Tribunal's jurisdiction on the basis of prerequisites to the assertion of jurisdiction. The prerequisites to the assertion of jurisdiction appear under MCL 205.735 for appeals commenced before January 1, 2007, and under MCL 205.735a for appeals commenced after December 31, 2006. Courts have long recognized that not all prerequisites to the assertion of jurisdiction reduce the subject-matter jurisdiction of a tribunal—some are merely claim-processing rules that do not implicate subject-matter jurisdiction. See *Union Pacific R Co v Brotherhood of Locomotive Engineers & Trainmen Gen Comm of Adjustment*, 558 US 67, 81-82; 130 S Ct 584; 175 L Ed 2d 428 (2009).

Although it did not directly consider whether the Legislature intended to make the prerequisites stated under MCL 205.735 jurisdictional, the Supreme Court has characterized them as jurisdictional. *Szymanski v*

Westland, 420 Mich 301, 303-305; 362 NW2d 224 (1984). This Court has been inconsistent when interpreting whether the prerequisites to the Tax Tribunal's acquisition of jurisdiction stated under MCL 205.735 implicated subject-matter jurisdiction—and therefore could not be waived or forfeited—or were merely procedural and could be waived or forfeited. Compare *Parkview Mem Ass'n v Livonia*, 183 Mich App 116, 121; 454 NW2d 169 (1990) (holding that a failure to comply with a prerequisite under MCL 205.735, although stated in terms of the acquisition of jurisdiction, was merely procedural and did not constitute a limitation on subject-matter jurisdiction), with *Leahy v Orion Twp*, 269 Mich App 527, 532; 711 NW2d 438 (2006) (holding that a failure to comply with a prerequisite under MCL 205.735 deprived the Tax Tribunal of jurisdiction). The inconsistency has, in part, been the result of the Supreme Court's handling of these prerequisites. The *Parkview* Court relied in part on the Supreme Court's decision in *W & E Burnside, Inc v Bangor Twp*, 314 NW2d 196 (1978), in which the Court reversed this Court's decision to affirm the Tax Tribunal's dismissal of the case for lack of jurisdiction on the ground that the taxpayer did not protest before the board as required under MCL 205.735(1). See *id.*; *W & E Burnside, Inc v Bangor Twp*, 77 Mich App 618, 624; 259 NW2d 160 (1977), rev'd 314 NW2d 196 (1978). If the requirements stated under MCL 205.735 limited the Tax Tribunal's subject-matter jurisdiction, then the failure to comply with those requirements could not be waived. Accordingly, the decision in *W & E Burnside* suggested that the Supreme Court viewed the prerequisites as jurisdictional only in the looser sense.

In any event, and as discussed later in this opinion, the Tax Tribunal did not err when it concluded that New Covert Generating had met the requirements of

MCL 205.735a(4)(b). Therefore, the Tax Tribunal had the authority to consider the appeal.

2. ACQUIRING JURISDICTION

The resolution of this issue involves the proper interpretation of MCL 205.735a(4)(b). The goal of statutory interpretation is to discern and give effect to the Legislature's intent. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The best indicator of the Legislature's intent is the language of the statute itself. *Id*. If the statute is unambiguous, this Court must assume that the Legislature intended the meaning clearly expressed and must enforce the statute as written. *Id*. Notably, a statute is not interpreted in a vacuum; rather, it must be interpreted in context and with a view to the statute's placement within the overall statutory scheme. *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008).

As part of the General Property Tax Act, see MCL 211.1 *et seq*., the Legislature created boards of review for townships and other municipalities, the primary function of which is to examine and review the accuracy of tax assessment rolls. MCL 211.29(1). The Legislature also required boards of review to meet for limited periods to hear taxpayer protests of an assessment. MCL 211.30(4). Normally, a board must afford an opportunity to be heard to any person who has appeared before the board to protest an assessment. MCL 211.30(3). But a township may require a taxpayer to first properly raise his or her claim to the assessor or another agency as a prerequisite to filing a protest before the board. MCL 211.107(1); *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722-723; 702 NW2d 692 (2005). The statutory provisions most directly addressing a board's authority do not otherwise

impose any prerequisites that must be met before a person may file a protest with the board.

The Legislature also created the Tax Tribunal through the Tax Tribunal Act, MCL 205.701 *et seq*. See MCL 205.721. The Tax Tribunal is a quasi-judicial agency, MCL 205.721(1), that has exclusive jurisdiction "for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state," MCL 205.731(a). An agency is defined to include boards of review. See MCL 205.703(a). Accordingly, the Legislature provided the Tax Tribunal with the general authority to hear appeals from final decisions of boards of review.

Before January 1, 2007, the Tax Tribunal could only acquire jurisdiction over a tax dispute involving an assessment or exemption if the aggrieved party first protested the assessment or claimed the exemption before the appropriate board of review, see MCL 205.735(2), which was consistent with the Legislature's conferral of jurisdiction to hear appeals from final decisions and orders. Although the Legislature generally continued to require petitioners to first protest to the appropriate board of review for disputes arising after December 31, 2006, see MCL 205.735a(3), the Legislature provided taxpayers with the option to appeal directly to the Tax Tribunal without protesting to the board under certain circumstances:

> (4) In the 2007 tax year and each tax year after 2007, all of the following apply:
>
> (a) For an assessment dispute as to the valuation or exemption of property classified . . . as commercial real property, industrial real property, or developmental real property, the assessment may be protested before the

> board of review or appealed directly to the tribunal without protest before the board of review as provided in [MCL 205.735a(6)].
>
> (b) For an assessment dispute as to the valuation or exemption of property classified . . . as commercial personal property, industrial personal property, or utility personal property, the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in [MCL 205.735a(6)], if a statement of assessable property is filed under [MCL 211.19] prior to the commencement of the board of review for the tax year involved.
>
> (c) For an assessment dispute as to the valuation of property that is subject to taxation under . . . the commercial redevelopment act, . . . the enterprise zone act, . . . the technology park development act, . . . the obsolete property rehabilitation act, . . . [or] the commercial rehabilitation act, . . . the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in [MCL 205.735a(6)]. This subdivision does not apply to property that is subject to the neighborhood enterprise zone act . . . . [MCL 205.735a(4).]

Notably, the provisions of MCL 205.735a(4) are not framed as limitations on the acquisition of jurisdiction. Rather, they are framed as exceptions to the general prerequisite to the Tax Tribunal's acquisition of jurisdiction over a tax dispute as provided under MCL 205.735a(3). For tax disputes commenced after December 31, 2006, the Legislature reaffirmed that, except as otherwise provided under MCL 205.735a or other law, "for an assessment dispute as to the valuation or exemption of property, the assessment must be protested before the board of review" before the Tax Tribunal could acquire jurisdiction of the dispute as provided under MCL 205.735a(6). See MCL 205.735a(3).

Under MCL 205.735a(4), the permissive verb "may" was used to establish exceptions to the mandatory prerequisite to the acquisition of jurisdiction under MCL 205.735a(3). *Walters v Nadell*, 481 Mich 377, 383; 751 NW 2d 431 (2008) (stating that the term "may" ordinarily is permissive, not mandatory). The Legislature provided that, for certain qualifying assessment and exemption disputes, the assessment or exemption "may be protested before the board of review or appealed directly to the tribunal without protest before the board of review . . . ." See MCL 205.735a(4)(a) and (c). The disjunctive "or" established that a taxpayer "may" do either of two things: the taxpayer "may" protest the assessment "before the board of review," or the taxpayer "may" appeal directly to the Tax Tribunal without protest before the board of review. In the former case, the Tax Tribunal would not acquire jurisdiction until after the taxpayer completed the protest and filed a petition in compliance with MCL 205.735a(6). In the latter case, the taxpayer could appeal directly to the Tax Tribunal by filing a petition in compliance with MCL 205.735a(6), notwithstanding the requirement stated under MCL 205.735a(3). Nothing within the statutory scheme suggests that the taxpayer who elects the first option might not subsequently appeal to the Tax Tribunal. The Legislature's statement that the assessment may be protested to the board or appealed directly to the Tax Tribunal *without protest to the board* demonstrates that the direct appeal is an exception to, not a replacement of, the requirement stated under MCL 205.735a(3). See MCL 205.735a(4)(a) and (c).

The only distinction between Subdivisions (a) and (c) and the exception stated in Subdivision (b) is that, for the exception stated under Subdivision (b), the Legislature added a limitation to the permissive language:

> For an assessment dispute as to the valuation or exemption of . . . commercial personal property, industrial personal property, or utility personal property, the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in [MCL 205.735a(6)], if a statement of assessable property is filed . . . . [MCL 205.735a(4)(b).]

If the Township and the County's preferred interpretation were correct, the exception stated under MCL 205.735a(4)(b) would necessarily apply to both options; that is, it would have to be understood to read that "the assessment may be protested before the board of review . . . if a statement of assessable property is filed" before the commencement of the board of review, or the assessment may be "appealed directly to the tribunal without protest before the board of review . . . if a statement of assessable property is filed" before the commencement of the board of review. Under that interpretation, the statute would, in effect, impose a prerequisite on the taxpayer's ability to protest *to the board of review*.

But Subdivision (b) does not address the authority of boards of review to hear a protest; it addresses the prerequisites applicable to the Tax Tribunal's acquisition of jurisdiction under an exception to the rule stated in MCL 205.735a(3). Tellingly, MCL 205.735a(3) already provides that the Tax Tribunal acquires jurisdiction to hear appeals that have first been protested to the board of review without imposing any such requirement. That is, if a petitioner first protested to the board of review, the Tax Tribunal would subsequently acquire jurisdiction under MCL 205.735a(3) without any need to resort to any of the permissive exceptions provided under MCL 205.735a(4). Therefore, given the statutory scheme as a whole and interpreting the

statute in context, the condition applies to the last antecedent of the two antecedents separated by the disjunctive "or"—namely, it applies only in those appeals in which the taxpayer has directly appealed without making a protest to the board of review. See *Kales v Oak Park*, 315 Mich 266, 271; 23 NW2d 658 (1946) (stating that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose that requires a different construction).

In the previous appeal, this Court rejected the Township's construction of MCL 205.735a(4) because that construction, in effect, read a limitation into MCL 205.735a(3) that did not exist:

> MCL 205.735a provides a general jurisdictional rule in § (3) that provides that an assessment dispute must be protested before the board of review prior to the Tax Tribunal acquiring jurisdiction in accordance with the petition filing requirements of subsection (6). MCL 205.735a provides exceptions to the general rule, however, in subsection (4). Each subsection restates the general jurisdictional rule, but makes the general rule permissive rather than mandatory. Thus, while protest before [the] board of review is not required for property covered in each of the three subsections prior to an appeal before the Tax Tribunal, protest before the board of review remains an available course. Respondent's proposed reading of the exception in subsection (4)(b) would add a requirement to the exception that does not exist in the general rule in section (3); that is, section (3) requires only that a petitioner protest an assessment before the board of review and does not require the filing of a statement of assessable personal property in order to allow the tribunal to acquire jurisdiction of the dispute under MCR 205.735a(6) upon the timely filing of a petition. Subsection (4)(b) similarly permits a petitioner to protest an assessment before the board of review, but also offers a petitioner the option of appealing to the tribunal without protest if an additional condition is

> satisfied: a statement of assessable property must be filed under § 19 of the general property tax act before commencement of the board of review for the particular tax year. [*New Covert Generating Co*, unpub op at 4.]

When read in context and with a view to the role of the exceptions in the statutory scheme as a whole, see *Manuel*, 481 Mich at 650, MCL 205.735a(4)(b) is not equally susceptible to more than a single meaning, *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 39-40; 761 NW2d 269 (2008).[4] Rather, the plain language shows that the Legislature intended the requirement that the taxpayer file a statement of assessable property to apply only in cases of a direct appeal. MCL 205.735a(4)(b) plainly authorizes, but does not require, a taxpayer to appeal directly to the Tax Tribunal if the taxpayer filed a statement of assessable property. In the alternative, the taxpayer may protest to the board and, if he or she does so, the taxpayer has satisfied the prerequisite to the Tax Tribunal's acquisition of jurisdiction stated under MCL 205.735a(3).

Here, it is undisputed that New Covert Generating protested the assessments and exemptions before the board of review for each petition. Consequently, the

---

[4] The Township, the County, and amici suggest adoption of their alternate construction of the statute because that construction would encourage disclosures and support the laudable goals of uniformity of practice in the assessment of taxes. Whether those policies might be better served by precluding a taxpayer from asserting an appeal before the Tax Tribunal for those years when the taxpayer did not file a statement of assessable property, or filed a noncompliant statement, is a policy argument that has no relevance when determining the proper construction of a statute. *Stabley v Huron-Clinton Metro Park Auth*, 228 Mich App 363, 370; 579 NW2d 374 (1998) (stating that "[t]his Court will not impose a policy-driven interpretation . . . of a statute when the Legislature has [already] chosen among competing policy considerations").

Tax Tribunal acquired jurisdiction of the appeals consistently with MCL 205.735a(3) after a timely petition under MCL 205.735a(6). For these reasons, the Tax Tribunal did not commit an error of law when it determined that it had acquired jurisdiction over the appeals. See *Mich Props*, 491 Mich at 527-528.[5]

IV. "PARTY IN INTEREST"

The Tax Tribunal also did not commit an error of law or adopt wrong principles when it concluded that New Covert Generating was a party in interest capable of invoking its jurisdiction.[6]

This Court reviews the Tax Tribunal's judgment and orders for fraud, error of law, or the adoption of wrong principles, *Mich Props, LLC*, 491 Mich at 527-528, while we review de novo whether the Tax Tribunal erred as a matter of law when it interpreted or applied the relevant statutes, *Makowski*, 317 Mich App at 441. This Court also reviews de novo as a question of law whether the Tax Tribunal had subject-matter jurisdiction. *Midwest Energy*, 268 Mich App at 523.

The Legislature provided, in relevant part, that the jurisdiction of the Tax Tribunal "is invoked by a party in interest, as petitioner, filing a written petition . . . ." MCL 205.735a(6). In *Spartan Stores*, 307 Mich App at 566-567, the Court had to determine whether Spartan Stores, Inc., which indirectly owned Family Fare, LLC,

[5] This resolves this issue on appeal, and therefore we need not address New Covert Generating's argument regarding collateral estoppel or the Township and the County's argument that the statements of assessable property filed by New Covert Generating did not satisfy the requirements of MCL 205.735a(4)(b).

[6] As noted earlier, to the extent that the Township and the County's appeal in Docket No. 348721 was untimely, we treat the appeal as if leave to appeal had been granted. *Schultz*, 212 Mich App at 200 n 1.

was a party in interest sufficient to invoke the Tax Tribunal's jurisdiction over the assessment of property in which Family Fare held a leasehold interest. It also had to determine whether Family Fare was a party in interest even though it did not own the underlying property. *Id*.

The *Spartan Stores* Court examined the methods by which an appeal typically proceeded to the Tax Tribunal and noted that taxpayers previously had to protest an assessment at the local board of review before the taxpayer could proceed to the Tax Tribunal. *Id*. at 571, citing MCL 205.735(2). The Court recognized that MCL 211.30(4) authorized only those persons (or their agents) whose property had been assessed to protest before boards of review; that is, only the actual owner of the assessed property could protest to the board. *Id*. at 570. The interplay between these statutes, the Court related, generally made it unnecessary to define the scope of the phrase "party in interest":

> [H]istorically it was unnecessary for courts to define the use of "party in interest" in MCL 205.735(3) with any more specificity, because the term necessarily encompassed only those parties that had protested before the board of review—i.e., the property owner or its agent. MCL 211.30(4). In other words, the board of review's strict limit on which parties could contest property-tax assessments served as a screen on which parties could appeal those assessments to the Tax Tribunal, and necessarily limited the scope of the phrase "party in interest" in MCL 205.735(3) to property owners or their agents. [*Id*. at 571-572.][7]

---

[7] The Court recognized that it had discussed the phrase "party in interest," as used under MCL 205.735, in *Jefferson Sch v Detroit Edison Co*, 154 Mich App 390; 397 NW2d 320 (1986), but it concluded that that decision did not provide any clarity regarding the proper understanding of the phrase because the *Jefferson Sch* Court discussed the phrase before there was a direct appeal to the Tax Tribunal without protest before the board. See *Spartan Stores*, 307 Mich App at 574 n 7.

The Court held that the phrase "party in interest" should not be limited to the actual owner of the assessed property, explaining that the phrase referred more broadly to any person who held *any* property interest in the assessed property. *Id*. at 575-576. The Court held that a leasehold interest was such a property interest: "Michigan courts have long held that leaseholds manifestly are 'interests,' in that they are 'part of a legal . . . claim to or right in property.' Most importantly, for the purposes of our case, 'the word "interest" as applied to land embraces and includes leasehold interests and rights derived therefrom . . . .' " *Id*. at 575 (citations omitted; ellipses in original). Because Family Fare held a leasehold interest in the assessed property, the Court held that Family Fare was a party in interest within the meaning of MCL 205.735a(6), even though it did not own the underlying real property being assessed. *Id*. at 577. The Court, however, rejected the contention that Spartan was a party in interest as the indirect owner of Family Fare, given that Michigan courts respect the separate existence of artificial entities; because Spartan was not the actual owner of the real property and did not enter into the lease agreement, it did not have a property interest in the assessed property. *Id*. at 577-578. For that reason, the Court concluded, Spartan was not a party in interest within the meaning of MCL 205.735a(6). *Id*. at 578.

Returning to our case, it is undisputed that New Covert Generating was the actual owner of the real and personal property that had been assessed. Therefore, it was plainly a party in interest under both the original understanding of that phrase and the broadened construction of that phrase given by the *Spartan Stores* Court. Contrary to the Township and the County's assessment, the Court's discussion of the law applicable

to disregarding the separate existence of entities did not indicate that such an ownership interest may be insufficient when there has been an abuse of the corporate form. See *Spartan Stores*, 307 Mich App at 577 n 13.

Instead, the *Spartan Stores* Court stated that it could not conclude that Spartan had an interest in the property because it had to respect Spartan's separate existence from Family Fare. *Id*. It did not suggest that Family Fare's status as a party in interest would be lost if Family Fare's separate existence were disregarded. *Id*. Similarly, here there had been no underlying action involving a request to disregard the separate existence of New Covert Generating from the entities that directly or indirectly own and control it. *Gallagher v Persha*, 315 Mich App 647, 654, 664-666; 891 NW2d 505 (2016) (stating that the equitable doctrine of piercing the corporate veil is a remedy that may be invoked in a separate action to redress an underlying wrong). Accordingly, the Tax Tribunal did not commit an error of law when it respected New Covert Generating's separate existence, as it was required to do, see *Green v Ziegelman*, 310 Mich App 436, 450-451; 873 NW2d 794 (2015), and determined that New Covert Generating was a party in interest that had the right to invoke the Tax Tribunal's jurisdiction consistent with *Spartan Stores*, 307 Mich App at 575-577, and MCL 205.735a(6). New Covert Generating was the record owner of the assessed property and, therefore, was necessarily a party in interest within the meaning of MCL 205.735a(6).

We reject the Township and the County's argument that it would be absurd to allow a so-called "shell" corporation to invoke the Tax Tribunal's jurisdiction. Although the undisputed evidence showed that New Covert Generating outsourced its operations and man-

agement to related entities, it was also undisputed that New Covert Generating actually owned the real and personal property at issue, which was worth hundreds of millions of dollars. Given the value of these properties, New Covert Generating had a powerful incentive to comply with the tax laws and to adhere to the Tax Tribunal's orders and judgments in order to protect its property from liens, foreclosure, or seizure. See MCL 211.40 (providing that the failure to pay taxes assessed on real and personal property creates a lien on the real and personal property by operation of law, and the liens take precedence over all other claims to the property); MCL 211.47 (authorizing taxing authorities to seize and sell personal property for unpaid taxes and providing a cause of action against the assessed entity for unpaid taxes). And if New Covert Generating's owners abused New Covert Generating's separate existence and recognition of its separate existence would be inequitable, the Township and the County could seek to have a circuit court disregard New Covert Generating's separate existence and enforce a judgment for unpaid taxes against the owners. See *Gallagher*, 315 Mich App at 664-666; *Green*, 310 Mich App at 450-451.

The Tax Tribunal additionally had the authority to penalize New Covert Generating for discovery violations occasioned by its failure or refusal to authorize or cause the entities with whom it contracts to provide relevant discovery, should the taxing authorities be unable to get the discovery directly from those contracting entities. See MCL 205.732(c) (providing that the Tax Tribunal's powers include "[g]ranting other relief or issuing writs, orders, or directives that it deems necessary or appropriate in the process of disposition of a matter over which it may acquire jurisdiction"). Although the Township and the County make

much of New Covert Generating's purported discovery violations, which they argue prevented a fair hearing in the Tax Tribunal, they have not appealed any of the Tax Tribunal's discovery orders. Accordingly, there is no basis for concluding that New Covert Generating committed discovery violations that prevented a fair hearing.

V. PROPER CONSTRUCTION OF THE TERM "TURBINE"

We next turn to whether the Tax Tribunal committed an error of law when it gave the term "turbine" its ordinary meaning.

Before 2007, the Legislature imposed a state education tax on property classified as industrial personal property, see MCL 211.903(1), and allowed local taxing authorities to impose a school operating tax on industrial personal property of up to 18 mills, see MCL 380.1211(1). As part of a tax reform, the Legislature amended those statutes to exempt personal property classified as industrial property from both taxes. See 2007 PA 37 (amending MCL 380.1211(1), in relevant part, to include an exemption for industrial personal property); 2007 PA 38 (adding Subsection (3) to MCL 211.903, which exempted industrial personal property from the state education tax). The Legislature amended the statutes to exclude turbine personal property from the exemptions otherwise applicable to industrial personal property. After the amendment, MCL 211.903 provided:

> (3) For taxes levied after December 31, 2007, the following property is exempt from the tax levied under this act:
>
> (a) Except as otherwise provided in subdivision (b), personal property classified under . . . MCL 211.34c, as industrial personal property.

> (b) Beginning December 31, 2011, a turbine powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale is not eligible for the exemption under this subsection.

After its amendment, MCL 380.1211 provided, in relevant part:

> (1) Except as otherwise provided in this section and [under MCL 380.1211(c)], the board of a school district shall levy not more than 18 mills for school operating purposes or the number of mills levied in 1993 for school operating purposes, whichever is less. A principal residence, qualified agricultural property, qualified forest property, supportive housing property, property occupied by a public school academy, and industrial personal property are exempt from the mills levied under this subsection except for the number of mills by which that exemption is reduced under this subsection. . . .
>
> * * *
>
> (10) As used in this section:
>
> * * *
>
> (e) "Industrial personal property" means the following:
>
> (*i*) Except as otherwise provided in subparagraph (*ii*), property classified as industrial personal property under . . . MCL 211.34c.
>
> (*ii*) Beginning December 31, 2011, industrial personal property does not include a turbine powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale.

The definition of industrial personal property is quite broad; it includes "[a]ll machinery and equipment, furniture and fixtures, and dies on industrial parcels, and inventories not exempt by law." See MCL 211.34c(3)(c)(*i*). However, the Legislature chose to ex-

clude turbines from the definition of industrial personal property, which, in effect, excluded turbines from the exemption from taxation for industrial personal property. Both of the exclusions to the exemption state that "industrial personal property," as defined under MCL 211.34c, does not include "a turbine powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale." See MCL 211.903(3)(b); MCL 380.1211(10)(e)(*ii*). The dispute on appeal involves the proper interpretation of the term "turbine" as used in these two statutes.

When interpreting a statute, this Court's goal is to determine the Legislature's intent. *Sun Valley Foods*, 460 Mich at 236. The best indicator of the Legislature's intent is the language of the statute itself. *Id*. If the statute is not ambiguous, this Court must assume that the Legislature intended the meaning clearly expressed and must enforce the statute as written. *Id*. A statute is ambiguous only when it irreconcilably conflicts with another provision or is equally susceptible to more than a single meaning. *Alvan Motor Freight*, 281 Mich App at 39-40. Notably, when construing a statute, this Court does not interpret the statute in a vacuum; rather, it must interpret the statute in context and with a view to the statute's placement within the overall statutory scheme. *Manuel*, 481 Mich at 650.

The Legislature did not define the word "turbine" under MCL 211.34c, MCL 211.903, MCL 380.1211, or any related statute. And there is no basis for concluding that the term has acquired a technical meaning. Therefore, this Court must construe the term according to the common and approved usage of the language. MCL 8.3a; see also *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). The Tax Tribunal looked to a dictionary for evidence of the

common usage for the term "turbine," which was proper. *Krohn*, 490 Mich at 156. A turbine is defined as "a rotary engine actuated by the reaction or impulse or both of a current of fluid (such as water, steam, or air) subject to pressure and [usually] made with a series of curved vanes on a central rotating spindle," *Merriam-Webster's Collegiate Dictionary* (11th ed), or "[a]ny of various machines in which the kinetic energy of a moving fluid is converted to rotary mechanical power," *The American Heritage College Dictionary* (3d ed). Accordingly, reduced to its simplest terms, the ordinary meaning of the term "turbine" is a machine or engine that is rotated by moving fluids.

The Legislature further provided that only those turbines that were "powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale" were excluded from the exemption. MCL 211.903(3)(b); MCL 380.1211(10)(e)(*ii*). Contrary to the contention of the Township and the County before the Tax Tribunal and on appeal, this qualifying language did not expand the ordinary meaning of the term "turbine." A turbine remained an engine or machine that was rotated by fluids. Read in context, it is beyond reasonable dispute that the Legislature added the qualifying clause to limit the exclusion to a particular class of turbines. Given its common meaning, the term "turbine" applies to a wide variety of engines or machines that are rotated by moving fluids—everything from a waterwheel to a wind turbine. But the Legislature chose not to exclude waterwheels and wind turbines from classification as industrial personal property. Rather, it chose to limit the exclusion to those turbines that met two criteria: turbines that were (1) "powered" by "gas, steam, nuclear energy, coal, or oil" and (2) that have the primary purpose of "the generation of electricity for sale." Although the limiting language refers to

the generation of electricity, the qualifying language cannot be understood to expand the ordinary understanding of the term "turbine" to encompass property that would be needed to enable the turbine to generate electricity. Applying the only reasonable construction, it is evident that the limiting language was intended only to limit the type of turbine that was excluded from the definition of industrial personal property—it was not intended to expand the types of property excluded from the definition of industrial personal property.

New Covert Generating urges a construction of the statute that goes beyond the plain meaning of the statute. New Covert Generating argues that the statutory language requires the Tax Tribunal to determine the value of the turbine as an isolated piece of equipment and then subtract that value from the value of the industrial personal property as a whole.

As the Township and the County correctly note, MCL 211.903 and MCL 380.1211 do not prescribe valuation methods. Rather, those statutes establish two things: that industrial personal property is exempt from the education taxes, and that a certain class of turbines is not industrial personal property. Those statutes, accordingly, only establish which industrial personal property was excluded from the exemption provided for industrial personal property. They do not establish the manner for calculating the taxable value of the property excluded from the exemption.

Additionally, New Covert Generating's construction ignores the fact that the statutes do provide that a turbine will not be excluded from the definition of industrial personal property unless "powered" by, in relevant part, gas or steam. The use of the past participle indicates that the turbines will only be excluded from the definition of industrial personal

property when actually used in the manner described (i.e., when powered by gas or steam for the primary purpose of generating electricity for sale on the market). See MCL 211.903(3)(b); MCL 380.1211(10)(e)(*ii*). Therefore, the limiting language provides that only installed turbines of the class described are excluded from the exemption.

The conclusion that the turbines must be valued in relation to a functioning power plant also follows from the statutes governing the proper valuation of personal property. True cash value is defined as the "usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale." MCL 211.27(1). And the testimony and evidence at trial established that the value of the plant as a whole was inherently linked to the value of the turbines within the plant's system for generating electricity.

Extensive testimony was put before the Tribunal establishing that the value of the plant depended almost entirely on the attributes and condition of the plant's turbines. The experts agreed that the expected lifespan and depreciation applicable to the turbines affected the value of the plant as a whole and that the plant's capacity, efficiency (its heat rate), and its economic obsolescence were related to its turbines and significantly affected the plant's value. There was also testimony that the long-term service plan for the turbines affected the value of the plant. Therefore, the testimony and evidence established that persons who value and purchase power plants value the plant and its equipment as a whole and do so, in significant part, on the basis of installed and functioning turbines.

Consequently, the "usual selling price at the place where the property to which the term is applied," MCL 211.27(1), for a turbine that is "powered by gas, steam, nuclear energy, coal, or oil the primary purpose of which is the generation of electricity for sale," MCL 211.903(3)(b); MCL 380.1211(10)(e)(*ii*), is the price that a buyer would pay for the turbine as a functioning component part of a power plant.

New Covert Generating's argument that such a valuation indirectly causes the value of the turbine to include the value of ancillary equipment in violation of the exclusions stated under MCL 211.903 and MCL 380.1211 is not well-taken. The statutes, when read in harmony, necessarily require the valuation of the turbine in relation to the value of a functioning whole—that is, the value of the turbine must be ascertained as part of the value of the plant that "powered" the turbine by "gas" or "steam" for the primary purpose of generating electricity for sale on the market because only turbines powered in this way are excluded from the definition of industrial personal property. See MCL 211.903(3)(b); MCL 380.1211(10)(e)(*ii*). With New Covert Generating's preferred construction, the value of the turbines would have to be determined without reference to their value as a component of a functioning plant. That construction results in an overstatement of the value of the other industrial personal property of the plant, the value of which was valued as part of a functioning whole. Indeed, without a functioning turbine, the other property might have no value at all—the plant might, as one witness opined, be "shot." Likewise, that construction dramatically undervalues the turbines themselves because they are not valued as a functioning component part of a power plant but as an isolated piece of equipment that had been used and was subject to depreciation and obsolescence. As the

Township and the County correctly observe, that construction essentially results in valuing the turbines as scrap and not according to the price that a seller would be willing to pay for the turbines as part of a functioning unit.

New Covert Generating also suggests that valuing the turbines as a component of a functioning plant runs afoul of the doctrine of uniformity in taxation, see Const 1963, art 9, § 3, because the value includes the costs of installation, which can vary from developer to developer. New Covert Generating's contention relies on a false premise. All other variables being the same, two turbines in two different plants would have the same value without regard to how much was paid to install them by the original developer. The value of the turbine as part of a functioning unit simply does not vary on the basis of the amount paid to install it. Rather, when proper valuation techniques are applied, the value of the turbine as a component of a functioning power plant will comply with the requirement of uniformity in taxation because similarly situated taxpayers will be assessed according to the value of the turbine as a component of a functioning whole. See *Armco Steel Corp v Dep't of Treasury*, 419 Mich 582, 592; 358 NW2d 839 (1984) (stating that "the controlling principle is one of equal treatment of similarly situated taxpayers").

The Tax Tribunal did not commit an error of law when it interpreted the statutes to apply to a machine or engine rotated by fluid that was powered by—in relevant part—gas or steam and with a primary purpose of generating electricity. Accordingly, it did not commit an error of law when it concluded that the term did not apply to ancillary equipment necessary to enable the turbine to generate electricity. The Tax

Tribunal also did not commit an error of law when it determined that the value of the turbines at issue had to be ascertained by reference to their value as a component part of a functioning power plant. See *Mich Props*, 491 Mich at 527-528.

VI. TAX TRIBUNAL'S FINDINGS AND DETERMINATIONS OF VALUE

As already noted, Michigan's Constitution limits this Court's ability to review "any [agency] decision relating to valuation or allocation" of taxes to review for "fraud, error of law or the adoption of wrong principles . . . ." Const 1963, art 6, § 28. An agency commits an error of law or adopts wrong principles when the agency's findings are not supported by competent, material, and substantial evidence on the whole record. See *Fisher-New Ctr Co v Mich State Tax Comm (On Rehearing)*, 381 Mich 713, 715; 167 NW2d 263 (1969); *Mich Props*, 491 Mich at 527-528.

The nature of the review required under the substantial-evidence test was articulated in *Mich Employment Relations Comm v Detroit Symphony Orchestra, Inc*, 393 Mich 116; 223 NW2d 283 (1974), in which the Court explained that, although review was not de novo, it nevertheless must be thorough and required assessment of the evidence as a whole:

> What the drafters of the Constitution intended was a thorough judicial review of administrative decision, a review which considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the prov-

> ince of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. Cognizant of these concerns, the courts must walk the tightrope of duty which requires judges to provide the prescribed meaningful review. [*Id*. at 124.]

This Court has characterized the substantial-evidence test as requiring evidence that a " 'reasoning mind would accept as sufficient to support a conclusion.' " See *Black v Dep't of Social Servs*, 195 Mich App 27, 30; 489 NW2d 493 (1992), quoting *Soto v Mich Dep't of Social Servs Dir*, 73 Mich App 263, 271; 251 NW2d 292 (1977). Evidence that a reasoning mind would accept as sufficient is more than a scintilla but less than a preponderance. See *Black*, 195 Mich App at 30. Further, it is not this Court's place to resolve conflicts in the evidence or pass on the credibility of witnesses—that is, if there is adequate evidence to support the agency's decision, then this Court cannot substitute its judgment for the agency's judgment. *Id*.

A. REPLACEMENT COST: SWITCHYARD

The Township and the County first argue that the Tax Tribunal should not have deducted the costs associated with the construction of a new switchyard from the base cost estimate for a new plant stated in the Energy Information Administration's 2016 Annual Energy Outlook report because there was insufficient evidence to support a $41 million deduction from the base cost.

It was undisputed that New Covert Generating's tax parcels did not include the switchyard for operation in the PJM market on the valuation date. In calculating the value of New Covert Generating using the replacement-cost method for valuation, the experts examined the estimated cost to build a state-of-the-art

plant and then adjusted the value of that plant to reflect the actual condition of the New Covert Generating plant. Both appraisers used the Energy Information Administration's Annual Energy Outlook reports to obtain a baseline estimated cost for a new plant. However, Duff & Phelps chose to use the 2016 report, whereas Concentric chose to use the 2013 report.

New Covert Generating's expert testified that the estimated cost for a new plant stated in the reports included the costs associated with the construction of a switchyard. Because New Covert Generating did not own a switchyard for its market and the existing switchyard had no value to New Covert Generating, the expert opined that the cost included in the reports for a switchyard had to be deducted to reflect New Covert Generating's actual situation on the valuation date.

The record evidence reveals that the Tax Tribunal had to decide between two diametrically opposed positions: one stating that the Tax Tribunal should deduct $41 million to subtract out the costs associated with a new switchyard, and the other stating that the Tax Tribunal should make no adjustments to the baseline cost of a new plant to reflect the inclusion of equipment for a switchyard. Given the testimony supporting the conclusion that the Energy Information Administration's report included some costs associated with a switchyard or switchyard equipment, the Tax Tribunal cannot be faulted for concluding that the baseline cost stated in those reports had to be adjusted to subtract those costs. Similarly, one of New Covenant Generating's experts clarified how Duff & Phelps concluded that more than $41 million should be deducted from the baseline cost. His testimony, when considered with the exhibits underlying his opinion, was evidence that a reasonable mind would consider sufficient to justify the

deduction of 3.74% from the base replacement cost provided in the report, notwithstanding the contrary testimony and evidence. See *Black*, 195 Mich App at 30.

The Township and the County further argue that there was no evidence that the MISO switchyard actually cost $41 million and that there was evidence that suggested that it had a much lower original cost. That argument is inapposite. Testimony made it clear that the 3.74% was applied to the baseline replacement cost of a new plant as a way to calculate the amount included within the total cost that reflected the costs of a new switchyard. That is, the deduction did not reflect the value of the actual MISO switchyard.

The Township and the County similarly complain that New Covert Generating never disclosed how much it cost to build the MISO switchyard. The cost to build a specific switchyard at some point long before the valuation date was, however, not relevant to determining the amount of costs relating to a switchyard that was included in the Energy Information Administration's cost estimate in the 2016 Annual Energy Outlook report. Because the cost of the original switchyard was irrelevant to determining how much of the cost estimate for a new plant reflected the cost of a new switchyard, the Tax Tribunal had no obligation to discuss the MISO switchyard's value or justify the apparent difference between that value and the calculated value of a new switchyard that was included in the cost estimate for a new plant. See MCL 205.751(1); *Oldenburg v Dryden Twp*, 198 Mich App 696, 699-700; 499 NW2d 416 (1993) (stating that the Tax Tribunal's concise statement of facts and determinations of law need only be sufficient to facilitate meaningful appellate review).

The Township and the County presented testimony and evidence to undermine the view that the cost of a

new plant estimated in the 2016 report included approximately $41 million in costs associated with the construction of a new switchyard. That being said, the expert adequately explained the basis of his opinion, and there was underlying evidence from the reports to support his testimony. Accordingly, the dispute was a matter of the weight and credibility of the evidence, which was for the Tax Tribunal to resolve. *Black*, 195 Mich App at 30.

There was competent, material, and substantial evidence to support the Tax Tribunal's resolution of the amount of any adjustment to the baseline estimated replacement cost for a new plant to reflect the fact that the existing plant did not include a switchyard. Therefore, it did not commit an error of law by resolving that dispute in New Covert Generating's favor. See *Mich Props*, 491 Mich at 527-528.

B. INTANGIBLES

Michigan's Constitution provides that the Legislature must provide for the taxation of only real property and tangible personal property. See Const 1963, art 9, § 3. Therefore, to the extent the valuations at issue included value for intangible assets that were not a value-influencing factor that had to be accounted for in calculating the value of tangible property, see *Meadowlanes Ltd Dividend Housing Ass'n v Holland*, 437 Mich 473, 495-496; 473 NW2d 636 (1991), it was proper to reduce those values by the amount attributable to the intangible assets. Here, the Tax Tribunal accepted Duff & Phelps's contention that it was reasonable to reduce New Covert Generating's value by 3% for the approximate value of its intangibles. The Tax Tribunal explained that there was evidence of substantial intangible assets, such as the service contract and Mitsubishi

warranty, customized software, emission permits, fuel supply contracts, and the interconnection agreement.

The Township and the County argue that there was no evidentiary support for a 3% reduction for intangibles. More specifically, they state that there was no evidence for specific intangibles that were applicable to New Covert Generating and no study to support the use of a generic 3% estimate. They also contend that the Tax Tribunal accepted New Covert Generating's deductions for expenses related to the intangibles when calculating the value using the income approach and then deducted 3% for the value of the intangibles, which resulted in a double deduction.

As the Township and the County correctly note, two experts testified that New Covert Generating did not have intangibles that warranted a deduction. However, one of those experts also agreed that power plants typically have intangibles, that the most important intangibles for power plants involved contracts, and that 3% was a standard figure (though commonly applicable to a business that owned multiple plants).

Although there was testimony admitting that New Covert Generating had a trained workforce in place, the undisputed evidence showed that New Covert Generating outsourced its management and operations to other entities and had no employees of its own. Similarly, while there was testimony that it did not matter that the workforce belonged to another entity, there was no basis for valuing that workforce's training and experience as an intangible asset of New Covert Generating because New Covert Generating had no ability to control the workforce beyond the terms of the agreement with the employees' employer. That is, any value arising from the workforce was derived from the agreement that New Covert Generating had with the

employees' employer. The same is true for the other intangible assets that might be owned by the entities with which New Covert Generating contracted to operate its plant. Nevertheless, there was evidence that New Covert Generating had intangible assets in the form of such contracts. There was also evidence that those contracts would have some value. Indeed, one expert used the long-term service agreement with Mitsubishi to estimate New Covert Generating's future maintenance expenses and rejected a sales-comparison approach to valuing New Covert Generating on the grounds that power plants were unique and the value of a power plant could be affected by undisclosed data, such as the value of undisclosed contracts. Similarly, another expert agreed that New Covert Generating had a long-term service agreement with warranties that had some value. Additionally, there was evidence that New Covert Generating had other valuable contracts and permits of which the value should be excluded.

The Township and the County claim that the Tax Tribunal erred by accepting Duff & Phelps's deduction of the expenses associated with maintaining the intangible assets while at the same time deducting the value of those assets. The two concepts are distinct, as New Covert Generating explains on appeal. The expenses associated with maintaining an asset are expenses that reduce net income, which necessarily affects a valuation premised on income. But those expenses are distinct from the value of the asset itself, and the expenses do not implicate whether the value of the asset is subject to taxation. Therefore, it did not amount to an error of law or the adoption of a wrong principle to deduct the value of nontaxable assets even though the expenses associated with the maintenance

of those assets were deducted under the income approach to valuation. *Mich Props*, 491 Mich at 527-528.

In sum, expert testimony confirmed that power plants like New Covert Generating frequently have valuable intangible assets in the form of contractual rights and that 3% of total value was a commonly used estimate for the value of the intangible property. Given the testimony and evidence that New Covert Generating owned valuable contract rights, a reasonable person could conclude that some value should be deducted to reflect the value of the intangible property that was not subject to taxation. See *Black*, 195 Mich App at 30. And whether the general figure should be modified on the specific facts applicable to New Covert Generating was a matter of the evidence's weight and credibility to be resolved by the Tax Tribunal, which this Court will not second guess on appeal. See *id*. That testimony, when considered in light of the evidence concerning Duff & Phelps's experience and the other testimony and evidence, constituted competent, material, and substantial evidence to support a finding that 3% of New Covert Generating's value could be attributed to its intangible assets. *Mich Props*, 491 Mich at 527-528.

C. WORKING CAPITAL

The Township and the County also argue that the Tax Tribunal erred when it accepted Duff & Phelps's deduction for working capital, asserting that the evidence showed that New Covert Generating did not need significant working capital because PJM paid New Covert Generating on a weekly or bimonthly basis, which was adequate to cover New Covert Generating's monthly operating expenses.

The expert testimony offered by the Township and the County suggested that New Covert Generating

might not need substantial working capital because its revenue stream was adequate to finance its needs. But they did not relate their opinions to all the expenses that New Covert Generating might have had—such as its labor costs, management costs, or costs arising from contractual agreements. Moreover, the testimony of a New Covert Generating expert was adequate to establish that the generally applicable estimate of working capital accurately modeled New Covert Generating's actual working capital needs. Because there was competent evidence to support either position, it was for the Tax Tribunal to resolve the conflicting evidence, and this Court cannot substitute its judgment for that of the Tax Tribunal. *Black*, 195 Mich App at 30. The Tax Tribunal did not commit an error of law when it accepted Duff & Phelps's handling of this disputed calculation. *Mich Props*, 491 Mich at 527-528.

D. COST TO FINANCE

The Tax Tribunal's decision to accept Duff & Phelps's estimate for the cost to finance a new construction project was also supported by competent, material, and substantial evidence on the whole record. In accepting an incredibly low rate of 1.02%, the Township and the County maintain, the Tax Tribunal also mischaracterized the rate that Concentric actually applied as 12%.

As discussed, the parties relied on Annual Energy Outlook reports by the Energy Information Administration when calculating the base cost for a new plant. Those reports state the "overnight cost" of a plant, which is the estimate of all the costs for everything that one would need to build a plant on the day of valuation. The overnight cost, according to one expert, did not include the expenses associated with the actual

construction, such as the expenses related to financing the project. Accordingly, the parties agreed that the base cost for a new plant should be adjusted to reflect the costs associated with the financing for the project.

Duff & Phelps viewed the cost a bit differently for purposes of the valuation; it chose to determine the cost by looking at the owner's lost opportunity to invest the amount needed to develop the new plant in a long-term interest-rate vehicle. It calculated the lost interest over the development period to be $16 million on an investment of a "billion 92 million."

By contrast, an expert for the Township and the County assumed that a typical developer would finance 38% of the project with equity and the remaining percentage with construction loans; that expert calculated the total cost to finance the approximately $690 million expense over a construction term of three years using interest rates that began at 7.23% and gradually rose to 7.86%. The total cost under that approach amounted to more than $62 million. Because the hypothetical owner of the new plant developed the plant, in part, using equity, the cost was increased by the owner's expected profit.

The Tax Tribunal accepted Duff & Phelps's treatment of the cost to finance as the more reasonable approach. In explaining its reasoning, the Tax Tribunal stated that Concentric placed the interest rate at 12%, which was not the actual rate assigned in Concentric's appraisal. The Tax Tribunal rejected that rate not only because it felt that the rate was unreasonable but also because a market-based interest rate was highly variable and depended in significant measure on who the developer was, rather than the nature of the property itself. Accordingly, the Tax Tribunal determined, application of a market rate would run afoul of the doctrine of uniformity in taxation.

Additionally, the Tax Tribunal indicated in its opinion denying reconsideration that the reference to 12% interest did not warrant any relief because it had properly rejected the application of a market rate as violative of the doctrine that taxation should be uniform.

The Tax Tribunal did not err when it rejected the market-rate approach to calculating the costs associated with financing the development of a new plant. As the evidence showed, there were many different debt instruments available to finance a new project. Yet, in assessing the value of property, the Tax Tribunal had to ensure that the valuation method ensured uniformity in taxation, but a valuation that varied significantly on the basis of an interest-rate calculation would violate that requirement. See *Meadowlanes*, 437 Mich at 493. The approach taken by Duff & Phelps avoided the problem of varying interest rates by assuming that the developer could finance the entire project with equity and then measuring the expense by calculating the lost revenue from investment in a treasury bond. The Tax Tribunal found that Duff & Phelps's approach better conformed to the uniformity requirement and resulted in a more reasonable approximation of the base cost for a new plant. Because there was testimony supporting that proposition that was adequate to permit a reasonable mind to find that the $16 million cost adjustment accurately represented the cost to finance, the Tax Tribunal did not commit an error of law when it adopted that approach. *Black*, 195 Mich App at 30.

E. PLANT EFFICIENCY AND FUEL COSTS

The Township and the County finally argue that the Tax Tribunal adopted a wrong principle when it ac-

cepted Duff & Phelps's heat rate for a new plant that used a turbine that did not exist on the valuation date and that did not reflect real working conditions.

The Tax Tribunal determined that, of the two Annual Energy Outlook reports that the parties used to calculate the base cost of a new plant, Duff & Phelps's use of the 2016 report reflected a more accurate assessment of the cost of a new plant on the valuation date of December 31, 2015. The Tax Tribunal reasoned that the information contained in the 2016 report was relevant, even though issued some months after the valuation date, and that it better reflected the technology available in 2015.

The Tax Tribunal's rationale was adequate to justify its decision to accept Duff & Phelps's use of the 2016 report. The 2013 report reflected data for a new plant that was available in 2012—it did not reflect the advancements that occurred in the years since. Further, there was testimony that the data reflected in the 2016 report was collected in 2015. Therefore, even though the report itself did not get released until 2016, the underlying data could have been collected by a hypothetical developer and used to calculate the cost of a new plant for purposes of valuing an existing plant on December 31, 2015. Moreover, even though the report was not released until some months after the valuation date, as the Tax Tribunal properly recognized, that fact did not make the report irrelevant. Rather, it was a factor to consider in assigning the weight afforded to the information contained in the report. *Jones & Laughlin Steel Corp v Warren*, 193 Mich App 348, 354; 483 NW2d 416 (1992).

The Township and the County attempt to distinguish *Jones & Laughlin* on the basis that the data at issue there involved an actual sale, not a report that

discussed a technology that was not in existence. The attempt is unavailing; the *Jones & Laughlin* Court held that evidence is not automatically rendered irrelevant because the evidence involved events occurring after the valuation date. *Id*. Under that holding, the Tax Tribunal did not commit an error of law when it determined that the data from that report was relevant to the findings of fact necessary to calculate the replacement cost of New Covert Generating's plant on December 31, 2015. MRE 401; MRE 402. Indeed, the Tax Tribunal determined that the data from the 2016 report better reflected the costs and heat rate for a plant on December 31, 2015, than did the 2013 report, which necessarily reflected technology that was several years out of date by the valuation date. Therefore, the Tax Tribunal's finding that the 2016 report was more credible and worthier of greater weight was supported by competent, material, and substantial evidence. *Black*, 195 Mich App at 30. Similarly, whether there should be additional modifications to the data reflected in the report to better reflect real-world operating conditions was a matter of the weight and credibility of the data related in the report, which was within the province of the Tax Tribunal to resolve. *Id*. The Tax Tribunal did not commit an error of law or adopt a wrong principle in its handling of the 2016 report. *Mich Props*, 491 Mich at 527-528.

F. OWNER'S PROFIT

On cross-appeal, New Covert Generating argues that the Tax Tribunal erred by including in the cost of a new plant an amount attributable to the owner's profit. It maintains that, in *Meijer, Inc v Midland*, 240 Mich App 1; 610 NW2d 242 (2000), this Court held that owner's profit would be applicable only under circumstances

when the property was developed to make a profit from sale and there was evidence that the market price would bear inclusion of the owner's profit. New Covert Generating argues that the Tax Tribunal erred by failing to consider these factors and erred because there was no evidentiary support for them. Finally, it argues that there was no evidentiary support for the 5% figure actually selected for owner's profit.

In *Meijer*, we analyzed whether the Tax Tribunal erred when it accepted a valuation that added "five percent for entrepreneurial profit" to the cost approach for valuing a property, *id*. at 8, agreeing with foreign authorities that the "true cash value of developed real estate may not always be reflected by the cost of the project without the inclusion of entrepreneurial profit," *id*. at 10. The Court stated that the Tax Tribunal, however, could not mechanically include an entrepreneurial or owner's profit, and it warned that determining when it was proper to include owner's profit in the cost calculation might be difficult. *Id*. Thus, we held that an owner's profit may be included when a developer might develop the property in order to profit from its sale, *id*. at 11, but there must be "some evidence upon which one can support the conclusion that the market would bear the inclusion of entrepreneurial profit," or the inclusion of such profit would amount to pure speculation, *id*. at 12. Because there was no evidence that a developer would develop a 180,000 square-foot retail building for profit, the Tax Tribunal had erred by including a 5% owner's profit. *Id*. at 13.

Here, although the Tax Tribunal adopted Duff & Phelps's approach to valuation using the cost approach, it determined that that approach was flawed to the extent that it did not include "owner's profit" because "no one would build a plant for free." The Tax Tribunal

accepted Concentric's included owner's profit of $53,853,870. When New Covert Generating challenged this decision in its motion for reconsideration, the Tax Tribunal clarified that entrepreneurial incentives were appropriate because the property was specifically developed as a merchant generator operating in the private market. For that reason, it concluded that the plant was intended to earn a return on its owner's investment.

Although it might be true generally that regulated utilities do not develop property for profit from sale, that is not necessarily the case for the development of a merchant generator. Rather, as the parties' experts related, a merchant generator competes in the market and hopes to profit from the sale of electricity. And a developer might develop a merchant generator with the expectation to sell it for a profit to an entity that specializes in the energy market or to transfer it to a related company to serve as part of its energy portfolio. Indeed, there was evidence in the record that supported an inference that New Covert Generating was acquired, marketed, and transferred for profit, which included an effort to profit from the sale of the plant.

Duff & Phelps calculated the replacement cost by first determining the cost to develop a new state-of-the art plant with a similar nameplate capacity and chose not to increase the cost of development by the cost to finance some or all of the project, which impliedly meant that its appraisal involved a hypothetical developer who financed the project with its own resources. Duff & Phelps assumed that the developer's only cost beyond the investment of more than $1 billion in the project itself would be the lost opportunity to invest the $1 billion in treasury bonds. However, it is reasonable to assume that a developer with more than $1 billion to invest would likely not choose to invest in the develop-

ment of a for-profit merchant generator if it could not realize a profit greater than the interest that it might receive from investing its $1 billion in treasury bonds. Accordingly, under the development model advanced by Duff & Phelps, an accurate baseline cost should include some profit beyond the lost opportunity to invest.

Both the Tax Tribunal and the New Jersey Tax Court have recognized that entrepreneurial profit must be included when calculating the cost of a new development under like conditions: " 'When the direct and indirect costs of developing a property are used to provide an indication of value, the appraiser must also include an economic reward sufficient to induce an entrepreneur to incur the risk associated with a building project.' " *Metuchen I, LLC v Borough of Metuchen*, 21 NJ Tax 283, 292 (2004),[8] quoting American Institute of Real Estate Appraisers, *The Appraisal of Real Estate* (Chicago: American Institute of Real Estate Appraisers, 2001), p 360. The court in *Metuchen I* further observed:

> Entrepreneurial profit is compensation for risk and expertise associated with development. Therefore, a realistic cost approach must recognize adequate compensation to the entrepreneur to induce him to organize the project. It is necessary to include a figure which reflects the time, effort, and incidental expense of the owner in the development of the property. [*Metuchen I*, 21 NJ Tax at 292 (citations omitted).]

Accordingly, there was record support for the Tax Tribunal's decision to include entrepreneurial profit in the

[8] "Cases from other jurisdictions are not binding precedent, but we may consider them to the extent this Court finds their legal reasoning persuasive." *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 147 n 5; 871 NW2d 530 (2015).

base cost of the cost to develop a new power plant. See *Meijer*, 240 Mich App at 11.

The Tax Tribunal accepted Concentric's assessment of the cost of equity that an investor would expect to receive for developing a merchant electric generator. In doing so, it impliedly adopted Concentric's underlying rationale and data, which it could do to satisfy its duty to state the facts consistent with MCL 205.751(1). See, e.g., *Consol Aluminum Corp v Dep't of Treasury*, 206 Mich App 222, 238; 521 NW2d 19 (1994) (stating that the Tax Tribunal may adopt findings and conclusions of law by reference, and, when it does, it need only make separate findings and conclusions with regard to those areas with which it disagrees with the adopted rationale). Although Duff & Phelps presented testimony to undermine Concentric's position regarding the inclusion of owner's profit, expert testimony and Concentric's appraisal were sufficient—notwithstanding the contrary evidence—to permit a reasonable mind to find that the base cost of a new plant should include the costs associated with the equity investors' expected return and that a reasonably approximate proxy group would expect a return of about 5%. See *Black*, 195 Mich App at 30. Therefore, because there was competent, material, and substantial evidence to support its findings and conclusions, the Tax Tribunal did not commit an error of law when it included owner's profit in the cost of a new plant. *Mich Props*, 491 Mich at 527-528.

G. SEGRETO SWITCHYARD

Finally, New Covert Generating argues that the Tax Tribunal erred in its treatment of the expenses associated with the construction of the Segreto switchyard. It maintains that the Tax Tribunal itself recognized that New Covert Generating had to spend at least an

additional $12 million to complete the project but did not reduce the cost to reflect that obligation, even though a prospective buyer would take that expense into consideration. New Covert Generating further argues that the Tax Tribunal should have deducted the full $58,915,530 because that expenditure was necessary to ensure that the property was fit for its highest and best use.

On appeal, New Covert Generating makes much of the fact that a purchaser would normally account for the costs that it would have to pay after purchasing the plant in order to operate at its highest and best use. But the testimony and evidence supported a finding that the costs associated with the PJM Interconnection, which included the Segreto switchyard, had already been paid by the valuation date. Accordingly, there was evidence that a purchaser would not have to account for those costs when purchasing the plant. Rather, the purchaser would value the plant on the basis of the completed interconnection project. New Covert Generating's mere disagreement with the Tax Tribunal's findings does not establish that the Tax Tribunal committed an error of law or adopted a wrong principle. *Black*, 195 Mich App at 30.

New Covert Generating also concludes that the Tax Tribunal must have erred in its findings because the Tax Tribunal admitted as much on reconsideration. In its opinion and judgment, the Tax Tribunal found that the costs associated with the Segreto switchyard had already been paid before the valuation date and, for that reason, should not be deducted from the valuation of New Covert Generating. A different judge reviewed the motions for reconsideration and opined that the first judge erred by making that finding because the evidence showed that additional amounts would be due

in 2016. However, that judge did not have the opportunity to hear the witnesses and assess their credibility. That judge also did not acknowledge that the report that purportedly established the costs associated with the interconnection project was a cost estimate prepared some years earlier and did not involve actual data. Given the lack of evidence that New Covert Generating had actual obligations arising from the construction of the Segreto switchyard after the valuation date, the original judge could properly find that the obligations had been paid before the valuation date and, on that basis, could determine that it was inappropriate to value New Covert Generating by deducting expenses already paid or on the assumption that it would have future expenses related to another entity's property. On this record, there was competent, material, and substantial evidence to support the Tax Tribunal's decision to exclude any deductions for costs associated with the Segreto switchyard. Consequently, the Tax Tribunal did not commit an error of law when it chose not to deduct any amount from the value of New Covert Generating on the basis of the interconnection project. *Mich Props*, 491 Mich at 527-528.

VII. SANCTIONS

The Township and the County have not shown that the Tax Tribunal erred when it determined that the filing of the motions at issue warranted sanctions.

Although this Court's review of a Tax Tribunal's findings of fact and application of law is generally quite limited, those limitations apply only to decisions relating to valuation or allocation of taxes, see Const 1963, art 6, § 28, which is not at issue for an order of sanctions. This Court reviews de novo whether the Tax Tribunal properly interpreted and applied the court

rules, and this Court reviews for clear error the Tax Tribunal's findings underlying its application of the court rules. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that the Tax Tribunal made a mistake. *Id*.

The Legislature has authorized the Tax Tribunal to issue any order that it deems necessary or appropriate in the process of disposition of a matter over which it has jurisdiction. MCL 205.732(c). Additionally, the Tax Tribunal has promulgated its own rules, and Rule 215 provides that the Michigan Court Rules apply in the absence of an applicable tribunal rule. Rule 792.10215. The Tax Tribunal has not promulgated specific rules governing sanctions for filing frivolous documents, so the court rules apply to the Tax Tribunal's decision.

The Tax Tribunal sanctioned the Township, the County, and counsel under what was then MCR 2.114(D), which has since been relocated to MCR 1.109(E).[9] The court rules provide that, by signing a document filed with the court, the signer certifies that "to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," MCR 1.109(E)(5)(b), and that he or she has not interposed the document "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," MCR 1.109(E)(5)(c). If a signatory signs a document in violation of the rule, the court

[9] Because the substantive provisions are the same, we will cite the current court rule.

"shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees." MCR 1.109(E)(6).

"An attorney has an affirmative duty to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed." *LaRose Market, Inc v Sylvan Ctr, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). "The reasonableness of the attorney's inquiry is determined by an objective standard, not the attorney's subjective good faith." *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 731; 909 NW2d 890 (2017). "A court must determine whether a claim or defense is frivolous on the basis of the circumstances at the time it was asserted." *Id*. at 732. "[A] claim is devoid of arguable legal merit if it is not sufficiently grounded in law or fact, such as when it violates basic, longstanding, and unmistakably evident precedent." *Adamo Demolition Co v Dep't of Treasury*, 303 Mich App 356, 369; 844 NW2d 143 (2013) (quotation marks and citations omitted).

The Township and the County filed two motions that the Tax Tribunal determined warranted sanctions. They filed a motion for summary disposition in October 2017 concerning New Covert Generating's status as a party in interest, and they filed a motion for summary disposition in June 2018 arguing that the Tax Tribunal lacked jurisdiction because New Covert Generating had not filed statements of personal property.

In its brief in support of its motion for summary disposition involving whether New Covert Generating was a party in interest, the Township and the County acknowledged the decision in *Spartan Stores*, 307 Mich

App 565, but argued that that case had not involved a shell corporation. They also noted that the *Spartan Stores* Court had stated that the separate existence of an entity could be disregarded. The Township and the County indicated that all the elements necessary to disregard New Covert Generating's separate existence were present and that the Legislature did not intend to allow shell companies to invoke the Tax Tribunal's jurisdiction. Both parties asked the Tax Tribunal to dismiss New Covert Generating's petitions for lack of jurisdiction.

Although the Township and the County mentioned the decision in *Spartan Stores*, they did not discuss it in any meaningful way. Moreover, they ignored the actual holdings in *Spartan Stores*—this Court expanded the concept of party in interest to include not only the actual owner of the assessed property but also any entity that held an interest in the property. See *Spartan Stores*, 307 Mich App at 575-576. The Township and the County also ignored the fact that the *Spartan Stores* Court held that Spartan was not a party in interest because it indirectly owned the entity that owned the leasehold interest, Family Fare, which was insufficient to establish an interest in the property because courts must generally respect the separate existence of artificial entities. *Id*. at 577 n 13.

The Township and the County also did not examine the actual language of the statute and did not identify the terms that demonstrated that the statute actually barred so-called "shell" companies from being a party in interest. Rather, they appeared to argue that the Tax Tribunal should treat the record owner of the assessed property as though it were not a party in interest—even though caselaw clearly established that it was a party in interest—because New Covert Gen-

erating was an asset-holding entity that used other entities to run its day-to-day operations, which made discovery complicated. Notably, the Township and the County did not sue to have New Covert Generating's separate existence disregarded. Indeed, they did not even address whether the Tax Tribunal had the authority to disregard New Covert Generating's separate existence. See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 548; 656 NW2d 215 (2002) (stating that the Tax Tribunal does not have equitable powers).

Examining the actual arguments made in their motion for summary disposition premised on MCL 205.735a(6), there was no basis in fact or law for the motion. Because it is well settled that courts respect the separate existence of an artificial entity except in certain exceptional cases, the Tax Tribunal had no choice but to respect New Covert Generating's separate existence. See *Green*, 310 Mich App at 450-451. Additionally, the Court in *Spartan Stores* held that an entity—such as New Covert Generating—with an interest in the assessed property was a party in interest. See *Spartan Stores*, 307 Mich App at 575-576. Consequently, the Township and the County's motion for summary disposition was not well grounded in fact or law, and there was nothing in the motion to suggest that the Township and the County were urging a good-faith extension, modification, or reversal of the existing law. See MCR 1.109(E)(5)(b). Indeed, the Tax Tribunal aptly characterized the motion as arising from discovery disputes that it had addressed and would continue to address, if necessary. The Tax Tribunal also did not err when it determined that the Township and the County essentially ignored the holding in *Spartan Stores*. The Tax Tribunal recognized that the Township and the County did not explain how the title owner of the assessed property could ever be

found not to be a party in interest. Because the Township and the County's motion premised on New Covert Generating's status as a party in interest was not well grounded in fact or law, the Tax Tribunal had to apply an appropriate sanction for the filing of the October 2017 motion. See MCR 1.109(E)(6).

In their June 2018 motion for summary disposition premised on jurisdiction, the Township and the County argued—as they had in the previous litigation—that a taxpayer could not invoke the Tax Tribunal's jurisdiction without first filing statements of assessable property. They maintained that New Covert Generating had to file Forms L4175, 3991, and 4094, as promulgated by the State Tax Commission. They acknowledged that New Covert Generating had filed all three forms, even if under protest, but maintained that the filings did not comply with the instructions for completing the forms. They then argued that the filings were inadequate to meet what they believed was required under MCL 205.735a(4)(b) to invoke the Tax Tribunal's jurisdiction.

The Tax Tribunal relied on this Court's decision in the appeal involving the petitions from 2010 and 2011 and concluded that New Covert Generating did not have to file statements of assessable property before directly appealing to the Tax Tribunal because it was undisputed that New Covert Generating had protested the tax years at issue before the board. The Tax Tribunal also noted that this Court had stated that the only form that New Covert Generating had to file was Form 4175, which it did. Accordingly, the Tax Tribunal denied the motion.

The Township and the County's preferred construction—although implausible, as discussed earlier—was not so implausible that counsel could not

advocate for that position without running afoul of MCR 1.109(D). Therefore, the Tax Tribunal erred to the extent that it determined that the motion was not well grounded in fact or law. To the extent that the Tax Tribunal relied on counsel's purportedly inconsistent positions in different cases involving different parties, that too was error. Counsel had every right to advance the lawful objectives of his clients by every reasonably available means permitted by law, even if that position was inconsistent with the position that counsel advanced on behalf of a different client. See MRPC 1.2(a). Therefore, the trial court clearly erred when it determined that the filing of the June 2018 motion for summary disposition was not well grounded in fact or law. Nevertheless, that was not the only basis for the Tax Tribunal's decision to impose sanctions.

In determining that sanctions were warranted, the Tax Tribunal initially stated that the timing of the June 2018 motion just before the July 2018 contested hearing raised the issue as to whether it was filed for an improper purpose, such as to delay or harass New Covert Generating. It also indicated that the motion might be frivolous given this Court's previous decision in the prior appeal. However, the Tax Tribunal withheld resolution of those issues.

In its opinion applicable to tax year 2016, the Tax Tribunal provided a further rationale for its decision to sanction the Township and the County for the motions for summary disposition filed in October 2017 and June 2018. It first discussed the motion filed in October 2017 and considered the manner by which counsel for the County conducted the litigation, noting that counsel had filed what was, in effect, six motions for summary disposition in addition to requests for leave to appeal. It further wrote that counsel had used

motions for immediate consideration in a way that compelled New Covert Generating to respond within seven days. The Tax Tribunal also cited counsel's conduct in other litigation, which suggested that counsel was familiar with the holding in *Spartan Stores*, and stated that counsel used allegations of fact and innuendo to cast New Covert Generating in a bad light. The Tax Tribunal found that the purpose of the motion was to "poison the well at [the] hearing, rather than to win on the merits of the motion."

With regard to the motion filed in June 2018, the Tax Tribunal determined that that motion was also frivolous and further found that it was "imposed for an improper purpose." The Tax Tribunal reiterated these determinations and findings for the order applicable to tax years 2012 through 2015. Finally, on reconsideration, the Tax Tribunal stated, in relevant part, that the Township and the County could not reasonably cite the discovery disputes as justification for the motions because the Tax Tribunal had resolved the discovery disputes. Additionally, the Tax Tribunal again cited counsel's positions in other litigation regarding the holding in *Spartan Stores* as evidence that counsel's purpose for filing the motion was improper.

Based on the entire record, the Tax Tribunal's findings for both motions were not clearly erroneous. The Township and the County had been involved in long, ongoing, and contentious tax disputes with New Covert Generating. As the Tax Tribunal noted, the Township and the County filed three motions for summary disposition in each of the tax appeals, even though it subsequently withdrew one. When the timing is considered in relation to the stage of the dispute, the discovery battles, and the date scheduled for the contested hearing, the Tax Tribunal could reasonably

conclude that the motions were filed for ulterior motives: namely, to poison the well before the hearing, harass New Covert Generating, and increase the cost of litigating the valuation dispute. The Tax Tribunal was familiar with the present litigation, the past litigation, the parties, and their counsel. Accordingly, it was in the best position to assess the credibility and motivation of the parties and counsel. See MCR 2.613(C). MCR 1.109(E)(5) provides that the effect of a signature on a document represents that the signer read the document, the document was well grounded in fact and law, "*and*" it was not filed for an improper purpose. (Emphasis added.) Therefore, although the Tax Tribunal clearly erred in determining that the June 2018 motion for summary disposition was not well grounded in fact and law, it could still properly impose sanctions based on its finding that the motion was filed for an improper purpose. On this record, the Court is not left with the definite and firm conviction that the Tax Tribunal clearly erred in its findings. See *Johnson Family Ltd Partnership*, 281 Mich App at 387.

Once the Tax Tribunal found that counsel filed the motions for an improper purpose, it had to impose an appropriate sanction, even if the motion was otherwise well grounded in fact and law. See MCR 1.109(E)(6). Moreover, the Township and the County have not challenged the propriety of the actual sanctions or the amount of the sanction. Therefore, they have not identified a basis for reversing the Tax Tribunal's orders imposing sanctions.

Affirmed.

MURRAY, C.J., and CAVANAGH and SWARTZLE, JJ., concurred.

WHITE v DEPARTMENT OF TRANSPORTATION

Docket No. 349407. Submitted July 7, 2020, at Detroit. Decided October 1, 2020, at 9:00 a.m.

Ellen White filed an action in the Wayne Circuit Court against her employer, the Department of Transportation, alleging that she was racially discriminated against in violation of MCL 37.2202(1) of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., when she was denied a promotion; plaintiff amended her complaint to add a count of retaliation in violation of MCL 37.2701(a) when defendant allegedly took retaliatory actions after plaintiff filed the original complaint. Plaintiff, an African American woman, worked for defendant in its real-estate-services section, dealing with right-of-way acquisition and relocation. In 2008, she was hired in at Classification Level 10 (PA 10), one year later was reclassified to PA 11, and in 2013, was reclassified to PA 12. Plaintiff lived in, and her assigned work office was located in, Lansing. In 2015, plaintiff was assigned to the Gordie Howe International Bridge project in Detroit; she worked four days a week in Detroit, during which time defendant paid for her to stay in a local hotel, and she reported to the Lansing office only for a biweekly meeting. In 2016, plaintiff applied for a property-specialist position, classified as Level 13. When she applied, plaintiff had received "High Performing" ratings for each of the four years before the job posting and "Meets Expectation" ratings for the four years before that. The only other applicant for the position was a white woman who had 30 years' experience in the real estate industry, was hired by defendant in 2015 as a PA 10, and was reclassified as a PA 12 in 2016; the other applicant had received high-performing ratings for each of the two years she had worked for defendant. The interview panel unanimously selected the other applicant as the best applicant for the position. In December 2017, plaintiff filed this action. In January 2018, plaintiff received from her supervisor a "Needs Improvement" rating for her 2017 job performance; as a result, plaintiff was placed on a performance improvement plan (PIP). Three weeks later, defendant moved for a change of venue, arguing that plaintiff was assigned to the Lansing office and that venue could not be based on an employee's temporary work station. Plaintiff

opposed the motion, averring that the workstation in Detroit was not temporary and that she only reported to Lansing for biweekly meetings. The court, Martha M. Snow, J., ultimately denied the motion. Two days after filing the change-of-venue motion, plaintiff's supervisor informed plaintiff that she would now report to Lansing daily and go to Detroit for appointments only. A week after the workplace location change, plaintiff's supervisor issued plaintiff a notice of formal counseling, alleging that plaintiff's performance was unacceptable and that plaintiff had failed to comply with the PIP. In August 2018, plaintiff added the retaliation claim on the basis of the negative performance rating and the workplace location change. After discovery was completed, both parties moved for summary disposition. The trial court granted defendant's motion for summary disposition with regard to plaintiff's racial discrimination claim, reasoning that plaintiff had failed to establish an issue of material fact regarding whether defendant's asserted nondiscriminatory reason for the promotion decision—that the other candidate was the best candidate for the job—was a pretext for racial discrimination. The court also granted defendant summary disposition of plaintiff's retaliation claim on the basis that plaintiff had failed to identify an adverse employment action. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 37.2202(1)(a) prohibits an employer from failing or refusing to hire or recruit, discharging, or otherwise discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. Two types of claims may be brought for violations of this provision: those alleging disparate treatment and those alleging disparate impact. To establish a claim of intentional discrimination when there is no direct evidence of the impermissible discrimination, a plaintiff must set forth a prima facie case, which includes evidence that (1) the plaintiff belongs to a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. After a plaintiff establishes a prima facie case of discrimination, the employer has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision to rebut the presumption created by the plaintiff's prima facie case. If the employer gives a legitimate, nondiscriminatory reason for the employment decision, the presumption of discrimination is rebutted, and the

burden shifts back to the plaintiff to show that the employer's reasons were not the true reasons, but a mere pretext for discrimination. To avoid summary disposition, the plaintiff must demonstrate that the evidence, construed in the plaintiff's favor, would permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the employer's adverse action. In this case, plaintiff's four grounds for asserting that defendant's explanation for choosing the other candidate was a pretext for discrimination—that the person defendant hired was not qualified for the position, that plaintiff was more qualified and had more experience as a PA, that defendant's employees gave conflicting testimony about whether the interview panel was the actual decision-maker, and that statistics proved a pattern of conduct—were not sufficient to establish a material question of fact regarding whether defendant's legitimate nondiscriminatory reason for the decision was a pretext. Accordingly, the trial court correctly granted summary disposition of plaintiff's racial-discrimination claim.

2. MCL 37.2701(a) prohibits retaliation or discrimination against a person because the person has opposed a violation of the ELCRA or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the ELCRA. The ELCRA's antidiscrimination and antiretaliation provisions mirror those provisions in Title VII of the federal Civil Rights Act, 42 USC 2000e *et seq*., and relevant federal caselaw guides Michigan courts' interpretation of the ELCRA. The antiretaliation provisions of both Title VII and the ELCRA bar retaliation or discrimination with no limitation on the type of acts that would be considered unlawful, while the acts' respective substantive antidiscrimination provisions specify that prohibited discriminatory acts must affect specified aspects of an employee's employment, such as compensation or a condition of employment. In *Burlington N & S F R Co v White*, 548 US 53 (2006), the United States Supreme Court determined that Title VII's substantive antidiscrimination provision and its antiretaliation provision are not coterminous, i.e., that the scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts. Thus, the antiretaliation provision does not forbid the same conduct prohibited by the antidiscrimination provision; actionable retaliation is not limited to discriminatory actions that affect the terms and conditions of employment, as some earlier decisions by the United States Courts of Appeals had declared. To be actionable under Title VII, a retaliatory action must deter reasonable employees from objecting to violations of the act, applying an

objective test. Consequently, on a motion for summary disposition of a retaliation claim, a court must determine if the plaintiff has submitted sufficient proofs to establish a question of fact regarding whether the action meets the *Burlington* standard. Whether the alleged action would deter a reasonable employee from objecting to discrimination is determined on a case-by-case basis, taking into account the context, and is dependent on the particular circumstances of the case. In other words, each retaliation claim is considered on its facts and not by application of a general rule that certain actions are, by nature, not materially adverse. Because the ELCRA's antiretaliation provision, MCL 37.2701(a), does not contain the limitation language used in the substantive discrimination provision, MCL 37.2702(1), there is no basis to limit retaliatory acts under the ELCRA to those only affecting the terms and conditions of employment such as pay, hiring, and firing. Accordingly, *Burlington* must be followed, and the *Burlington* reasonable-employee standard for determining whether an employer has committed a retaliatory adverse employment action applies to retaliation claims under the ELCRA. Under the facts of this case, the needs-improvement evaluation, the corresponding PIP, and the workplace transfer from Detroit to Lansing, all of which occurred during a venue dispute in the original failure-to-promote discrimination claim, were neither trivial acts nor minor annoyances. The needs-improvements job-performance rating and corresponding PIP carried potential adverse results, and the timing of the workplace location change was evidence that the change was meant to affect the underlying litigation. These actions could have dissuaded a reasonable employee from making or supporting a claim of discrimination under the ELCRA. Defendant's reliance on pre-*Burlington* federal precedent was misplaced because those cases applied a different standard for Title VII retaliation claims that was expressly overruled by *Burlington*. The dissent's reliance on federal caselaw regarding whether negative performance evaluations or PIPs constitute adverse employment actions is similarly misplaced because many of the cases were decided before *Burlington* and others misapplied *Burlington* by evaluating retaliation claims under the same standard as substantive discrimination claims. The dissent's assertion that to be actionable, negative performance evaluations and PIPs must have tangible job consequences is contrary to the holding in *Burlington*. Under these facts, a reasonable jury could reasonably have found that the alleged retaliatory actions taken against plaintiff were materially adverse, and the trial court erred by granting summary disposition on this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with the opinion.

RIORDAN, P.J., concurring in part and dissenting in part, agreed with the majority's conclusion that plaintiff failed to establish a discrimination claim under MCL 37.2202(1)(a) but disagreed with the majority's analysis of plaintiff's retaliation claim under MCL 37.2701(a). It was unnecessary to determine whether the majority's adoption of the *Burlington* standard was correct because plaintiff failed to provide an objective basis for establishing that the alleged retaliatory actions were materially adverse under existing precedent or the newly adopted reasonable-employee standard. In other words, plaintiff did not support her general allegation that she was denied raises or promotions because of her race or age, and there was no evidence that a reasonable employee in the same circumstances would be dissuaded from making a discrimination claim. There was insufficient evidence to establish that plaintiff's negative performance evaluations and PIP plan had materially adverse consequences, a requirement under existing federal caselaw to qualify as an adverse employment action. It is reasonable to conclude that federal courts intentionally carried over this pre-*Burlington* legal standard related to PIPs and performance evaluations into post-*Burlington* jurisprudence. The majority's attempt at distinguishing cited federal caselaw on the facts is unconvincing, given the similarities between the requirements imposed in plaintiff's PIP and those imposed in the federal cases. Judge RIORDAN would have applied the *Burlington* test consistently with federal caselaw that requires evidence of tangible job consequences to establish a retaliation claim and would have affirmed the trial court's grant of summary disposition in favor of defendant on both claims.

CIVIL ACTIONS — ELLIOTT-LARSEN CIVIL RIGHTS ACT — ANTIRETALIATION PROVISION — RETALIATORY ACTIONS — REASONABLE-EMPLOYEE STANDARD.

MCL 37.2701(a) prohibits retaliation or discrimination against a person because the person has opposed a violation of the Elliott-Larsen Civil Rights Act (ELCRA), or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the ELCRA; the reasonable-employee standard set forth in *Burlington N & S F R Co v White*, 548 US 53 (2006), applies to retaliation claims brought in Michigan under the ELCRA; the scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts; to be actionable, a retaliatory action must deter reasonable employees from objecting to discrimination, applying an objective test; whether the alleged

> action would deter a reasonable employee from objecting to discrimination is determined on a case-by-case basis, taking the context into account, and is dependent on the particular circumstances of the case (MCL 37.2101 *et seq*.).

The Mungo Law Firm, PLC (by *Leonard Mungo*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Michael J. Dittenber*, Assistant Attorney General, for defendant.

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

SHAPIRO, J. Plaintiff, Ellen White, brought a claim of employment discrimination against defendant, the Department of Transportation, alleging that she had been denied a promotion as a result of racial discrimination in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. After she filed suit, defendant took certain actions that plaintiff concluded were in retaliation for having sued the department. Accordingly, she amended her complaint to add a count alleging retaliation in violation of ELCRA, MCL 37.2701(a).

Sometime later, defendant moved for summary disposition as to each claim. The trial court granted the motion in full and dismissed the case. Plaintiff then appealed in this Court. For the reasons stated in this opinion, we affirm the dismissal of plaintiff's failure-to-promote claim but reverse the dismissal of her retaliation claim.

I. FACTS & PROCEDURAL HISTORY

Plaintiff is African American. In 2008, she began working as a property analyst (PA) for defendant's

real-estate-services section. Plaintiff's job involved right-of-way acquisition and relocation, meaning she would help acquire property needed for defendant's projects and then find new housing for the former property owners. Beginning in 2015, she was assigned to the Gordie Howe International Bridge (GHIB) project in Detroit. She lived in Lansing and was formally assigned to defendant's Lansing office, but she worked in Detroit four days each week during which she was housed in a local hotel.

Plaintiff was hired at Classification Level 10 (PA 10). A year later she was reclassified to a PA 11. She stayed at that level until 2013, when she became a PA 12. In April 2016, defendant posted an opening for a property specialist, Classification Level 13 (PS 13). This position is responsible for managing defendant's statewide relocation program. There were two applicants for the position: plaintiff and Lori Crysler, who is Caucasian. Crysler was originally hired by defendant in January 2015 as a PA 10 and in February 2016, she was reclassified to a PA 12. Crysler had 30 years' experience in the real estate industry before joining defendant. At the time of application, plaintiff had received a "High Performing" annual rating for the previous four years. Her performance ratings in the four years before that were "Meets Expectations." Crysler had received high-performing ratings in her two evaluations. Both candidates interviewed for the PS 13 position in May 2016. The three-person interview panel unanimously selected Crysler for the position.[1]

Plaintiff filed suit in the Wayne Circuit Court on December 18, 2017, alleging racial discrimination in

[1] There was a fourth member of the panel who served as a "hiring manager," but she did not have a vote in the selection.

violation of ELCRA.[2] At the time, plaintiff was working full-time in Detroit on the GHIB project and she only went to defendant's Lansing office for biweekly meetings. On January 8, 2018, plaintiff's supervisor rated her 2017 job performance as "Needs Improvement." This was the first time that plaintiff received a negative annual performance rating. And as a result of the needs-improvement rating, plaintiff was placed under a "Performance Improvement Plan" (PIP) for a period of up to six months, with a formal review to be conducted within three months.

On January 29, 2018, defendant filed a motion for a change of venue to Ingham County, which was later denied. The motion was based, in part, on defendant's assertion that plaintiff's "assigned duty station is Lansing" and that venue cannot be based on an "employee's temporary work station[] . . . ." On February 13, 2018, before the change-of-venue motion was denied on February 21, 2018, plaintiff submitted an affidavit in opposition to the motion in which she stated that her "workstation in Detroit is not 'temporary' " and that she had been working there since about January 2015. Two days later, on February 15, 2018, plaintiff's supervisor sent an e-mail to plaintiff, directing her to report to Lansing daily beginning February 20 and informing her that she would go to Detroit on an appointment basis only. The following week, on February 21, 2018, the supervisor issued plaintiff a notice of formal counseling that outlined plaintiff's alleged failure to comply with the PIP and provided new dates for her to show progress. The notice stated that plaintiff's "performance is unacceptable." Plaintiff went on medical

[2] Plaintiff also alleged age discrimination, but she did not address that claim at the summary-disposition stage, nor does she appeal the dismissal of that claim. Accordingly, we will not address it.

leave in March 2018 because of stressful work conditions. She did not return to work before retiring in November 2018.

In August 2018, plaintiff filed an amended complaint, adding a retaliation claim on the basis of the negative performance rating and the change in her work location. After discovery was completed, the parties filed competing motions for summary disposition under MCR 2.116(C)(10). The trial court ruled that plaintiff failed to establish a question of fact whether defendant's nondiscriminatory reason for the promotion decision, i.e., that Crysler was the best candidate for the position, was a pretext for racial discrimination. The court granted summary disposition of plaintiff's retaliation claim on the ground that she had failed to identify an adverse employment action.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court granted summary disposition in favor of defendant under MCR 2.116(C)(10) on the basis that plaintiff failed to establish a genuine issue of material fact. A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion brought under MCR 2.116(C)(10), we must view that evidence in the light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. See *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, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. PLAINTIFF'S FAILURE-TO-PROMOTE DISCRIMINATION CLAIM

Plaintiff first argues on appeal that the trial court erred by dismissing her discrimination claim because she established a question of fact whether defendant's stated reason for the promotion decision was a pretext for discrimination. We disagree and affirm the order granting summary disposition as to that count.

1. CONTROLLING LAW

ELCRA prohibits employers from discriminating on the basis of race. MCL 37.2202 states:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

"The courts have recognized two broad categories of claims under this section: 'disparate treatment' and 'disparate impact' claims." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). This case concerns disparate treatment because plaintiff alleges that defendant intentionally discriminated against her on the basis of race. See *Duranceau v Alpena Power Co*, 250 Mich App 179, 182; 646 NW2d 872 (2002).

Because there is "no direct evidence of impermissible bias," plaintiff's claim of intentional discrimination must proceed under the *McDonnell Douglas*[3] burden-shifting framework. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). First, the

[3] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

plaintiff must set forth a prima facie case. In *Hazle*, the Supreme Court determined that the "plaintiff was required to present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination."[4] *Id*. at 463. "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case."[5] *Id*. at 464.

If the defendant gives a legitimate, nondiscriminatory reason for the employment decision, the presumption of discrimination is rebutted, "and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134; 666 NW2d 186

[4] *Hazle* explained that "the elements of the *McDonnell Douglas* prima facie case should be tailored to fit the factual situation at hand." *Hazle*, 464 Mich at 463 n 6. In *Hazle*, the plaintiff lost a sought-after promotion to an outside candidate. *Id*. at 459. The plaintiff alleged discrimination on the basis of race and maintained that she was the more qualified candidate. *Id*. at 460. As in *Hazle*, plaintiff is also challenging a promotion decision on the basis of race, and she argues that she had more internal experience and was better qualified than the selected applicant. Given the factual similarity, we conclude that *Hazle*'s formulation of the prima facie case is controlling here.

[5] Defendant argues that plaintiff did not present evidence raising an inference of discrimination. However, in its motion for summary disposition, defendant conflated the fourth element of the prima facie case with plaintiff's duty to show that the stated reason for the employment decision was a pretext. Perhaps as a result, the trial court also conflated the issues. In any event, because we conclude that plaintiff fails to create a question of fact on pretext, we will assume for purposes of this appeal that she established a prima facie case.

(2003). "At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.' " *Hazle*, 464 Mich at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998).

2. APPLICATION

Defendant's nondiscriminatory reason for its employment decision is that Crysler was the best candidate for the position. Plaintiff offers four grounds for concluding that this explanation is a pretext for discrimination.

Plaintiff first argues that Crysler was not qualified for the sought position. The Civil Service Commission determined that Crysler was qualified to apply for the position on the basis of equivalent experience. But in discovery, plaintiff established that Crysler made a misstatement in her application that could have affected the Civil Service Commission's eligibility determination.[6] Yet plaintiff has not presented evidence that defendant knew of the misstatement in Crysler's ap-

[6] The PS 13 job posting issued in April 2016 required four years' equivalent experience to a PA, including two years equivalent to a PA 11 or one year equivalent to a PA 12. In her application, Crysler indicated that she had been employed as a PA 12 since January 2015, i.e., she had one year of actual experience as a PA 12. In fact, Crysler was hired in January 2015 as a PA 10 and was not reclassified to a PA 12 until February 2016; thus, she did not have one year of actual experience as a PA 12. While plaintiff assumes that Crysler was not qualified given the misstatement, the record does not indicate what the Civil Service Commission would have decided had Crysler accurately stated her employment history with defendant.

plication at the time of the promotion decision. A similar issue arose in *Hazle*, where the plaintiff claimed that the selected applicant "committed 'résumé fraud' in representing her educational and employment background." *Hazle*, 464 Mich at 460. The Supreme Court held that even if the plaintiff was correct, this failed to establish that the employer's nondiscriminatory reason was pretextual because "there is no record evidence that any of this was known to defendants when they made their employment decision."[7] *Id*. at 474. Although defendant might have discovered the misstatement in Crysler's application, there is no evidence that it did, and it therefore properly relied on the Civil Service Commission's finding that she was qualified. The discovery of a misrepresentation unknown to the employer until after the promotion decision does not show that race was a motivating factor in the decision.

Plaintiff also argues that she was more qualified and had more experience as a PA than Crysler. Although plaintiff had more internal experience, Crysler had a substantial amount of real estate experience before joining defendant. The interview panel clearly valued that experience, and it is apparent from the panel's recommendation memo that Crysler gave an impressive interview. In any event, plaintiff's subjective claim that she was more qualified does not create a question of fact on whether the employer's proffered reason for the decision is pretextual. *Hazle*, 464 Mich at 476.

[7] The *Hazle* Court noted that under the after-acquired-evidence doctrine, an employer may not rely on the employee's subsequent wrongdoing to justify the prior employment decision; the Court reasoned that "a logical corollary of this principle [is] that an employee cannot establish discriminatory intent by offering evidence of facts that were unavailable to the employer when it made its employment decision." *Hazle*, 464 Mich at 475 n 15.

Further, "the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id*. (quotation marks, citation, and alteration omitted). Plaintiff is essentially challenging defendant's business judgment, which is insufficient to raise a question of fact of whether the nondiscriminatory explanation for the hire was a pretext for racial discrimination. See *Town v Mich Bell Tel Co*, 455 Mich 688, 704; 568 NW2d 64 (1997) (opinion by BRICKLEY, J.); *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997).

Plaintiff next argues that defendant's employees gave conflicting testimony about whether the interview panel was the actual decision-maker in this case. As defendant argues, however, plaintiff is not pursuing a "cat's paw" theory of liability under which a supervisor's discriminatory animus is imputed to the ultimate decision-maker. See, e.g., *Chattman v Toho Tenax America, Inc*, 686 F3d 339, 350 (CA 6, 2012). Indeed, plaintiff has not provided evidence of discriminatory animus by any of defendant's employees regarding the decision to promote Crysler rather than plaintiff. We therefore do not see how a discrepancy regarding who made the ultimate decision in this case shows discriminatory intent. Moreover, we conclude that the alleged inconsistencies in this case merely show the nuance of defendant's administrative bureaucracy and that they do not create a triable issue of fact on whether the promotion decision was motivated by racial bias.[8]

[8] Plaintiff relies on testimony that defendant's hiring decisions are made by the sought position's direct supervisor, who is a member of the interview panel. Yet a member of the interview panel in this case

Finally, plaintiff relies on statistics of defendant's work force to show pretext. There are few published decisions in Michigan addressing the use of statistics to show intentional discrimination. We have recognized that "[t]he use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual." *Dixon v W W Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1987). In *Featherly v Teledyne Indus, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361(1992), we characterized the statistics indicating that older employees were most affected by layoffs as "weak circumstantial evidence of age discrimination" but determined that the statistics supported the plaintiffs' prima facie case "especially when conjoined with the other facts evidencing age discrimination." By contrast, in this case, there is no separate evidence that race was a factor in the promotion decision, and statistics would be plaintiff's only circumstantial evidence of discrimination.

The use of statistics to prove intentional or disparate discrimination is more settled in federal caselaw. We are not bound by federal precedent interpreting analogous questions under Title VII of the federal Civil Rights Act, 42 USC 2000e *et seq*., but that caselaw is

---

explained that the direct supervisor's decision is "fairly easy" when the interview panel is unanimous, as was the case here. In other words, if there is disagreement within the interview panel, the direct supervisor has to make a unilateral decision, but that was not necessary in this case. Plaintiff also relies on testimony that the head of defendant's real estate section reviewed the interview panel's recommendation before giving it to HR. But this does not change the fact that it was the interview panel who selected Crysler. Finally, plaintiff notes that two employees were listed as hiring managers on the panel's recommendation memo. As explained by multiple witnesses, however, hiring managers handled the administrative and compliance aspects of the interview process but did not have a vote in the selection.

generally considered persuasive. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 437; 566 NW2d 661 (1997); *McCalla v Ellis*, 180 Mich App 372, 377-378; 446 NW2d 904 (1989). The United States Court of Appeals for the Sixth Circuit has held that "[a]ppropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can, if unrebutted, create an inference that a defendant discriminated against individual members of the class." *Peeples v Detroit*, 891 F3d 622, 635 (CA 6, 2018) (quotation marks and citations omitted). But "the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanations for the disparity." *Id*. (quotation marks and citation omitted).

Plaintiff notes that African Americans make up 13.9% of Michigan's population but only about 6% of defendant's workforce.[9] She also relies on statistics regarding the percentage—over a one- or two-year period—of defendant's reclassifications (3%), promotions (4%), and hires (4%) that have gone to African Americans. However, without additional information regarding the racial composition of the job applicants, these statistics are not sufficient to establish a pattern of discrimination. As to reclassifications, plaintiff fails to show that there is a significant deviation relative to the percentage of African Americans in defendant's workforce, and the fact that no African American had been hired as a PS 13 in at least the last 15 years is insufficient to establish a pattern of discrimination given that we have not been provided with information regarding the number of postings or the applicant pool

[9] All statistics contained in this opinion are approximate and come from undisputed data provided by plaintiff.

for those postings.[10] See *Hague v Thompson Distrib Co*, 436 F3d 816, 829 (CA 7, 2006) ("[I]f the plaintiffs rely on the racial composition of a workforce as evidence of discrimination it must subject all of the employer's decisions to statistical analysis to find out whether [race] makes a difference.") (quotation marks and citation omitted; alteration in original).

In sum, plaintiff fails to establish a material question of fact whether defendant's legitimate, nondiscriminatory reason for the promotion decision was a pretext. Defendant properly relied on the Civil Service Commission's determination that Crysler was qualified for the sought position. Plaintiff's subjective opinion that she was more qualified for the position does not by itself create a triable question of fact. The promotion decision was unanimously made by the interview panel, and any alleged discrepancy regarding the hiring process is immaterial. Plaintiff's statistical evidence is not sufficiently probative without additional context and analysis.

C. PLAINTIFF'S RETALIATION CLAIM

Plaintiff next argues that the trial court erred by granting defendant summary disposition of her retaliation claim. We agree.

1. BACKGROUND

Under ELCRA, an employer is liable if it retaliates against an employee for having engaged in protected activity, e.g., opposing a violation of the act's antidiscrimination provision. See *DeFlaviis*, 223 Mich App at 436. ELCRA's antiretaliation provision states:

---

[10] Plaintiff does not claim that the information does not exist or that defendant has withheld such information in discovery.

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701.]

Here, plaintiff claims that defendant retaliated against her for filing her failure-to-promote lawsuit. In its motion for summary disposition, defendant argued that plaintiff did not submit evidence sufficient to allow a reasonable jury to conclude that defendant's actions were materially adverse. In reviewing the issue under MCR 2.116(C)(10), we are obligated to consider the evidence and inferences from that evidence in the light most favorable to plaintiff. See *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009).

The record is clear as to certain salient facts. First, plaintiff had been working for defendant since 2008, had twice been assigned a higher classification, and in her annual performance reviews had received either a "Meets Expectations" or "High Performance" rating from her supervisor.[11] She filed suit on December 18, 2017. Three weeks later, on January 8, 2018, she had her annual performance review for 2017 and, for the first time, received an unsatisfactory rating: "Needs Improvement."

Second, during this time, plaintiff's failure-to-promote case was progressing and defendant brought a

[11] Plaintiff received a "Meets Expectations" rating for 2008, 2009, 2010 and 2011. She received a "High Performance" rating for 2012, 2013, 2014, and 2015. The 2016 review gave plaintiff a "High Performance" rating, but the parties disputed whether that review was fully completed.

motion to change venue from Wayne County to Ingham County. On February 13, 2018, plaintiff filed her response, which included her affidavit that she worked primarily in Detroit. Two days after she submitted that affidavit, on February 15, 2018, defendant informed plaintiff that she was to report to work in Lansing rather than Detroit.

2. CONTROLLING LAW

As already noted, while we are not bound by Title VII caselaw, Michigan courts regularly look to it for guidance in interpreting ELCRA. This stems from the fact that ELCRA is "clearly modeled after Title VII . . . ." *Rasheed v Chrysler Corp*, 445 Mich 109, 123 n 20; 517 NW2d 19 (1994). And in this case, we see no reason to depart from the United States Supreme Court's interpretation of the comparable Title VII provisions. ELCRA's antidiscrimination and antiretaliation provisions mirror Title VII's. Like Title VII, ELCRA prohibits employers from discriminating against an individual on the basis of race "with respect to employment, compensation, or a term, condition, or a privilege of employment," MCL 37.2202(1)(a), and also from limiting, segregating, or classifying "an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant" because of race, MCL 37.2202(1)(b). See 42 USC 2000e-2(a).[12] The antiretaliation provisions of both ELCRA and Title

[12] 42 USC 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to

VII differ from their respective antidiscrimination provisions in that the antiretaliation provisions bar retaliation or discrimination with no limitation on the type of acts that would be considered unlawful. See MCL 37.2701(a); 42 USC 2000e-3(a).[13]

The controlling case regarding Title VII's antiretaliation provision is *Burlington N & S F R Co v White*, 548 US 53; 126 S Ct 2405; 165 L Ed 2d 345 (2006). Before *Burlington*, courts had been applying the same standards to discrimination and retaliation cases. Specifically, some federal circuit courts concluded that to establish a claim for retaliation, the alleged retaliatory action needed to involve an "ultimate employment decision" such as hiring, firing, rate of pay, or promotion, which is consistent with the standard for a discrimination case. In *Burlington*, however, the Supreme Court concluded that

> Title VII's substantive provision and its antiretaliation provision are not coterminous. The scope of the antiretaliation provision extends beyond workplace-related or employment-related retaliatory acts. We therefore reject

---

his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[13] 42 USC 2000e-3(a) provides, in pertinent part:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> the standards applied in the Courts of Appeals that have treated the antiretaliation provision as forbidding the same conduct prohibited by the antidiscrimination provision and that have limited actionable retaliation to so-called "ultimate employment decisions." [*Id*. at 67 (citation omitted).]

Significantly, *Burlington* went on to define "materially adverse" as an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," *id*. at 68 (quotation marks and citation omitted), and stated that "the antiretaliation provision, unlike the substantive provision, *is not limited to discriminatory actions that affect the terms and conditions of employment*,"[14] *id*. at 64 (emphasis added).

At the same time, the Court said that Title VII "does not set forth a general civility code for the American workplace"; that "petty slights, minor annoyances, and simple lack of good manners" are not actionable even if retaliatory; and that the actions must deter reasonable employees, noting that the test is objective. *Id*. at 68 (quotation marks and citation omitted). An objective

---

[14] In concluding that claims of retaliation are not restricted to actions affecting the terms and conditions of employment, *Burlington* relied on the provisions' textual differences and on the presumption that Congress intended for different words to have different meanings; i.e., Congress would have specified that retaliation was limited to employment decisions if it intended that result. *Burlington*, 548 US at 62-63. The same presumption regarding textual differences in statutes exists in Michigan. "If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). *Burlington* also reasoned that the objective of the antiretaliation provision, i.e., to prevent "an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees," could not be accomplished by prohibiting only actions "directly related" to employment. *Burlington*, 548 US at 63-64.

test does not mean that the ultimate question is for the court; rather, the court must determine if the plaintiff has submitted sufficient proofs to establish a question of fact whether or not the action meets the *Burlington* standard. Thus, the decision must be based in the facts of the case, not bright-line or categorical rules as to what actions would deter an employee from objecting to discrimination. As stated in *Burlington*:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, *a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others*." [*Id*. at 69 (citations omitted; emphasis added).]

The examples given by the Supreme Court in this passage are telling. It would be easy to hold that not being invited to a training lunch, or having to accommodate a minor schedule change, does not constitute a material adverse action regardless of their effect. However, *Burlington* rejects the idea that certain actions are always or never materially adverse—each case is to

be considered on its facts and not by application of a general rule that certain actions are, by nature, not materially adverse.

Notably, defendant does not refer to *Burlington* in its brief. Instead it suggests that we rely on a pre-*Burlington* case, *Peña v Ingham Co Rd Comm*, 255 Mich App 299; 660 NW2d 351 (2003), which in turn relied on pre-*Burlington* caselaw from the Sixth Circuit for the proposition that an adverse employment action typically "takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.' " *Id*. at 312, quoting *White v Burlington N & S F R Co*, 310 F3d 443, 450 (CA 6, 2002), vacated for en banc rehearing 321 F3d 1203 (CA 6, 2003). However, as discussed, federal precedent applying that standard to retaliation claims was expressly overruled by *Burlington*, 548 US 53.[15] It would be a strange result, to say the least, if we continued to follow Title VII precedent overruled by a United States Supreme Court decision based on the same statutory language found in ELCRA.

We have not addressed in a published ELCRA case whether to follow *Burlington*.[16] We do so here and

---

[15] The Sixth Circuit decision relied on by *Peña* was the case that led to the Supreme Court's decision in *Burlington*. After *Peña* was decided, the Sixth Circuit vacated *Burlington*, 310 F3d 443, and decided the case en banc, holding that the plaintiff was subjected to retaliatory adverse employment actions, *White v Burlington N & S F R Co*, 364 F3d 789 (CA 6, 2004). The Supreme Court affirmed, applying the reasonable-employee standard already discussed.

[16] We have applied *Burlington* in an unpublished decision. See *Rott v Madison Dist Pub Sch*, unpublished per curiam opinion of the Court of

adopt the reasonable-employee standard for determining whether an employer has committed a retaliatory adverse employment action under ELCRA. Given that the antiretaliation provision does not contain the limiting language used in the substantive discrimination provision, there is no basis in MCL 37.2701(a) to limit retaliatory acts under ELCRA to those affecting the terms and conditions of employment such as pay, hiring, and firing. The adoption of *Burlington* is also consistent with our long history of applying persuasive Title VII precedent to analogous ELCRA issues absent statutory differences.

3. APPLICATION

Plaintiff alleges that defendant retaliated against her in two ways after she filed her lawsuit on December 18, 2017. First, that on January 8, 2018, she was given a negative performance evaluation that required her to work under a PIP, which was expanded in February with additional requirements set forth in a "Notice Of Formal Counseling." Second, that the work-location change from Detroit to Lansing affected her ability to perform her job, which involved regularly meeting in Detroit with homeowners and others parties affected by the eminent-domain process necessary to the building of the GHIB.

For the reasons already discussed, we reject defendant's argument that the imposition of a needs-improvement rating and PIP could *never* deter a rea-

---

Appeals, issued December 21, 2010 (Docket No. 294291), p 3. In other cases, we have noted *Burlington* but held or indicated that the plaintiff's claim failed under that standard without expressly deciding whether to adopt it. See *Aguilar v Saginaw*, unpublished per curiam opinion of the Court of Appeals, issued August 30, 2018 (Docket No. 339016), pp 15-17; *Haase v IAV Auto Engineering, Inc*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2011 (Docket No. 298348), p 5.

sonable employee from opposing acts of discrimination. Consistently with *Burlington*, we must consider these actions in the context in which they occurred, not in the abstract. Plaintiff had received only positive or satisfactory evaluations during the nine years she worked for defendant until the evaluation conducted one month after she filed her lawsuit. And, a month later, in the midst of a litigation venue dispute, plaintiff was effectively transferred from Detroit to Lansing, which precluded her from performing her duties on-site without regularly commuting to Detroit.

Per *Burlington*, "it is for a jury to decide whether anything more than the most petty and trivial actions against an employee should be considered 'materially adverse' to [the employee] and thus constitute adverse employment actions." *Crawford v Carroll*, 529 F3d 961, 973 n 13 (CA 11, 2008). See also *McArdle v Dell Prod, LP*, 293 F Appx 331, 337 (CA 5, 2008) ("Whether a reasonable employee would view the challenged action as materially adverse involves questions of fact generally left for a jury to decide."). We conclude that the imposition of a PIP and plaintiff's effective transfer were neither "trivial" acts nor "minor annoyances," *Burlington*, 548 US at 68, and therefore, the question of whether plaintiff was subject to an adverse employment action should be determined by a jury.

First, the negative evaluation and PIP, in and of themselves, plainly carried a substantial deterrent effect. The PIP included increased monitoring and an additional mandatory performance review. Civ Serv R 2-3.2(a)(2) (2020). It set dates and requirements for improvement in areas for which plaintiff was rated as needing improvement and required her to meet weekly with her supervisor to review her compliance. The plan also required plaintiff to take multiple courses, includ-

ing both civil service and substantive real estate classes, to cross-train in other areas within the real-estate-services section.

Further, imposition of a PIP under the Civil Service Commission Rules may have consequences beyond its requirements. Failure to comply with the plan risks an unsatisfactory "interim rating," which constitutes discipline under the Civil Service Commission Rules "and may be the basis for additional discipline, up to and including dismissal." Civ Serv R 2-3.3(d). A PIP can also lead to formal counseling, as was the case here, during which plaintiff was informed—a day after submitting an affidavit opposing defendant's request for a venue change—that her work performance was unacceptable, the obvious implication being that her job and livelihood were at risk.

While defendant argues that negative performance evaluations, PIPs, and formal counsel do not constitute discipline or preclude an employee from applying for a different internal position, performance evaluations "may be considered in making employment decisions, including appointment, promotion, retention, assignment, and training." Civ Serv R 2-3.1(d). Thus, while a needs-improvement rating does not formally preclude an employee from pursuing a different position or promotion, it is highly likely, if not certain, that such a rating will reflect poorly on the employee and hinder future advancement.[17] Further, the Civil Service Com-

[17] Defendant relies on caselaw stating that "the effect of a poor evaluation is ordinarily too speculative to be actionable." *Douglas v Donovan*, 385 US App DC 120, 124; 559 F3d 549 (2009). However, the cited case concerned discrimination, not retaliation. As discussed, *Burlington* clarified that what constitutes an adverse action for purposes of retaliation is broader than what constitutes an adverse employment action under the substantive discrimination provision. Further, we reject the suggestion that the potential consequences of an alleged adverse

mission Rules provide that a needs-improvement rating renders the employee "ineligible for reclassification," Civ Serv R 2-3.2(b)(2)(B), and is neither appealable nor grievable, Civ Serv R 2-3.2(b)(2)(A).

In addition to the negative performance evaluation and PIP, plaintiff's retaliation claim is based on her sudden workplace transfer from Detroit to Lansing in the midst of a venue dispute. Again, plaintiff filed this case in Wayne County, and defendant moved to change venue. Plaintiff responded in opposition and attached her affidavit in which she described her duties in Detroit as grounds for venue in Wayne County. Two days after plaintiff submitted her affidavit, her supervisor informed her that her primary workplace would thereafter be in Lansing, where she was to report daily, and that she would have to drive to and from Detroit for any appointments she had near the worksite. The timing of this change is clearly more than fortuitous; indeed, it is compelling. A reasonable jury could readily conclude that plaintiff's work location was changed precisely to affect the underlying litigation, i.e., because she filed suit, defendant transferred her in hopes of making her suit more difficult. See *Funk v Lansing*, 821 F Appx 574, 584 (CA 6, 2020) (noting that "temporal proximity is relevant to causation" and that the fact that the employer's action came just two days after the plaintiff made his complaint "is of particular concern").

Generally, being reassigned closer to one's home would not be a considered an adverse employment

---

action should not be considered in applying the reasonable-employee standard. Reasonable people consider possibilities and contingencies when making decisions. Given that the needs-improvement rating and PIP could lead to discipline (including dismissal) and the hindrance of professional advancement, a reasonable employee would consider those possibilities in deciding whether to make or support a charge of discrimination and could reasonably conclude that it would be better not to do so.

action. However, as discussed, the particular circumstances of the job must be considered in evaluating whether an action is materially adverse. See *Burlington*, 548 US at 68. Plaintiff explained at her deposition that being at the project location was essential to relocation work because "[y]ou have to be accessible to those property owners. They may want to come into the office. They may want you to come out to the field . . . but whatever their issue is that's what you're there for." She further explained, "You don't know what's going to come up on any given day on any of your parcels. . . . So you have to be there every day to be accessible to your property owners." Plaintiff's view that the change in her work location represented a fundamental change in her employment has an objective basis. It was explained to her when she was offered a job as a PA that the position would require her presence at the project location during the week, and indeed, she was present there as required until the reassignment. Because being at the project site was an essential part of relocation work, we conclude that the change in plaintiff's work location represented more than a mere alteration of job responsibilities.

Applying *Burlington*, we conclude that the needs-improvement evaluation, the corresponding PIP, and the workplace transfer could dissuade a reasonable employee from making or supporting a claim of discrimination under ELCRA. Accordingly, whether plaintiff suffered an adverse employment action in this case is a question for the jury, and the trial court erred by granting summary disposition.

The partial dissent does not dispute that we should follow *Burlington*, but it attempts to avoid the effect of that United States Supreme Court case by citing several United States Court of Appeals cases addressing

whether negative performance evaluations or PIPs constitute adverse employment actions. The cited cases do not lead us to change our view. First, many of the cases rely in whole or in part on pre-*Burlington* precedent. For instance, in *Cole v Illinois*, 562 F3d 812, 816-817 (CA 7, 2009)—which is an oft-cited case on this issue[18]—the United States Court of Appeals for the Seventh Circuit observed *Burlington*'s holding, but then concluded that the PIP in that case was not an adverse action based entirely on cases decided before *Burlington* that did not apply the reasonable-employee standard but, instead, analyzed retaliation claims under the same standards as substantive discrimination claims.[19] The dissent asserts that the reliance on

[18] Three of the cases cited by the dissent rely directly on *Cole*. See *Fields v Bd of Ed of City of Chicago*, 928 F3d 622, 626 (CA 7, 2019) (relying on *Boss v Castro*, 816 F3d 910, 917-918 (CA 7, 2016), in turn relying on *Cole*; *Payan v United Parcel Serv*, 905 F3d 1162, 1172-1174 (CA 10, 2018); *Langenbach v Wal-Mart Stores, Inc*, 761 F3d 792, 799 (CA 7, 2014).

[19] The same is true of *Baloch v Kempthorne*, 384 US App DC 85, 93; 550 F3d 1191 (2008), which concluded that an unsatisfactory performance review was not a materially adverse action and in support cited two cases, each of which was decided before *Burlington*. One of those cases, *Oest v Illinois Dep't of Corrections*, 240 F3d 605 (CA 7, 2001), alleged discrimination and retaliation, but the retaliation claim was dismissed for lack of a causal connection and the holding with respect to the discrimination claim has since been overturned. See *Ortiz v Werner Enterprises, Inc*, 834 F3d 760, 765 (CA 7, 2016). Similarly, *Langenbach*, 761 F3d 792, relied on *Cole* and a pre-*Burlington* case, *Haywood v Lucent Techs, Inc*, 323 F3d 524, 532 (CA 7 2003), and involved a plaintiff who alleged that she was given an unsatisfactory review and placed on a PIP after she took leave under the Family and Medical Leave Act (FMLA). However, as the *Langenbach* court noted, the plaintiff had "already received low performance evaluations and had been placed on a PIP" *before* she took her FMLA leave. *Langenbach*, 761 F3d at 800. Similarly, defendant's reliance on *Jarvis v Siemens Med Solutions USA, Inc*, 460 F Appx 851 (CA 11, 2012), is of little value because in that case, the plaintiff did not have a history of positive reviews (as the instant plaintiff did), failed to show up for work on several occasions, and falsified his time card. See *id*. at 854-855.

pre-*Burlington* decisions should be viewed as a determination that *Burlington* did not affect the applicable standards for retaliation cases. However, *Burlington* clearly *did* change the standard for retaliation cases, and we do not find perfunctory application of pre-*Burlington* caselaw—without any discussion of the fact that the relied-upon cases were decided before *Burlington*—to be a persuasive application of the reasonable-employee standard. And as noted, such decisions are especially unpersuasive given that the United States Supreme Court made clear that courts should not define whole categories of actions that may not be considered material regardless of context.

The Sixth Circuit has recognized that the *Burlington* standard must be applied on a case-by-case basis. In *Halfacre v Home Depot, USA, Inc*, 221 F Appx 424 (CA 6, 2007), two months after the plaintiff claimed race discrimination in a failure-to-promote case, he received an evaluation with an overall performance grade that was lower than all his previous evaluations. His prior evaluations were "generally stellar." *Id*. at 425-426. As part of his case, the plaintiff alleged retaliation, and the defendant's summary-disposition motion was granted before the Supreme Court's decision in *Burlington*. *Id*. at 426-427. In its decision, the district court held "as a categorical matter, that '[a] performance evaluation that is lower than an employee feels is warranted is not an adverse employment action sufficient to state a claim of discrimination.' " *Id*. at 432 (citation omitted). By the time the Sixth Circuit considered the appeal from the district court decision, the Supreme Court had issued its decision in *Burlington*. In light of that decision, the Sixth Circuit reversed, reasoning that the district court's categorical approach "is now suspect. . . . [A lower performance] evaluation could—in certain circumstances—'dissuade[] a reasonable worker from

making or supporting a charge of discrimination.' " *Id*., quoting *Burlington*, 548 US at 68 (second alteration in original).

The Sixth Circuit has also recognized that *Burlington* set forth a "more liberal definition [that] permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context." *Michael v Caterpillar Fin Servs Corp*, 496 F3d 584, 596 (CA 6, 2007). In that case, the court held that "[t]he retaliatory actions alleged by [the plaintiff], including her brief placement on paid administrative leave and the 90–day performance plan," met the "*relatively low bar*" for a materially adverse action for purposes of a retaliation claim. *Id*. (emphasis added). See also *Estate of Olivia v New Jersey*, 579 F Supp 2d 643, 671 (D NJ, 2008) (holding that "[a]n unwarranted negative [performance] evaluation by one's supervisor could have a deterrent effect" and cause "a reasonable worker [to] be dissuaded from making a charge of discrimination").

The dissent asserts that negative performance evaluations and PIPs must have "tangible job consequences" to be actionable. The dissent does not elaborate on what constitutes a tangible consequence but indicates with a supporting citation that there must be a financial harm. However, that position cannot be squared with *Burlington*, which held in part that a reassignment of job duties, a change in schedule, or even exclusion from a business lunch—without any mention of a pay deduction—could be an adverse employment action. *Burlington*, 548 US at 69-71. Nor is there support for that position in MCL 37.2701(a), which simply prohibits an employer from retaliating or discriminating against a person who engaged in a protected activity. Moreover, ELCRA is remedial and should be construed broadly in

order to accomplish its purpose, *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 414; 653 NW2d 415 (2002), which, as it relates to retaliation, is to allow employees to report discrimination without a reasonably based fear of retribution.

In sum, to the extent that cases cited by the dissent hold that a negative performance evaluation or PIP can never constitute an adverse action for purposes of a retaliation claim, we decline to follow these cases because they do not contain a persuasive discussion of the reasonable-employee standard. Moreover, that standard must be applied on a case-by-case basis, and here, plaintiff did not merely receive a negative performance evaluation,[20] she also was placed under a PIP, received a notice of formal counseling, and was effectively reassigned to a work location that was less conducive to performance of her duties. Cf. *Henry v Abbott Laboratories*, 651 F Appx 494, 505 (CA 6, 2016) (holding that a reasonable jury could find that the alleged adverse actions could dissuade a reasonable employee from making or supporting a charge of discrimination when the plaintiff, in addition to receiving a low performance review, was subjected to "increased scrutiny, a letter of expectations threatening further action if her performance did not improve, and being kept on the training line").

---

[20] Several of the cases relied on by the dissent do not involve negative performance evaluations or PIPs but, rather, employees who received lower, but still satisfactory, job evaluations. *Thibodeaux-Woody v Houston Community College*, 593 F Appx 280, 285-286 (CA 5, 2014); *AuBuchon v Geithner*, 743 F3d 638, 644-645 (CA 8, 2014); *Weber v Battista*, 494 F3d 179, 184-185; 377 US App DC 347 (2007). Similarly, PIPs were not at issue in the two cases relied on by the dissent involving employee counseling. See *Cheatham v Dekalb Co, Georgia*, 682 F Appx 881, 889-890 (CA 11, 2017); *Woods v Washington*, 475 F Appx 111, 112-113 (CA 9, 2012). Nor did the plaintiffs in any of the cases cited by the dissent also claim retaliation based on a change in work location.

Viewing the evidence in a light most favorable to the opposing party, we conclude that plaintiff has presented evidence sufficient to create a genuine issue of fact whether defendant's actions were materially adverse, i.e., that such actions "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 US at 68 (quotation marks and citations omitted). A jury could reasonably find that the alleged retaliatory actions taken against plaintiff, i.e., the negative performance evaluation, PIP, and work relocation, were materially adverse. Therefore, we conclude that the trial court erred by granting defendant's motion for summary disposition as to this claim.

III. CONCLUSION

We affirm the dismissal of plaintiff's discrimination claim but reverse the dismissal of her retaliation claim. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having prevailed in full, costs may not be taxed. MCR 7.219(A).

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

RIORDAN, P.J. (*concurring in part and dissenting in part*). I agree with the trial court's conclusion that plaintiff failed to establish a discrimination claim. However, I disagree with the majority that plaintiff's performance evaluation, performance improvement plan (PIP), formal counseling, and reduced travel requirements were adverse employment actions and that, as a result, they support plaintiff's retaliation claim. In reaching this conclusion, it is not necessary to consider whether the majority's adoption of the standard in

Burlington N & S F R Co v White, 548 US 53, 71; 126 S Ct 2405; 165 L Ed 2d 345 (2006), is proper because plaintiff provides no objective basis for demonstrating that the alleged retaliatory actions were materially adverse under either our existing precedent or under the majority's newly adopted rule. See *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364-365; 597 NW2d 250 (1999) (explaining that there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another are not controlling); *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 311-312; 660 NW2d 351 (2003) (applying *Wilcoxon* to a retaliation claim and citing various United States Court of Appeals cases for the proposition that "[a]lthough there is no exhaustive list of adverse employment actions, typically it takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation' "); *Burlington*, 548 US at 71 (considering whether a reasonable employee would find the challenged action materially adverse, meaning that it would dissuade a reasonable worker from making or supporting a claim of discrimination).

Plaintiff fails to submit any evidence to support her general allegation that she was prevented from obtaining potential promotions. She neither alleges nor offers any version of facts to support that she was denied raises or promotions because of her race or age. Rather, until plaintiff voluntarily went on medical leave, she maintained the same position and salary, she was not disciplined under the Civil Service Rules, and she remained eligible for promotion. While the majority

offers its own conjecture, plaintiff has not submitted any evidence to support a conclusion that a reasonable employee in the same circumstances would be dissuaded from making a discrimination claim.

The majority reasons that plaintiff suffered an adverse employment action because a needs-improvement rating and a PIP plan carry potential consequences. However, I would hold, consistent with federal caselaw, that plaintiff failed to meet her burden of demonstrating that she suffered an adverse employment action because negative performance evaluations and PIP plans alone are not sufficient evidence to support that claim.

Federal courts applying *Burlington* require allegations and evidence that PIPs and negative performance evaluations have materially adverse consequences in order to qualify as an adverse employment action. See, e.g., *Halfacre v Home Depot, USA, Inc*, 221 F Appx 424, 433 (CA 6, 2007) (noting that lower performance-evaluation scores that do not actually affect an employee's wages or professional advancement are not materially adverse); *Cole v Illinois*, 562 F3d 812, 816 (CA 7, 2009) (holding that "the adoption of the improvement plan did not constitute an adverse action that would cause a reasonable employee to forego exercising her rights under the [Family and Medical Leave Act]," did not result in a reduction in responsibility, pay, hours, or any other benefit, and did not impose a material change in employment duties); *Thibodeaux-Woody v Houston Community College*, 593 F Appx 280, 286 (CA 5, 2014) (stating that "[a] less than optimal performance review, without more, is not something that would have discouraged [the employee] from asserting a charge of discrimination"); *Payan v United Parcel Serv*, 905 F3d 1162, 1174 (CA 10, 2018) (concluding that "placement on an employee improve-

ment plan alone does not qualify as a materially adverse action as defined by *Burlington*"); *Sykes v Pennsylvania State Police*, 311 F Appx 526, 529 n 2 (CA 3, 2008) (noting that lower performance evaluations "are not by themselves actionable under Title VII absent a showing . . . that they resulted in a more tangible form of adverse action, such as ineligibility for promotional opportunities") (quotation marks and citation omitted); *Crawford v Carroll*, 529 F3d 961, 974 (CA 11, 2008) (finding that an unfavorable performance evaluation constituted an adverse employment action when it actually rendered the plaintiff ineligible for a merit pay increase); *Weber v Battista*, 494 F3d 179, 184-185; 377 US App DC 347 (2007) (holding that two performance evaluations "qualif[ied] as adverse actions" under *Burlington* "insofar as they resulted in the plaintiff losing a financial award or an award of leave"); *AuBuchon v Geithner*, 743 F3d 638, 644 (CA 8, 2014) (explaining that since *Burlington*, to avoid the "triviality pitfall," a materially adverse employment action must produce some injury or harm, and commencing performance evaluations, falsely reporting poor performance, sending critical letters threatening discipline, among other acts, as a matter of law do not establish a prima facie case of retaliation absent materially adverse consequences to the employee); *Fields v Chicago Bd of Ed*, 928 F3d 622, 626 (CA 7, 2019) (stating that "performance improvement plans, even though they had the *potential* to lead to termination or other discipline, are not enough" to establish an adverse employment action). See also *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997) (recognizing that while federal precedent interpreting the federal Civil Rights Act is often used as guidance, it is not binding on this Court). This is not to say that a PIP or negative performance evaluations

may *never* be the basis for a retaliation claim, but that there must be some evidence of tangible job consequences. *Baloch v Kempthorne*, 384 US App DC 85, 93; 550 F3d 1191 (2008) ("[P]erformance reviews typically constitute adverse actions only when attached to financial harms.").

The majority takes great pains to distinguish the case before us from the overwhelming weight of federal cases and notes that many of the cases cited in this opinion merely apply the law to the facts and rely on cases predating *Burlington*. Rather than assume that the federal courts were unaware of the dates of the authorities they cite, or that they were all simply mistaken by citing cases decided before *Burlington*, it is more reasonable to conclude that the federal courts intentionally carried over the pre-*Burlington* legal standard for relying on PIPs and performance evaluations as the basis for retaliation claims into post-*Burlington* jurisprudence. Additionally, many of the cited cases clearly and concisely state the law under *Burlington* and additional exegesis was not required. The majority does not explain what further wisdom the federal courts must express when applying well-established law to the uncomplicated facts of those cases.

Additionally, the majority attempts to factually distinguish this case from the cited cases by characterizing the PIP at issue as more onerous than those in the cited cases. Plaintiff was required to take classes, cross-train in other areas, and meet weekly with her supervisor. These requirements are similar to those in federal cases in which work-related objectives were identified, timelines established, and follow-up meetings were scheduled. See *Jarvis v Siemens Med Solutions USA, Inc*, 460 F Appx 851, 853 (CA 11, 2012)

(noting that the PIP identified objectives the plaintiff needed to achieve within 30 days and scheduled review meetings); *Langenbach v Wal-Mart Stores, Inc*, 761 F3d 792, 798 (CA 7, 2014) (observing that the PIP identified actions the plaintiff "could take to improve her performance, measurement standards by which her performance would be evaluated, and a time frame in which she was expected to improve"). Moreover, the majority offers no discernable test or guidance for measuring when a PIP is burdensome enough to dissuade a reasonable employee from making a discrimination claim. In this case, plaintiff was required to attend weekly meetings, but would monthly meetings have been requisitely oppressive? I agree with the majority's assertion that generally, the possibility of discipline can be stressful. See *Poullard v McDonald*, 829 F3d 844, 856 (CA 7, 2016) ("[T]he possibility of discipline can be stressful[.]"). However, the mere possibility or threat of discipline is insufficient to support a claim for retaliation, *id*. at 856-857, and excessive scrutiny, or " 'closer supervision,' " is not an actionable adverse employment action, *Thomson v Odyssey House*, 652 F Appx 44, 46 (CA 2, 2016). Accordingly, rather than applying the majority's newly adopted *Burlington* test in a novel manner, I would apply it in a manner consistent with the overwhelming body of federal cases that require evidence of tangible job consequences. In this case, plaintiff has not pleaded or submitted evidence of those consequences.

The majority concludes that plaintiff suffered negative consequences from the needs-improvement rating and PIP plan because she was issued a notice of formal counseling. However, neither plaintiff nor the majority explains how the notice was materially adverse to plaintiff. There are no allegations or evidence in the record that the notice had any effect on plaintiff's

salary or benefits[1] or that the notice would induce a reasonable employee to forgo making or supporting a discrimination claim.[2]

The majority further concludes that plaintiff established a genuine issue of material fact regarding whether the change in work location constitutes an adverse employment action. However, plaintiff's reduced travel schedule is not objectively adverse, *Wilcoxon*, 235 Mich App at 364; *Burlington*, 548 US at 68, particularly when she was instructed to continue to commute from her home office in Lansing to the Detroit worksite when the need arose. Plaintiff's concession that she did not again travel to Detroit after she began reporting to the Lansing office may be evidence that such a need did not arise thereafter, but it is not evidence of retaliatory motive. Nor is there any evidence

---

[1] *Wilcoxon*, 235 Mich App at 363 (observing that a materially adverse action is one such as termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation) (quotation marks and citations omitted). See also *Welsh v Fort Bend Indep Sch Dist*, 941 F3d 818, 827 (CA 5, 2019) (stating that under the *Burlington* standard, "when determining whether an allegedly retaliatory action is materially adverse, courts look to indicia such as whether the action affected job title, grade, hours, salary, or benefits or caused a diminution in prestige or change in standing among coworkers") (quotation marks, citations, and ellipsis omitted).

[2] *Burlington*, 548 US at 68. See also *Cheatham v DeKalb Co, Georgia*, 682 F Appx 881, 890 (CA 11, 2017) (finding that the plaintiff did not identify any " 'serious and material change in the terms, conditions, or privileges of employment' deriving from the written counseling, and thus it [did] not constitute an adverse employment action"); *Woods v Washington*, 475 F Appx 111, 112-113 (CA 9, 2012) (holding that there was no triable fact as to whether the plaintiff suffered an adverse employment action resulting from either "Formal Counseling" or "Final Counseling" because neither action affected his compensation, workplace conditions, responsibilities, or job status).

to support the conclusion that the reduced travel time would dissuade a reasonable employee from making a discrimination claim.[3]

I agree with the majority's disposition on all other issues. Accordingly, I would affirm the trial court in all respects.

---

[3] See *Johnson v TCB Constr Co, Inc*, 334 F Appx 666, 671 (CA 5, 2009) (holding that an added 30 to 35 minute commute was not an adverse employment action when there was no evidence that the added commute was unreasonable); *Webb v Round Rock Indep Sch Dist*, 595 F Appx 301, 302-303 (CA 5, 2014) (holding that the plaintiff failed to demonstrate that an added 16-mile commute was an adverse employment action because she failed to submit any evidence that it would dissuade a reasonable employee from making a discrimination claim).

KOMENDAT v GIFFORD

Docket No. 346990. Submitted May 12, 2020, at Detroit. Decided October 1, 2020, at 9:05 a.m.

Liliya Komendat brought an action in the Wayne Circuit Court against Home-Owners Insurance Company seeking uninsured motorist (UM) and personal protection insurance (PIP) benefits after she was injured in a collision with a car driven by Andrew Gifford and owned by Roxanne Gifford. Neither of the Giffords had no-fault insurance. Plaintiff had initially included the Giffords as defendants, but they were ultimately dismissed from the case. For some time, Home-Owners paid various bills for plaintiff pursuant to her husband's insurance policy, but in October 2015, Home-Owners refused to pay further benefits after a physician it had retained examined plaintiff and concluded that her injuries should have required only three to six months of treatment. Shortly after filing her complaint, plaintiff filed a request for defendant to admit that the Giffords' vehicle was uninsured at the time of the accident. Defendant denied the sought admission. Later, after some discovery but before trial, plaintiff moved for a directed verdict with respect to that issue, and as a result of that motion, defendant ultimately stipulated at trial that the vehicle was uninsured. After the close of defendant's proofs at trial, plaintiff moved for a directed verdict with respect to defendant's failure to pay a prescription bill during the time that defendant was voluntarily paying plaintiff PIP benefits. The trial court, Daniel A. Hathaway, J., granted the motion and awarded plaintiff $107.17 for the prescription bill and $38.57 in penalty interest. With respect to all other aspects of plaintiff's claims, the jury returned a verdict in favor of defendant. Plaintiff then moved for no-fault attorney fees under MCL 500.3148(1) on the directed verdict concerning the prescription bill, seeking $235,000 on the basis of the total amount of time her attorneys spent representing her in the case. Plaintiff also moved for $25,000 in sanctions under MCR 2.313(C) for defendant's failure to admit before trial that the Giffords' vehicle was uninsured. On May 24, 2018, the trial court entered a final judgment memorializing the results of the trial and a combined order ruling that plaintiff was due $4,688.75 in no-fault attorney fees and declining to sanction

defendant for failing to admit that the vehicle was uninsured before that evidence became available. Plaintiff appealed the final judgment and the combined order.

The Court of Appeals *held*:

1. Appellate jurisdiction in this case was not limited to plaintiff's claim for attorney fees. Given that the final judgment and the combined order together disposed of the remaining issues in the case, and given that the two orders were entered at or around the same time, it was not necessary to treat the combined order as a postjudgment order awarding attorney fees under MCR 7.202(6)(a)(iv).

2. The trial court did not err by denying plaintiff's motion to preclude the deposition testimony of defendant's three medical experts because a proper foundation was not laid in refreshing the witnesses' recollections at their respective depositions. Under MRE 602, a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. If a proper foundation is laid, a witness's personal knowledge may be established by refreshing the witness's memory with a writing or similar document. To lay a proper foundation, the proponent of the testimony must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the witness's present memory. In this case, defendant presented the witnesses with the reports that they had authored and asked whether review of the reports would refresh their recollection as to their examinations of plaintiff and their findings. Each witness responded in the affirmative. When viewed in context, these responses established, at least by implication, that the witnesses' memories had been refreshed upon review of their respective reports. In addition, it was not until plaintiff filed a pretrial motion to exclude the doctors' testimony on the ground that defendant failed to explicitly ask the experts whether the medical evaluations actually did refresh their memories that the basis for plaintiff's objection was made clear. MCR 2.308(C)(3)(a) provides that objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of a deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time. Had plaintiff raised her objections with specificity while defendant was examining its witnesses or while defendant was laying the foundation for its witnesses' testimony, the omission could have been readily

cured. Under these circumstances, the trial court did not abuse its discretion by admitting the deposition testimony of defendant's experts because, on review of the testimony at issue, it was not outside the range of reasonable and principled outcomes to hold that the witnesses' memories had, in fact, been refreshed by their respective evaluations.

3. The trial court did not abuse its discretion by providing a spoliation instruction to the jury with respect to plaintiff's failure to produce calendars that purportedly documented the household services her husband performed while plaintiff was unable to do so. A litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to an action, and failure to preserve that evidence can result in a sanction in the form of a spoliation instruction. The possibility that there were other ways to prove that her husband had rendered household and attendant-care services did not render a spoliation instruction improper. Moreover, as the use note for M Civ JI 6.01 indicates, a spoliation instruction is warranted if the evidence that is the subject of the instruction is material, not merely cumulative, and not equally available to the opposite party. The calendars at issue met all three criteria. Because the only question of fact that existed with regard to the calendars was whether plaintiff had a reasonable excuse for disposing of them, the trial court did not abuse its discretion by giving the jury instruction on spoliation.

4. The trial court failed to properly determine the amount of a reasonable no-fault attorney fee. MCL 500.3148(1) provides that in a PIP case the plaintiff's attorney fee may be assessed against the insurer if the jury finds that benefits are overdue and the court concludes that those benefits were unreasonably delayed or denied. In *Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016), the Supreme Court defined a three-step process by which a trial court is to determine a reasonable attorney fee for purposes of MCL 500.3148(1). First, the trial court must determine the reasonable hourly rate customarily charged in the locality for similar services. Second, the trial court must multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure. Third, the trial court must consider all the remaining factors set forth in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573 (1982), and in MRPC 1.5(a) to determine whether an up or down adjustment of the baseline fee is appropriate. Those eight factors are (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service

properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent. In this case, the trial court properly began its analysis by determining the reasonable hourly rate, but it then conflated the next two *Pirgu* steps by considering the eight factors before determining the baseline number of hours and the baseline fee. In addition, the court's basis for selecting 15.5 hours did not appear to be based on the record or the events in the case. Plaintiff's argument that the baseline fee should be based on 645 hours, which represented the total number of hours her attorneys expended in the entire case, was consistent with the language of MCL 500.3148(1) and with the fact that a no-fault suit typically involves multiple denials of benefits. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476 (2003), and *Moore v Secura Ins*, 482 Mich 507 (2008), limited the recovery of attorney fees to those that were attributable to overdue benefits but gave no direction about how to determine what attorney services are attributable to the overdue benefits. Defendant's suggestion that attorney time must be attributable *only* to overdue benefits was rejected. Instead, attorney services that supported other aspects of the case, as well as the overdue benefits, should be included because they are attributable to the overdue benefit claim even if not exclusively so. However, the baseline attorney time should not include time spent on other aspects of the claim that were not relevant to the unreasonably denied benefits. In sum, all reasonable attorney time in an action that recovers an overdue benefit unreasonably withheld should be included in the baseline number of hours unless those services were dedicated solely to the recovery of benefits that were found not overdue, in which case that time was not attributable to recovery of the overdue benefit. The case was remanded for the trial court to calculate the reasonable number of hours and the baseline fee and, if necessary, to adjust that figure based on the factors outlined in *Pirgu*, including the amount in question and the results obtained in the case as a whole.

5. The trial court did not err by denying sanctions on the basis of defendant's refusal to admit that the Giffords' vehicle was not insured. Under MCR 2.313(C), if a party denies the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in

making that proof, including attorney fees. The court shall enter the order unless it finds that the request was held objectionable pursuant to MCR 2.312, the admission sought was of no substantial importance, the party failing to admit had a reasonable basis to believe that they might prevail on the matter, or there was other good reason for the failure to admit. In this case, conclusive evidence regarding the proper owner of the vehicle in question was not uncovered until November 2017, about two years after plaintiff requested defendant's admission. And, while defendant was aware of a police report from the date of the accident mentioning that the vehicle was uninsured, this hearsay information was not of a character that would support a contrary conclusion for purposes of MCR 2.313(C).

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

INSURANCE — NO-FAULT — OVERDUE BENEFITS — ATTORNEY FEES.

MCL 500.3148(1) provides that in a case seeking personal protection insurance benefits, the plaintiff's attorney fee may be assessed against the insurer if the fact-finder determines that benefits are overdue and the court concludes that those benefits were unreasonably delayed or denied; to determine a reasonable attorney fee for purposes of MCL 500.3148(1), first, the trial court must determine the reasonable hourly rate customarily charged in the locality for similar services; second, the trial court must multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure; third, the trial court must consider eight additional factors: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent; all reasonable attorney time in an action that recovers an overdue benefit unreasonably withheld should be included in the baseline number of hours unless those services were dedicated solely to the recovery of benefits that were found not overdue, in which case that time was not attributable to recovery of the overdue benefit.

Lorelli & Lorelli (by *Malgorzata Lorelli* and *Vincent Lorelli*) for Liliya Komendat.

Secrest Wardle (by *Drew W. Broaddus* and *Renee T. Townsend*) for Home-Owners Insurance Company.

Before: BECKERING, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM. In this action for uninsured motorist (UM) and personal protection insurance (PIP) benefits, plaintiff, Liliya Komendat, appeals two orders entered by the trial court: (1) a final judgment partially in favor of plaintiff, and (2) a "combined order" that granted plaintiff a small portion of the no-fault attorney fees she requested against defendant Home-Owners Insurance Company.[1] We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

This case arises from injuries plaintiff suffered as a result of a January 22, 2015 motor vehicle accident. Plaintiff was a passenger in a vehicle struck by a car driven by Andrew Gifford and owned by Roxanne Gifford. Neither Roxanne nor Andrew had no-fault insurance. For some time, defendant insurer paid various medical and transportation bills for plaintiff, totaling about $61,000, pursuant to her husband's insurance policy with defendant. On October 13, 2015, defendant refused to pay further benefits after a physician it had retained examined plaintiff and concluded that her

[1] Although Andrew Gifford and Roxanne Gifford were also named defendants in this case, they were ultimately dismissed from the case. Accordingly, "defendant" as used in this opinion refers only to Home-Owners Insurance Company.

injuries should have required only three to six months of treatment.

Plaintiff filed suit against defendant, seeking PIP benefits and UM coverage. Shortly after filing her complaint, plaintiff filed a request for admission asking defendant to admit that the Giffords' vehicle was uninsured at the time of the accident. Defendant denied the sought admission. Later, after some discovery but before trial, plaintiff moved for a directed verdict with respect to that issue, and as a result of that motion, defendant ultimately stipulated at trial that the vehicle was uninsured.

After the close of defendant's proofs at trial, plaintiff moved for a directed verdict with respect to defendant's failure to pay a prescription bill during the time that defendant was voluntarily paying plaintiff PIP benefits. The trial court granted the motion and awarded plaintiff $107.17 for the prescription bill and $38.57 in penalty interest. With respect to all other aspects of plaintiff's claims, the jury returned a verdict in favor of defendant. The jury found that the accident did not cause plaintiff to suffer from a serious impairment of an important body function, which negated plaintiff's UM claim, and it found that plaintiff had not incurred any allowable PIP expenses in excess of what defendant had already paid.

Both parties subsequently filed a series of posttrial motions. Relevant to this appeal are plaintiff's motions seeking no-fault attorney fees under MCL 500.3148(1) and sanctions under MCR 2.313(C) for defendant's failure to admit before trial that the Giffords' vehicle was uninsured. Regarding the request for no-fault attorney fees, plaintiff relied on the directed verdict concerning the prescription bill and sought attorney fees of $235,000 based on the total amount of time her attor-

neys spent representing her in the case. Regarding the request for sanctions, plaintiff sought $25,000 for defendant's failure to admit before trial that the Giffords' vehicle lacked insurance.

On May 24, 2018, the trial court entered both a final judgment memorializing the results of trial—the directed verdict for the prescription bill and the jury verdict for no cause of action with respect to the other aspects of plaintiff's claim—and a "combined order" disposing of the parties' posttrial motions. The court ruled in the combined order that plaintiff was due no-fault attorney fees on the basis of the overdue prescription bill and the lack of evidence that defendant's failure to pay the bill was reasonable. The court next considered the proper amount of the fee to be assessed and concluded that $4,688.75 was a reasonable attorney fee. The court then declined to sanction defendant for failing to admit that the vehicle was uninsured before that evidence became available. The court ruled that, although most everyone involved in the case *believed* the Giffords' vehicle was uninsured, that fact was not conclusively known until long after defendant declined plaintiff's request to admit.

Plaintiff now appeals both the final judgment and the combined order. Plaintiff argues with respect to the final judgment that the trial court abused its discretion by admitting deposition testimony from defendant's three medical experts at trial and by giving a spoliation instruction to the jury with respect to a replacement-services calendar that was once in plaintiff's possession. With respect to the combined order, plaintiff contends that the trial court abused its discretion by awarding plaintiff only a portion of the attorney fees she requested and by failing to sanction defendant for its failure to admit.

II. JURISDICTION

We begin by considering defendant's argument that appellate jurisdiction in this case is limited to plaintiff's claim for attorney fees. Defendant asserts that, although plaintiff filed her claim of appeal within 21 days of entry of the trial court's order denying plaintiff's timely motion for reconsideration, the motion for reconsideration related only to the issue of attorney fees in the combined order, and not the final judgment. Defendant's argument is premised on the idea that the combined order is "a postjudgment order awarding or denying attorney fees and costs" pursuant to MCR 7.202(6)(a)(iv) and is therefore a final order distinct from the final judgment. We do not agree. While the statement in the combined order that "this case remains closed by the final judgment entered May 24, 2018" could be read to imply that the final judgment was entered before the combined order, one could also read the register of actions as suggesting that the combined order was entered first. In any event, for jurisdictional purposes, given that the final judgment and the combined order together disposed of the remaining issues in the case, and given that the two orders were undoubtedly entered at or around the same time, we are not convinced by defendant's suggestion that we must treat the combined order as a postjudgment order awarding attorney fees under MCR 7.202(6)(a)(iv). Accordingly, we conclude that we have jurisdiction and turn to review of the issues raised in plaintiff's briefing.

III. EXPERT TESTIMONY

Plaintiff first contends that the trial court erred when it denied her motion to preclude the admission of the deposition testimony of defendant's three medical

experts because a proper foundation was not laid in refreshing the witnesses' recollections at their respective depositions. We disagree.[2]

MRE 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." See also *Citizens Nat'l Bank of Cheboygan v Mayes*, 133 Mich App 808, 812; 350 NW2d 809 (1984). So long as a proper foundation is laid, one manner of establishing a witness's personal knowledge is to have the witness's memory refreshed by a writing or similar document. *Genna v Jackson*, 286 Mich App 413, 423; 781 NW2d 124 (2009). "To lay a proper foundation, the proponent must show that (1) the witness's present memory is inadequate, (2) the writing could refresh the witness's present memory, and (3) reference to the writing actually does refresh the witness's present memory." *Id*. Plaintiff asserts that the third element was never established with the three witnesses at issue, and accordingly, their deposition testimony should not have been admitted at trial. We reject plaintiff's argument for two reasons.

First, it is not clear that any error occurred. Defendant presented the witnesses with the reports that they had authored and asked whether review of the reports "would" refresh their recollection as to their examinations of plaintiff and their findings. Each witness responded in the affirmative. When viewed in context, these responses established, at least by implication, that the witnesses' memories had been re-

[2] A trial court's evidentiary rulings are reviewed for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995). "An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes." *Guerrero v Smith*, 280 Mich App 647, 660; 761 NW2d 723 (2008).

freshed upon review of their respective reports. For example, one expert, Dr. Lisa Porter-Grenn, testified:

> The date of my narrative report is approximately two years prior to today's date, so, of course, I would want to review it. And I copied it, downloaded it, and printed it out, yesterday, went through it, and refreshed all my memory of the case. And it's not that difficult to do. You know, once you do have the report, it's not difficult to remember the facts.

The other two experts each testified that review of their respective reports would refresh their recollections.

In addition, plaintiff did not make clear the basis for her objection to the use of the reports to refresh the witnesses' recollections. A hearsay objection without further explanation was made during the direct examination. It was only after defense counsel completed his direct examination of each witness that plaintiff raised a foundational objection on the basis of defendant's failure to properly refresh the witnesses' recollections. And it was not until plaintiff filed a pretrial motion to exclude the doctors' testimony that the basis for the objection was made clear, i.e., that defendant failed to explicitly ask the experts whether the medical evaluations actually *did* refresh their memories.

MCR 2.308(C)(3)(a) provides:

> Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of a deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

We have held before that "[a]n objection that counsel . . . has failed to lay a proper foundation for questions asked falls within the category of formal objec-

tions that may be obviated during the taking of the deposition." *Moore v Lederle Laboratories*, 42 Mich App 689, 693; 202 NW2d 481 (1972), aff'd 392 Mich 289 (1974). Had plaintiff raised her objections with specificity while defendant was examining its witnesses—or better, while defendant was laying the foundation for its witnesses' testimony—the omission could have been readily cured.

With all the above in mind, we conclude that the trial court did not abuse its discretion by admitting the deposition testimony of defendant's experts because, on review of the testimony at issue, it was not outside the range of reasonable and principled outcomes to hold that the witnesses' memories had, in fact, been refreshed by their respective evaluations.

IV. SPOLIATION

Plaintiff also argues that the trial court erred when it provided a spoliation instruction to the jury with respect to plaintiff's failure to produce calendars that purportedly documented the household services her husband performed while plaintiff was unable to do so. We see no error in the court's decision to give the instruction.[3]

At trial, plaintiff testified that she had made some calendars that kept track of the household and

[3] In general, preserved claims of instructional error are reviewed de novo, and reversal is only warranted when the failure to do so would be inconsistent with substantial justice. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). However, an instruction concerning "spoliation of evidence 'may be disturbed only upon a finding that there has been a clear abuse of discretion.' " *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018), quoting *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). "An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes." *Guerrero*, 280 Mich App at 660.

attendant-care services her husband had performed, but that she no longer had them and either lost them or disposed of them without realizing it. Later, on defendant's request, the trial court gave a spoliation instruction to the jury that read as follows:

> The Plaintiff in this case has not offered any written calenders [sic] as to services her husband performed. As this evidence was under the control of the Plaintiff and could've been produced by her, you may infer that the evidence could've been adverse to the Plaintiff if you believe that no reasonable excuse for Plaintiff's failure to produce the evidence has been shown.

On appeal, plaintiff primarily argues that the instruction was improper because there were multiple ways in addition to the use of the calendars to prove the fact that her husband had rendered household and attendant-care services. Plaintiff cites no authority, however, in support of the proposition that merely because there are other avenues to prove a fact, a spoliation instruction is not proper. A "litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to [an] action," *Brenner v Kolk*, 226 Mich App 149, 162; 573 NW2d 65 (1997), and failure to preserve that evidence can result in a sanction in the form of a spoliation instruction, *Pugno v Blue Harvest Farms LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018).

Moreover, as the use note contained in the pertinent model jury instruction indicates, a spoliation instruction is warranted if the evidence that is the subject of the instruction is (1) "material," (2) "not merely cumulative," and (3) "not equally available to the opposite party." M Civ JI 6.01. The calendars at issue here, which purportedly were written contemporaneously with plaintiff's husband's providing the at-issue ser-

vices, clearly were material. Also, because they were prepared in "real time," they could have shown that some of plaintiff's testimony was inaccurate or at least provided more detailed information. Finally, it is undisputed that the calendars were not available to defendant. Thus, because the only question of fact that existed with regard to the calendars was whether plaintiff had a reasonable excuse for disposing of them, the trial court did not abuse its discretion by giving the jury instruction.[4]

V. NO-FAULT ATTORNEY FEES

Plaintiff next argues that the trial court erred when it awarded only a small portion of the no-fault attorney fees she requested. We agree that the trial court failed to properly determine the amount of a reasonable fee and that its analysis was not consistent with the process outlined by the Supreme Court in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269; 884 NW2d 257 (2016), *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476; 673 NW2d 739 (2003), and *Moore v Secura Ins*, 482 Mich 507; 759 NW2d 833 (2008). Accordingly, we vacate the fee determination and remand for further

[4] We also note that plaintiff's assertion that the instruction gave the impression that she had done something wrong, and therefore "poisoned" the jury against her, is without merit. The jury instruction on its face simply states that *if* the jury finds that plaintiff had no reasonable excuse to dispose of the calendars, then the jury could make an adverse inference regarding the calendars. The instruction leaves that determination solely up to the jury without suggesting how the question should be decided, and the mere fact that the court *allowed* the jury to consider the question does not impermissibly taint or poison a jury. Thus, even assuming it was erroneous for the court to provide the instruction, reversal would not be warranted because plaintiff has failed to show how the error was inconsistent with substantial justice. See *Case*, 463 Mich at 6.

proceedings consistent with the procedure described below.[5]

MCL 500.3148(1) provides that in a PIP case the plaintiff's attorney fee may be assessed against the insurer if the jury finds that benefits are overdue and the court concludes that those benefits were unreasonably delayed or denied. At the time of trial, this provision stated:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1), as enacted by 1972 PA 294.][6]

In *Pirgu*, 499 Mich at 281, the Supreme Court defined a three-step process by which a trial court is to determine a reasonable attorney fee for purposes of MCL 500.3148(1). First, the trial court "must begin its analysis by determining the reasonable hourly rate customarily charged in the locality for similar services." *Id*. Second, having determined the proper hourly rate, "[t]he trial court must then multiply that rate by the reasonable number of hours expended in the case to arrive at a baseline figure." *Id*. Third, "the trial court must consider all of the remaining [factors

---

[5] We review the amount awarded for attorney fees for an abuse of discretion. *Moore*, 482 Mich at 516. However, questions of law, including the interpretation and application of a statute, are reviewed de novo. *Id*.

[6] This provision has been amended since the trial in this case was held, but the changes do not affect our analysis. See 2019 PA 21, effective June 11, 2019.

set forth in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), and in MRPC 1.5(a)] to determine whether an up or down adjustment [of the baseline fee] is appropriate." *Id*. (emphasis omitted). The Court summarized those eight factors as follows:

> (1) the experience, reputation, and ability of the lawyer or lawyers performing the services,
>
> (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,
>
> (3) the amount in question and the results obtained,
>
> (4) the expenses incurred,
>
> (5) the nature and length of the professional relationship with the client,
>
> (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer,
>
> (7) the time limitations imposed by the client or by the circumstances, and
>
> (8) whether the fee is fixed or contingent. [*Id*. at 282.]

In this case, the trial court properly began its analysis by determining the reasonable hourly rate. However, the court then conflated the next two *Pirgu* steps by considering the eight factors before determining the baseline number of hours and the baseline fee. In addition, the basis for the number of hours selected (15.5) does not appear to be related to any demonstrable analysis based on the record and the events in the case. The court simply stated that 15.5 hours "would have been reasonably and necessarily expended in advising and representing Plaintiff for her overdue prescription drug benefit." The court then multiplied what it found to be the reasonable number

of hours by the reasonable hourly rate to arrive at an attorney fee award of $4,688.75.[7]

Plaintiff argues that the baseline fee should be based on 645 hours, which represents the total number of hours her attorneys expended in the entire case. This approach is consistent with the language of the statute. At the time, the statute stated that "[a]n attorney *is entitled* to a reasonable fee for advising and representing a claimant *in an action* for personal or property protection benefits which are overdue." Former MCL 500.3148(1) (emphasis added). Typically, a suit involves multiple denials of benefits; individual suits are not filed as to each particular denial. Moreover, because the time for payment is 30 days after reasonable proofs, by the time of trial, if the jury finds that plaintiff is owed the benefits, the overwhelming majority of the benefits will be overdue. See MCL 500.3142(2).

Further, the first sentence of former MCL 500.3148(1) did not say that recovery of attorney fees depends on how successful the action is—it merely stated that the action must seek benefits that are overdue. The second sentence limited recovery as follows: "The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay *the claim* or unreasonably delayed in making

[7] Defendant suggests that this is a generous attorney fee award because it is a greater portion of the sought fee than is the amount of the overdue benefit in relation to the entire claim. No case has held that an attorney fee should be calculated on the basis of such a comparison. First, a pro rata approach has nothing to do with the time spent by the attorney, which is the first *Pirgu* step. Second, it ignores the intermingling of the claims in the case. Third, such an approach would provide for different results based solely on the total amount of the initial claim in relation to the amount overdue.

proper payment." Former MCL 500.3148(1), as enacted by 1972 PA 294 (emphasis added). This sentence does not provide a mechanism to reduce the amount of the attorney fee. It simply states that for attorney fees to be granted, the court must find that the failure to pay the claim was unreasonable. The use of the word "the" means there is only one claim, i.e., the entire action. If defendant has failed to pay a part of a claim, it has failed to pay the claim.

However, although the words "attributable to" do not appear in the statute, the Supreme Court held in *Proudfoot*, 469 Mich at 485, that recoverable attorney fees are limited to those "attributable to" recovery of the overdue benefits. Following *Proudfoot*, in *Moore*, 482 Mich at 524-525, the Court held that the plaintiff was not entitled to no-fault attorney fees when none of the attorney fees were attributable to the overdue benefit.[8]

Considering these two cases along with the later decided *Pirgu*, we conclude that we must harmonize the requirement that the fee reflect the number of hours expended "in an action" for overdue benefits with the requirement that the time be "attributable to" recovery of the overdue benefits. Doing so is further complicated because, although *Proudfoot* and *Moore* limited recovery of attorney fees to those that were attributable to overdue benefits, those cases gave no direction about *how* to determine what attorney ser-

[8] In *Moore*, the plaintiff did not attribute any of the sought attorney fees to recovery of the overdue benefit, which the defendant paid before trial. *Moore*, 482 Mich at 523. Moreover, the Court held that the defendant had a reasonable basis to have denied the only benefit that the jury found to be overdue, and thus the plaintiff was not entitled to attorney fees. *Id*. at 523-525. The case provided no guidance as to how to calculate a reasonable attorney fee or the "baseline figure," which is at issue here.

vices are attributable to the overdue benefits. Defendant would have us read these cases to insert the word "only" into *Proudfoot*'s holding, i.e., the attorney time must be "attributable *only* to" the overdue benefits. Under this approach, time that was spent in service of the case as a whole would not be counted. We disagree and conclude that attorney services that supported other aspects of the case, as well as the overdue benefits, should be included, because they are attributable to the overdue benefit claim even if not exclusively so. However, the baseline attorney time should not include time spent on other aspects of the claim that were not relevant to the unreasonably denied benefits. For instance, a motion relevant only to benefits that were reasonably denied should not be included, but a motion that relates to the entire case, or at least some benefit found to be unreasonably denied, should be.[9] In sum, all reasonable attorney time in an action that recovers an overdue benefit unreasonably withheld should be included in the baseline number of hours *unless* those services were dedicated solely to the recovery of benefits that were found not overdue, in which case that time was not attributable to recovery of the overdue benefit.

Defendant's argument fails to account for the reality of litigation in which different benefits and the evidence that relates to them are routinely intermingled and cannot be unmingled. For the most part, the work

[9] Consider, by way of example, a plaintiff who suffers a neck injury and a foot injury in the same accident and files suit seeking benefits denied for both injuries. If it is found that the claimed benefits as to the neck injury were not unreasonably denied, but benefits for treatment of the foot injury were unreasonably denied, work attributable only to litigating the neck injury need not be included in the baseline fee. However, if the work was in service of obtaining benefits for both injuries, then that time should be included in the baseline fee.

of an attorney serves the entire case and is not divisible into particular aspects of the case. For instance, depositions of lay and expert witnesses will cover many topics, including general information applicable to all unpaid benefits, and an attorney's time will be not readily divisible and the parts apportioned to specific benefits. The same will be true of discovery and dispositive motions that are relevant to multiple sought benefits.

We confronted a similar issue in *Tinnin v Farmers Ins Exch*, 287 Mich App 511, 521; 791 NW2d 747 (2010), in which we explicitly rejected the insurer's argument that for attorney time to be compensable under MCL 500.3148(1), it must be "*directly* attributable to securing" the overdue benefit. (Emphasis added.) In that case, the jury determined that the insurer wrongfully denied payment for office visits related to physical and medical rehabilitation treatment, but it awarded no recovery for the sought attendant-care services. *Id*. at 514. The trial court, however, awarded the plaintiff the full amount of the requested attorney fee. *Id*. As we explained, "the trial court found that all of the attorney's time for which plaintiff sought compensation was sufficiently related to securing the overdue benefits compensable under MCL 500.3148(1)," even though some benefits were properly denied. *Id*. at 521. We found no support in MCL 500.3148(1) for the insurer's argument that apportionment was required. *Id*. at 522.

Thus, in *Tinnin*, we rejected the notion that attorney services must be solely directed at overdue benefits to be compensable. Instead, we concluded that all the attorney time in that case was "sufficiently related" to the recovery of the overdue benefit. To be clear, the caselaw does not require that an attorney's

time be solely or even primarily related to the overdue benefits. Nor does it require the trial court, as occurred in this case, to speculate as to the number of hours that would have been spent if the plaintiff had sought payment only for the benefits that were found to have been unreasonably denied. Such an exercise is clearly speculative and is untethered to what took place in the actual, rather than hypothetical, litigation.

In sum, in determining the baseline fee in accordance with *Pirgu*, the court is to include all attorney time that was relevant to recovery of the overdue benefit, even if that time was also relevant to other aspects of the case. Attorney time that was related only to other aspects of the action, and did not bear on the benefits unreasonably withheld, should be excluded from the baseline. Any further limitation on the baseline number of hours would be difficult to square with *Pirgu*, the statute, or with the principle that the no-fault act's provisions should be liberally construed in favor of the intended beneficiaries. *Farmers Ins Exch v AAA of Mich*, 256 Mich App 691, 695; 671 NW2d 89 (2003).

Remand is necessary in this case so that the trial court can properly calculate the reasonable number of hours and the baseline fee consistent with this opinion. After doing so, the trial court may adjust that figure based on the factors outlined in *Pirgu*, including "the amount in question and the results obtained" in the case as a whole. *Pirgu*, 499 Mich at 282.

VI. SANCTIONS FOR FAILURE TO ADMIT

Finally, plaintiff contends that the trial court erred when it denied sanctions on the basis of defendant's

negative response to plaintiff's request to admit that the Giffords' vehicle was not insured. We disagree.[10]

"Pursuant to MCR 2.312(A), a party in a civil case may request certain admissions from the other party before trial." *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 350; 793 NW2d 246 (2010). At the time of trial, MCR 2.313(C) provided:[11]

> If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that
>
> (1) the request was held objectionable pursuant to MCR 2.312,
>
> (2) the admission sought was of no substantial importance,
>
> (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or
>
> (4) there was other good reason for the failure to admit.

Plaintiff filed the instant complaint on October 28, 2015, alleging in part entitlement to UM benefits pursuant to the insurance policy plaintiff's husband had with defendant. Not long after, plaintiff asked defendant to admit, among other things, that "neither Defendant Andrew Gifford nor the vehicle that he was operating at the time of the complained of motor

---

[10] We review for an abuse of discretion a trial court's decision on a request for sanctions under MCR 2.313(C). *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 349-350; 793 NW2d 246 (2010). "An abuse of discretion occurs when the court's decision falls outside the range of principled and reasonable outcomes." *Guerrero*, 280 Mich App at 660.

[11] MCR 2.313(C) was amended effective January 1, 2020, and the quoted material now appears at MCR 2.313(C)(2)(a) through (d).

vehicle accident was properly insured." On January 6, 2016, defendant responded as follows:

> Objection. This Request to Admit is vague and overbroad in the form and manner stated, and the information known or readily obtainable to Defendant is insufficient to enable Defendant to admit or deny the Request. Without waiving said objection, and to the extent that a response is required, Defendant denies the Request.

Defendant's objection is without merit because the request was neither vague nor overbroad. However, we conclude that defendant's refusal to make an affirmative admission regarding the Giffords' insurance status was not improper given its statement that it lacked sufficient information to either affirm or deny the request.

The record indicates that conclusive evidence regarding the proper owner of the vehicle in question was not uncovered until November 2017. This evidence only became known following the deposition testimony of the Giffords and the individual who sold them the vehicle. And, while defendant was aware of a police report from the date of the accident mentioning that the vehicle was uninsured, this hearsay information was not of a character that would support a contrary conclusion beyond the realm of reasonable possibility. To require a party to admit to such a fact under those circumstances would not be consistent with the effect of the court rule, which is to make the admitted fact "*conclusively* established." MCR 2.312(D)(1) (emphasis added). Accordingly, we find no error.

VII. CONCLUSION

The trial court failed to correctly calculate a reasonable attorney fee. We reject all other arguments raised in plaintiff's appeal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., and FORT HOOD and SHAPIRO, JJ., concurred.

In re BENAVIDES, MINORS

Docket No. 352581. Submitted August 5, 2020, at Detroit. Decided October 8, 2020, at 9:00 a.m.

The Department of Health and Human Services (DHHS) petitioned the Wayne Circuit Court, Family Division, for removal of LKB and ZMB from respondent's home after respondent committed an incident of domestic violence against the children's mother in the presence of the children. Respondent was convicted of domestic violence and placed on probation. Respondent refused to allow Child Protective Services (CPS) access to his residence for a home assessment, but the children's paternal uncle, who also resided in the home, allowed CPS into the home to perform the assessment. Respondent was court-ordered to complete parenting, domestic-violence, and anger-management classes. The children continued in respondent's custody until January 2020, when petitioner filed a supplemental petition to remove the children from respondent's care, alleging that respondent physically abused ZMB when he slapped the child, which caused ZMB severe bruising and a bloody nose. The children additionally had a history of unexplained bruises that respondent attributed to "roughhousing." Respondent was only partially compliant with his treatment plan and was terminated from parenting classes. Because placement of the children with their mother was not yet a viable option, the caseworker sought to place the children with their paternal uncle; respondent agreed to move out of the home to prevent disruption to the children's living arrangement. The trial court, Cynthia L. Miller, J., authorized the supplemental petition and ordered the minor children to be removed from respondent's custody and placed with DHHS, but their physical residence continued to be with their uncle. Respondent appealed the order.

The Court of Appeals *held*:

1. Under MCL 712A.13a(9), a child may only be placed in foster care if a court finds that custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being; no provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from risk; continuing the child's

residence in the home is contrary to the child's welfare; consistently with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child; and conditions of child custody away from the parent are adequate to safeguard the child's health and welfare. Under MCR 3.965(C)(4) and (5), if the court orders placement of the child in foster care, it must make explicit findings that it is contrary to the welfare of the child to remain at home and that reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required. In this case, the foster-care worker testified that respondent had a history of domestic violence against the children's mother in their presence and that respondent slapped ZMB, causing the child's nose to bleed and leaving a bruise on the child's face. In light of this testimony, the referee found that it would be contrary to the welfare of the children to remain in respondent's custody, and the trial court adopted the referee's recommendation. The trial court's findings were not clearly erroneous because the court considered all the requirements of MCL 712A.13a(9).

2. MCL 712A.13a(10) provides that if the court orders placement of the juvenile outside the juvenile's home, the court shall inform the parties of the following: the agency has the responsibility to prepare an initial services plan within 30 days of the juvenile's placement, the general elements of an initial services plan, and that participation in the initial services plan is voluntary without a court order. The plain language of MCL 712A.13a(10) contains no remedy for the failure to advise the parent of the agency's preparation of an initial services plan and the parent's voluntary participation. However, MCR 2.613(A) provides, in pertinent part, that an error or defect in anything omitted by the court is not ground for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. Moreover, the statute does not make compliance with MCL 712A.13a(10) a condition for removing a child from his or her home. Therefore, a trial court's failure to inform a respondent of the information required by this provision does not affect the validity of the trial court's order. However, in light of the plain language of the statute, MCL 712A.13a(10) did not apply to respondent's circumstances. The children did not need to be removed from their home where the safety plan with the paternal uncle was established; rather, respondent agreed to leave the home. The precipitating event—the placement of the juvenile outside the home—did not occur, and therefore the trial court was not required to advise him of the preparation of an initial services

plan. Moreover, because respondent was already required to participate in services, there was no need to discuss with him an initial services plan, nor was there any need to apprise him of any conditions under MCL 712A.13a(10).

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Jeffrey A. Ahee*, Assistant Attorney General, for petitioner.

Dorothy J. Dean for respondent.

Dawn A. Hoffmann for the minor children.

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

PER CURIAM. Respondent appeals as of right the trial court's order removing the minor children, LKB and ZMB, from his custody following the preliminary hearing when it authorized a supplemental petition. We conclude that the trial court did not err in removing the minor children from respondent's custody because there was sufficient evidence that respondent presented a substantial risk of harm to the children when he engaged in "roughhousing" with them over the objection of the caseworker, the children received suspicious bruises from the roughhousing, and one child required hospital treatment for a visible handprint on his face. This evidence satisfied the requirements of MCL 712A.13a(9) for removal. Additionally, there was no violation of the requirement that respondent receive notice of the placement, the agency's responsibility to prepare an initial services plan, the elements of the plan, and respondent's voluntary participation in the plan. MCL 712A.13a(10). The precipitating event for the notice to respondent did not occur because the children were placed with their paternal uncle and not removed from their home in

light of respondent's voluntary decision to leave the family home. Additionally, the preparation of an initial services plan was unnecessary given that respondent was required to participate in services in light of his domestic violence involving the children's mother. Therefore, finding no errors warranting reversal, we affirm. This appeal is decided without oral argument. MCR 7.214(E)(1)(b).

I. BASIC FACTS AND PROCEDURAL HISTORY

In September 2018, Child Protective Services (CPS) commenced proceedings after the mother suffered from substance abuse issues that endangered LKB. Although it was known that the mother and respondent, the children's father, were engaged in domestic violence, there was no indication that respondent physically abused the children. Consequently, the children were placed in respondent's care. In May 2019, a petition was filed seeking removal of the children from respondent after respondent committed an incident of domestic violence against the mother in the presence of the children. Ultimately, respondent was convicted of domestic violence and placed on probation. Additionally, the children missed 50 days of school while living with respondent, and respondent refused to allow access to his residence for a home assessment. However, the children's paternal uncle allowed CPS into the home to perform the assessment. Respondent was court-ordered to complete parenting, domestic-violence, and anger-management classes. Respondent resided in a home with the children, the paternal uncle, and the children's grandmother.

The children continued in respondent's custody until January 2020, when petitioner, the Department of Health and Human Services (DHHS), filed a

supplemental petition against respondent. It was alleged that respondent physically abused ZMB in late December 2019, and the agency sought the children's removal from respondent's care. Specifically, the caseworker requested a change of plan petition because respondent slapped ZMB on the face, which caused ZMB severe bruising and a bloody nose. ZMB was treated at an urgent care facility that apparently documented an observable handprint on the child's face, but ZMB was nonetheless released to the care of respondent. Additionally, the children had a history of unexplained bruises that respondent attributed to "roughhousing." The caseworker had requested that respondent stop this activity. To prevent removal of the children, DHHS had previously referred respondent to domestic-violence and anger-management classes. The agency also had conducted family team meetings, made home visits, and placed the children in a safety plan with the paternal uncle. However, respondent was only partially compliant with his treatment plan, and he was terminated from parenting classes.

The children's mother was not yet a viable placement because she had not sufficiently completed her treatment plan. Although respondent was also given a treatment plan and allowed to keep the children in his custody while participating in services, the supplemental petition now concluded that there was a risk of harm and sought the children's removal. However, the caseworker sought to place the children with their paternal uncle with whom they were currently residing. Because respondent lived with the children and the paternal uncle, respondent agreed to move out of the home to prevent disruption to the children's living arrangement. The trial court authorized the supplemental petition and ordered the minor children to be

removed from respondent's custody and placed with DHHS, but their physical residence continued to be with their uncle.[1]

II. THE CHILDREN'S REMOVAL

Respondent alleges that the trial court erred in removing the minor children from his custody because there was insufficient evidence to support the requirements of MCL 712A.13a(9) and MCR 3.965(C)(2). Specifically, respondent contends that the safety plan with the paternal uncle and the lack of additional injury between the urgent care visit and the preliminary hearing demonstrated that the children were not subject to a substantial risk of harm, and therefore, the safety plan could continue. We disagree.

A trial court's factual findings are reviewed for clear error. *In re COH, ERH, JRG, & KBH*, 495 Mich 184, 191; 848 NW2d 107 (2014). A finding is only clearly erroneous if an appellate court "is left with a definite and firm conviction that a mistake has been made." *In re Diehl*, 329 Mich App 671, 687; 944 NW2d 180 (2019) (quotation marks and citation omitted).

"At the preliminary hearing, the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial." *In re McCarrick/Lamoreaux*, 307 Mich App 436, 448; 861 NW2d 303 (2014), quoting MCR 3.965(B)(12) (quotation marks omitted). A child may only be placed in foster care if a court finds all of the following conditions:

---

[1] Our examination of the lower court record reveals that the children were returned to the care of their mother shortly after the preliminary hearing authorizing the supplemental petition.

> (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 risk as described in subdivision (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. [MCL 712A.13a(9).][2]

If the trial court orders placement of the child in foster care, it must make explicit findings that "it is contrary to the welfare of the child to remain at home," MCR 3.965(C)(3), and "reasonable efforts to prevent the removal of the child have been made or that reasonable efforts to prevent removal are not required," MCR 3.965(C)(4). See also *McCarrick/Lamoreaux*, 307 Mich App at 449.

Angelita Pierce, a foster-care worker, testified that respondent slapped ZMB, causing the child's nose to bleed and leaving a handprint-shaped bruise on his face. Respondent told Pierce he was just roughhousing with the child. This was not the first time one of the children had injuries respondent claimed were from roughhousing. Respondent had a history of domestic violence against the children's mother in their presence. He was referred to anger-management, domestic-violence, and parenting classes. Although respondent began those services, he had not completed them. After

---

[2] MCR 3.965(C)(2) is identical in substance to MCL 712A.13a(9).

this incident, a safety plan was put in place, and the paternal uncle agreed to prevent the abuse of the minor children.

In light of Pierce's testimony, the referee found "it's, clearly, contrary to the welfare of these two boys to remain in their father's care because of the allegation of severe physical abuse." The referee also concluded that respondent's physical abuse and inappropriate discipline of the children placed them at an extreme risk of harm. The referee also indicated on the form order that: (1) it would be contrary to the welfare of the minor children to remain in respondent's custody, (2) reasonable efforts to prevent removal of the minor children from the home were made, (3) respondent having custody of the minor children would present a substantial risk of harm to the children, (4) no reasonably available service would adequately safeguard the minor children from the risk of harm, and (5) conditions of custody away from the minor children's home were adequate to safeguard the minor children. The trial court adopted the referee's recommendation.

The trial court's findings were not clearly erroneous. The court's order considered all five requirements of MCL 712A.13a(9). Respondent's argument—that the safety plan involving the paternal uncle or other additional services would have been sufficient to protect the minor children—is unpersuasive. The children had a history of suspicious bruises, and respondent failed to stop "roughhousing" with the children despite the agency's request. Further, the bruising and missed schooling occurred while DHHS became involved because of the mother's issues. The injury to ZMB occurred when respondent had received a treatment plan from DHHS, but respondent had not engaged in and benefited from the services. For these reasons, we are

not "left with a definite and firm conviction that a mistake has been made." *Diehl*, 329 Mich App at 687 (quotation marks and citation omitted).

III. NOTICE OF CHANGE IN PLACEMENT

Respondent also argues that the trial court failed to advise him of his rights under MCL 712A.13a(10) following the placement decision and that this omission constitutes an additional violation of the law. We disagree.

If DHHS becomes aware of additional abuse or neglect of a child under the jurisdiction of the court and that abuse is substantiated, "the agency shall file a supplemental petition with the court." MCL 712A.19(1). "A preliminary hearing is the formal review of the petition . . . ." *In re Hatcher*, 443 Mich 426, 434; 505 NW2d 834 (1993), overruled on other grounds by *In re Ferranti*, 504 Mich 1 (2019). At this stage of the proceeding, the court must determine if the petition should be authorized and, if so, "whether the child should remain in the home, be returned home, or be placed in foster care pending trial." MCR 3.965(B)(12). If the petition is authorized, the court shall order the juvenile placed in "the most family-like setting available consistent with the juvenile's needs." MCL 712A.13a(12). The statute must be liberally construed to ensure the juvenile receives care, guidance, and control conducive to the child's welfare and preferably in the child's own home. MCL 712A.1(3). If the child is abused by a parent, the court may order the parent's removal from the home, and the court shall not leave the child in the home unless it finds that the individual with whom the child is placed will safeguard the child from harm. MCL 712A.13a(4) and (5).

MCL 712A.13a(10) addresses the child's placement outside the home and provides:

> If the court orders placement of the juvenile outside the juvenile's home, the court shall inform the parties of the following:
>
> (a) That the agency has the responsibility to prepare an initial services plan within 30 days of the juvenile's placement.
>
> (b) The general elements of an initial services plan as required by the rules promulgated under 1973 PA 116, MCL 722.111 to 722.128.
>
> (c) That participation in the initial services plan is voluntary without a court order.

When interpreting this statute, we give effect to the legislative intent by examining the plain language of the statute. *In re Ballard*, 323 Mich App 233, 235; 916 NW2d 841 (2018). If the statute is unambiguous, the Legislature intended the language as expressed, and the statute must be applied as written. *Id*. at 235-236.

The plain language of MCL 712A.13a(10) contains no remedy for the failure to advise the parent of the agency's preparation of an initial services plan and the parent's voluntary participation. However, "an error or defect in anything . . . omitted by the court . . . is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). Moreover, the statute does not make compliance with MCL 712A.13a(10) a condition for removing a child from his or her home. Therefore, a trial court's failure to inform a respondent of the information required by this provision does not affect the validity of the trial court's order.

Respondent contends that the trial court erred by failing to advise that the children's removal required

that the agency prepare an initial services plan, that the plan must contain the statutory elements, and that the plan's participation was voluntary. MCL 712A.13a(10). However, in light of the plain language of the statute, we conclude that MCL 712A.13a(10) did not apply to respondent's circumstances. Although it was concluded that the children needed to be removed from respondent's care, it was determined that the children did not need to be removed from their home where the safety plan with the paternal uncle was established. Rather, respondent agreed to leave the home to allow the children to remain in the residence to avoid a disruption to the children's environment. Thus, the precipitating event, the placement of the juvenile outside the home, did not occur, and therefore, the trial court was not required to advise respondent of the preparation of an initial services plan. MCL 712A.13a(10). Moreover, although the petition here stems from the children's mother, respondent himself is now also subject to it and has been required to participate in services because of the domestic violence respondent perpetrated against the mother in the children's presence. Because respondent was already required to participate in services, there was no need to discuss with him an initial services plan, nor was there any need to apprise him of any conditions per MCL 712A.13a(10). Respondent is not entitled to appellate relief under these circumstances.

Affirmed.

MARKEY, P.J., and K. F. KELLY and TUKEL, JJ., concurred.

In re GUARDIANSHIP OF VERSALLE, MINORS

Docket Nos. 351757 and 351758. Submitted October 7, 2020, at Grand Rapids. Decided October 15, 2020, at 9:00 a.m. Leave to appeal denied 509 Mich ___ (2022).

Petitioner filed petitions in the Muskegon Probate Court seeking to be appointed guardian of respondent-father's two minor children under MCL 700.5204(2)(b) of the Estates and Protected Individuals Code, MCL 700.1101 *et seq*. The children began living with petitioner, their paternal grandmother, in September 2017, when respondent-father was evicted from his apartment and moved into a hotel. Respondent-father permitted the children to live with petitioner because he did not feel he could provide for them in a hotel and did not want them to live in the hotel. However, respondent-father did not give petitioner any type of legal authority with regard to the children. Respondent-father allowed the children to live with petitioner until June 2019, when he took the children to Texas, where he had moved. About a month before respondent-father removed the children from petitioner, she petitioned for guardianship of the children, and the probate court, Gregory C. Pittman, J., granted the petitions. The Court of Appeals granted respondent-father's application for delayed leave to appeal.

The Court of Appeals *held*:

1. Parents have a constitutionally protected right to make decisions about the custody, care, and management of their children. Although this right is not absolute, the United States Constitution imparts a presumption that fit parents act in the best interests of their children. A fit parent is one who adequately cares for his or her children. Normally, there is no reason for the state to interfere in the private realm of the family by questioning the ability of fit parents to make the best decisions concerning the raising of their children, but the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of minors. The presumption in favor of natural parents is applicable to custody proceedings under the Child Custody Act, MCL 722.21 *et seq*., and respondent-father argued that it should also be afforded in guardianship proceedings. While the Court of Appeals had

previously only considered the constitutional rights of parents in the context of child custody, these rights must also be afforded in the guardianship context. The constitutional right of parents to make decisions about the care, custody, and management of their children cannot be dependent on the type of proceeding. Further, the Child Custody Act and the guardianship statutes have the same purpose of promoting the best interests of children and may be interpreted together. With regard to respondent-father's assertion that MCL 700.5204 is unconstitutional for failing to recognize the presumption in favor of a fit parent, statutes are presumed to be constitutional unless their unconstitutionality is clearly apparent. MCL 700.5204 protects a parent's decision regarding his or her child until that decision reflects that the parent is no longer adequately caring for the child. The statute is not applicable unless a parent (1) allows their child to permanently reside with another person, (2) has not granted legal authority to that person, and (3) is not residing with the child when the guardianship petition is filed. Although respondent-father was entitled to the presumption that he was a fit parent, MCL 700.5204(2)(b) provides an opportunity to rebut the presumption of a fit parent by showing that the parent has become unfit. The record showed that the children lived with petitioner for two years and that respondent-father did not indicate when the children would be returned to him, if ever. Even after respondent-father moved to Texas, the children continued to reside with petitioner. Under MCL 700.5204(2)(b), the children permanently lived with petitioner at the time the petition was filed. Respondent-father never granted petitioner any legal authority to care for the children. Therefore, under the statute, respondent-father had stopped providing adequate care for the children. The statute is constitutional because it implicitly protects a parent's right to raise their child by not allowing a guardianship to be imposed when the parent is adequately providing for the child; in other words, a parent's decision only comes under state-court review when the parent has effectively stopped providing adequate care for the child.

2. The evidence was sufficient to grant a guardianship. Petitioner presented evidence that the children were living with her for two years and that she did not know whether respondent-father planned for the children to live with him again. A parent's permission for the child to live with the petitioner must be ongoing at the time that the petition for guardianship is filed, which is shown by the child's actual presence in the care of another when the guardianship issue arises. In this case, petitioner filed the petition in May 2019, and respondent retrieved the children in June 2019, so the record established that the petition was filed while the

children were still living with petitioner, as required by the statute. The record also showed that respondent-father had not provided petitioner with legal authority, such as a power of attorney, to care for the children. Respondent-father did not attend the hearing to present his own evidence, so petitioner's testimony was uncontested.

Affirmed.

1. DUE PROCESS — PARENTAL RIGHTS — PRESUMPTION OF FITNESS — GUARDIANSHIPS.

Parents have a constitutional right to make decisions about the care, custody, and management of their children; the United States Constitution imparts a presumption that fit parents act in the best interests of their children and that there will normally be no reason for the state to inject itself into the private realm of the family by questioning this presumption; the presumption applies in the context of child-custody proceedings and also applies in the context of guardianship proceedings.

2. DUE PROCESS — PARENTAL RIGHTS — GUARDIANSHIPS.

MCL 700.5204(2)(b) permits a court to appoint a guardian for an unmarried minor if (1) the parent of the minor has permitted the minor to reside with another person, (2) the parent has not provided the other person with legal authority for the minor's care, and (3) the minor did not reside with the parent when the petition was filed; the statute protects a parent's constitutional right to make decisions regarding his or her child's care, custody, and management until those decisions reflect that the parent is no longer adequately caring for the child as provided by the statute.

The Maul Group, PLLC (by *Kristen Wolfram*) for respondent.

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

PER CURIAM. In these consolidated appeals, respondent-father appeals by delayed leave granted[1] the probate court's orders appointing petitioner as guardian of his two minor children. We affirm.

---

[1] *In re Guardianship of Versalle*, unpublished orders of the Court of Appeals, entered May 1, 2020 (Docket Nos. 351757 and 351758).

In May 2019, petitioner[2] filed petitions seeking to be appointed as the guardian of respondent's two minor children under MCL 700.5204(2)(b) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. Petitioner testified that the children had lived with her since September 2017, after respondent was evicted from his apartment and moved into a hotel. According to petitioner, respondent permitted the children to live with her because "[h]e couldn't provide for them in the hotel" and "didn't want them to be in the hotel." However, respondent did not give petitioner any type of legal authority over the children, such as a power of attorney. Petitioner testified that respondent did not give her legal authority because he did not want petitioner to take away his daughters. At the time the petitions for guardianship were filed, the children lived with petitioner. But at the time of the hearing on the petitions, the children lived with respondent in Texas because he had returned to Michigan to take them away.[3] The probate court granted the petitions for guardianship, and this appeal followed.

Respondent contests the constitutionality of MCL 700.5204(2)(b) by arguing that it does not impose a presumption in favor of a fit parent, thereby violating his constitutional right to raise his children. We disagree. "We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute." *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009).

---

[2] Petitioner is respondent's mother, and thus, the paternal grandmother of the children.

[3] The record reflects that petitioner was under the impression that respondent was just taking them to Texas for a visit. Instead, respondent kept the children.

We have held that "[p]arents have a constitutionally protected right to make decisions about the care, custody, and management of their children." *Zawilanski v Marshall*, 317 Mich App 43, 49; 894 NW2d 141 (2016). Although this right is not absolute, the United States Constitution imparts " 'a presumption that fit parents act in the best interest of their children' and that 'there will normally be no reason for the State to inject itself into the private realm of the family' " by questioning the ability of fit parents to make the best decisions concerning the raising of their children. *Id*., quoting *In re Sanders*, 495 Mich 394, 410; 852 NW2d 524 (2014), quoting *Troxel v Granville*, 530 US 57, 68-69; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). A "fit parent" has been defined "as a parent who 'adequately cares for his or her children.' " *Geering v King*, 320 Mich App 182, 190-191; 906 NW2d 214 (2017), quoting *Troxel*, 530 US at 68. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 US at 72-73 (opinion by O'Connor, J.). However, "the state has a legitimate interest in protecting the moral, emotional, mental, and physical welfare of the minor." *Geering*, 320 Mich App at 188 (quotation marks and citations omitted).

Respondent asserts that the statutory presumption favoring natural parents under the Child Custody Act, MCL 722.21 *et seq*., should also apply to guardianship proceedings. This statutory presumption is applicable to child custody disputes between the parent and a third person and states as follows: "[T]he court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." MCL 722.25(1). We have

stated that "the Legislature plainly recognized the fundamental constitutional nature of a parent's interest in childrearing when it enacted the presumption that in all custody disputes involving natural parents and third persons, absent clear and convincing evidence to the contrary, parental custody served the child's best interests." *Heltzel v Heltzel*, 248 Mich App 1, 26; 638 NW2d 123 (2001). In the Child Custody Act context, this presumption was found to control over the presumption in favor of an established custodial environment. *Hunter*, 484 Mich at 263. Our Supreme Court stated that "*Troxel* established a floor or minimum protection against state intrusion into the parenting decisions of fit parents." *Id*. at 262. "The constitutional protection in *Troxel* centers on the 'traditional presumption that a fit parent will act in the best interest of his or her child.' " *Id*., quoting *Troxel*, 530 US at 69.

While we have only considered the constitutional protection afforded parents in the context of child custody, the same protection must also be afforded in the guardianship context. Because "[p]arents have a constitutionally protected right to make decisions about the care, custody, and management of their children," this right cannot be dependent on the type of proceeding. *Zawilanski*, 317 Mich App at 49. In other words, a parent does not lose a constitutional right that would be afforded in a child custody case just because the parent is part of a guardianship proceeding instead of a custody case. We have stated that "[b]ecause the Child Custody Act of 1970 . . . and the guardianship statutes have the same purpose of promoting the best interests of children, the two statutes may be interpreted consistent with each other, or in pari materia." *Deschaine v St Germain*, 256 Mich App 665, 671 n 9; 671 NW2d 79

(2003) (citations omitted).[4] Therefore, we conclude that a parent's constitutional right to raise his or her child is also applicable in the guardianship context.[5]

With this right in mind, we next address the constitutionality of MCL 700.5204(2)(b). "Statutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its uncon-

---

[4] With respect to reading statutes *in pari materia*, our Supreme Court has stated:

> Statutes in pari materia are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. 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. [*State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998) (quotation marks and citation omitted).]

[5] We reject respondent's contention that guardianship proceedings are basically custody proceedings. It is correct that under the Uniform Child-Custody Jurisdiction and Enforcement Act (the UCCJEA), MCL 722.1101 *et seq*., proceedings for guardianships are included in the definition of "child-custody proceeding." MCL 722.1102(d). But the UCCJEA's purpose is to prescribe "the powers and duties of the court in a child-custody proceeding involving this state and a proceeding or party outside of this state[.]" *Fisher v Belcher*, 269 Mich App 247, 260; 713 NW2d 6 (2005) (quotation marks and citation omitted). There are several proceedings included under the UCCJEA's definition of "child-custody proceeding." See MCL 722.1102(d). However, the Child Custody Act and EPIC both acknowledge the existence of the two distinct proceedings, i.e., a custody proceeding and a guardianship proceeding. See MCL 722.26b(1) ("[A] guardian or limited guardian of a child has standing to bring an action for custody of the child as provided in this act."); MCL 700.5210 ("Upon receipt of a copy of a judgment or an order of disposition in a child custody action regarding a minor that is sent to the court as provided in section 6b of the child custody act of 1970, 1970 PA 91, MCL 722.26b, the court shall terminate the guardianship or limited guardianship for that minor."). Therefore, guardianship proceedings are distinct from custody proceedings in the sense that custody of a minor is a separate determination.

stitutionality is clearly apparent." *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 516; 857 NW2d 529 (2014) (quotation marks and citation omitted). "Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Phillips v Mirac, Inc*, 470 Mich 415, 423; 685 NW2d 174 (2004) (quotation marks and citation omitted). We conclude that the statute in this case, in essence, protects a parent's decision regarding his or her child until that decision reflects that the parent is no longer adequately caring for the child. See *Geering*, 320 Mich App at 190-191.

As discussed later in this opinion, MCL 700.5204 is not applicable unless a parent allows a child to permanently reside with another person and the parent does not grant legal authority to the other person. MCL 700.5204 provides in relevant part:

> (1) A person interested in the welfare of a minor, or a minor if 14 years of age or older, may petition for the appointment of a guardian for the minor. The court may order the family independence agency or a court employee or agent to conduct an investigation of the proposed guardianship and file a written report of the investigation.
>
> (2) The court may appoint a guardian for an unmarried minor if any of the following circumstances exist:
>
> * * *
>
> (b) The parent or parents permit the minor to reside with another person and do not provide the other person with legal authority for the minor's care and maintenance, and the minor is not residing with his or her parent or parents when the petition is filed.

In other words, for the probate court to consider appointing an individual as a guardian, that individual must establish that (1) the parent permits the children to reside with another person, (2) the parent does not provide that other person with legal authority for the children's care, and (3) the children do not reside with the parent when the petition is filed. See MCL 700.5204(2)(b).

With respect to permission, we have held that "the permission referred to in the statute must be currently occurring—which would be shown by the child's actual presence in the care of another—when the guardianship issue arises." *Deschaine*, 256 Mich App at 670. Moreover, we have recognized that a lower court may appoint a guardian "if parents permit their child to permanently reside with someone else when the guardianship issue arises . . . ." *Id*. at 669-670. As we stated more recently, " 'residence' is a place of abode accompanied with the intention to remain." *Berger v Berger*, 277 Mich App 700, 703; 747 NW2d 336 (2008) (some quotation marks and citation omitted). There must also be no grant of legal authority for a child's care and maintenance, which includes facilitating the child's "education and social or other activities" as well as "medical or other professional care, treatment, or advice." MCL 700.5215(c); see also *In re Martin*, 237 Mich App 253, 257; 602 NW2d 630 (1999) (addressing the powers and duties of a guardian under MCL 700.431, which was the precursor to MCL 700.5215).[6]

The presumption respondent seeks is that he was a fit parent. As detailed earlier, we agree that this presumption should apply to guardianship proceedings. As noted, "fit parents" are parents who ad-

[6] MCL 700.431 was repealed by 1998 PA 386, which enacted MCL 700.5215, effective April 1, 2000.

equately provide for their children. See *Geering*, 320 Mich App at 190-191. This includes providing for the "moral, emotional, mental, and physical welfare of the minor[.]" See *id*. at 188 (quotation marks and citation omitted). However, in coming under the purview of MCL 700.5204(2)(b), respondent had essentially stopped providing adequate care for the children, i.e., became unfit. In other words, MCL 700.5204(2)(b) provides an opportunity to rebut the presumption that respondent was a fit parent.[7] The record reflects that the children were with petitioner for two years, and during that time respondent did not indicate when the children would return to respondent, if ever. Petitioner testified that respondent was evicted from his apartment in Michigan and that he allowed the children to live with her while he stayed in a hotel. Respondent then moved to Texas and continued to allow the children to live with petitioner.

---

[7] Notably, our Supreme Court has recognized that there is no requirement to demonstrate parental unfitness in the context of the Child Custody Act. As the Court explained in *Hunter*, "*Troxel* carefully limited the constitutional scope of the parental presumption to the extent that a court need give decisions by fit custodial parents only a presumption of validity." *Hunter*, 484 Mich at 268 (quotation marks and citation omitted). The rationale set forth in *Hunter* persuades us that parental unfitness also need not be demonstrated in the guardianship context:

> Defendant would have the Court require a demonstration of parental unfitness before allowing the parental presumption to be rebutted where no such demonstration is required by [the Child Custody Act]. That would, in effect, give unlimited deference to all parenting decisions of parents deemed to be fit. However, "[a] determination that an individual has a fundamental right does not foreclose the State from ever limiting it." *In re RA*, 153 NH 82, 102; 891 A2d 564 (2005). Such a determination is not constitutionally mandated. To hold that parental unfitness is a mandatory prerequisite to rebutting the parental presumption would be inconsistent with the [Child Custody Act's] emphasis on best interests and lack of reference to fitness. [*Hunter*, 484 Mich at 268 n 40.]

As required under MCL 700.5204(2)(b), the children had permanently lived with petitioner, and there is no evidence to indicate that respondent intended anything otherwise.[8] There was also evidence that respondent received death benefits as a result of the children's mother's death, but he did not provide any of the money to the children. Furthermore, petitioner testified that she rarely received any money from respondent to help care for the children. Respondent also never granted petitioner legal authority to care for the children. Therefore, because respondent had left the children with petitioner permanently without granting petitioner legal authority to care for the children, respondent had stopped providing adequate care for the children. The requirements of MCL 700.5204(2)(b) essentially demonstrate a situation in which a parent has stopped providing adequate care for a child and a guardian needs to step in to provide for the child. Therefore, the statute implicitly protects a parent's constitutional right to the care, custody, and maintenance of his or her child by not allowing a guardianship to be imposed in circumstances where the parent adequately provides for the child, i.e., is a fit parent. This protection prohibits the state from interfering with that parent's constitutional right.

Respondent likens this case to *Troxel* and argues that MCL 700.5204(2)(b) is just as broad as the Washington statute that was interpreted in *Troxel*. The *Troxel* case involved a visitation dispute between the mother of two

[8] Respondent was not present at the hearing to contradict any of petitioner's testimony. Therefore, respondent asserts without basis that "[a]lthough [petitioner] testified that she did not know that [he] planned for the children to reside with him permanently in Texas . . . , [petitioner] prepared the petition originally in January 2019 and did not file it until May 9, 2019, indicating she was aware of the potential change." The only evidence presented supported petitioner's position.

children and the children's paternal grandparents. *Troxel*, 530 US at 60 (opinion by O'Connor, J.). The grandparents sought to obtain more frequent visitation with the child than the respondent-mother wished to offer. *Id*. at 60-61. There was a statute in place that permitted "[a]ny person to petition a superior court for visitation rights at any time" and authorized that court to grant visitation rights whenever "visitation may serve the best interest of the child." *Id*. at 60 (quotation marks omitted; alteration in original). The United States Supreme Court characterized the statute as "breathtakingly broad" and noted that it gave no deference to a child's parent. *Id*. at 67. The Supreme Court also stated that the statute allowed "a court [to] disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id*. The Supreme Court went on to hold that the visitation statute violated the respondent-mother's fundamental right to make parenting decisions regarding her children. *Id*. at 68-70 (stating that there was no allegation that the respondent-mother was unfit and that "there is a presumption that fit parents act in the best interests of their children").

In this case, the guardianship statute does not interfere with respondent's fundamental right to raise his children as the Washington statute did in *Troxel*. While MCL 700.5204(1) allows "[a] person interested in the welfare of a minor" to petition a court "for the appointment of a guardian for the minor," there are specific requirements that must be met under MCL 700.5204(2)(b) before the court can grant a guardianship. Specifically, the statute requires that the parent allow the child to permanently reside with another person, without granting legal authority to the other

person. See *Deschaine*, 256 Mich App at 669-670. Unlike the statute at issue in *Troxel*, MCL 700.5204(2)(b) does not allow a presiding court to makes its own determination of the child's best interests. Rather, there must be a showing of permanent residency and lack of legal authority. There must also be a showing that the other person filed the petition for guardianship while the child was living with him or her. Without meeting all three of the requirements, the court cannot grant the guardianship. MCL 700.5204(2)(b) is not nearly as broad as the statute in *Troxel* because it limits the trial court's determination to the requirements of the statute. The statute in *Troxel* allowed anyone to petition for visitation of a child and left it to the trial court to determine the child's best interests. The language of the Washington statute "effectively permit[ted] any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." *Troxel*, 530 US at 67. Under MCL 700.5204(2)(b), a parent's decision only comes under state-court review when the parent has effectively stopped providing adequate care for the child. Therefore, if a parent does not allow a child to permanently live with another person, or grants legal authority to the person whom the child permanently lives with, then that parent's constitutional right to raise the child will not be interfered with.

Respondent also argues that there was insufficient evidence to grant a guardianship. We disagree. "A circuit court's factual findings are reviewed for clear error, which occurs when this Court is left with a firm and definite conviction that a mistake was made." *Deschaine*, 256 Mich App at 668.

Petitioner presented evidence that the children were living with her for two years. Petitioner testified that

she did not know whether respondent would have the children live with him again, and he had indicated only that he would visit or have the children visit him. We have recognized that past permission is irrelevant; it is the permission that is ongoing at the time that the petition for guardianship is filed that is relevant. See *Deschaine*, 256 Mich App at 671-673. The petition was filed on May 9, 2019. Respondent retrieved the children on June 15, 2019, about a month after the petition was filed. Therefore, the record reflects that respondent permitted the children to live with petitioner at the time that the petition was filed. See *id*. at 670. ("[T]he permission referred to in the statute must be currently occurring—which would be shown by the child's actual presence in the care of another—when the guardianship issue arises."). The record also reflects that respondent did not provide petitioner with legal authority for the children's care, such as a power of attorney delegating parental authority to petitioner, even though the children had lived with petitioner, with respondent's permission, for two years. Further, petitioner testified that respondent told her that he did not want to give her legal authority. Finally, petitioner presented evidence that the children lived with her at the time that the petition was filed and that a month after the petition was filed, respondent came to Michigan and took the children to Texas. Because respondent decided not to attend the hearing to present his own evidence, petitioner's testimony is uncontradicted.

In sum, we conclude that MCL 700.5204(2)(b) is constitutional and does not infringe a parent's constitutional right to the care, custody, and management of his or her children. See *Zawilanski*, 317 Mich App at 49. Rather, the statute implicitly affords a parent the constitutional presumption that he or she is a fit

parent, while also providing a potential guardian the opportunity to rebut that presumption.

Affirmed.

MURRAY, C.J., and CAVANAGH and CAMERON, JJ., concurred.

ESTATE OF ROMIG v BOULDER BLUFF CONDOMINIUMS UNITS 73-123, 125-146, INC

Docket Nos. 347653 and 348254. Submitted October 8, 2020, at Grand Rapids. Decided October 15, 2020, at 9:05 a.m. Vacated and remanded 509 Mich ___ (2022).

Bobbie Jo Kooman, as personal representative for the estate of Robert J. Romig, and Terry Romig brought an action in the Ottawa Circuit Court against Boulder Bluff Condominiums Units 73-123, 125-146, Inc., doing business as Boulder Bluff Estates Condominium Association; Boulder Bluff Estates Condominium Association (the Association); and Gerow Management Company, Inc. (Gerow), alleging that defendants' delay or refusal to allow a disability modification to Terry's condominium unit discriminated against Robert. Terry and Robert lived in Unit 85 of Boulder Bluff Condominiums, and Terry submitted an accommodation request to Gerow, the Association's property manager, in accordance with the Association's bylaws, for permission to install a railing on the front porch and adjacent stairs of Unit 85. While waiting on a decision from the Association's board of directors, Robert fell down the stairs and was hospitalized. Terry informed the board of Robert's fall. Gerow notified Terry by letter that the board of directors denied the modification request. Terry and Robert obtained counsel, and counsel sent a letter to the board, claiming that the board did not comply with the Association's guidelines, that the denial was contrary to federal and state housing law, and that a doctor advised that Robert was disabled and needed the modifications made for his safety. Robert fell a second time and was hospitalized. Gerow then advised Terry that the modification request was approved. A few months later, Robert died. Plaintiffs filed a three-count complaint against defendants, alleging that defendants' delay or refusal to allow the disability modification discriminated against Robert. Plaintiffs alleged that defendants violated the Persons with Disabilities Civil Rights Act (the PWDCRA), MCL 37.1101 *et seq*., and Michigan's Condominium Act, MCL 559.101 *et seq*. Gerow moved for partial summary disposition, arguing that plaintiffs did not have a cause of action pursuant to MCL 37.1506a(1)(a) or MCL 37.1502(1)(b) because both provisions of the PWDCRA required that the alleged dis-

crimination occur "in connection with a real estate transaction." The trial court, Jon H. Hulsing, J., granted Gerow's motion, agreeing that this situation did not fit the PWDCRA's definition of a "real estate transaction." Boulder Bluff Condominiums and the Association filed their own motion for partial summary disposition that relied on the same argument raised by Gerow, and the trial court granted this motion as well. Plaintiffs appealed both orders by leave granted.

The Court of Appeals *held*:

1. One purpose of the PWDCRA is to ensure that all persons be accorded equal opportunities to obtain housing. MCL 37.1502(1)(b) of the PWDCRA prohibits certain discriminatory acts and provides, in relevant part, that an owner or any other person engaging in a real estate transaction shall not, on the basis of a disability, discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection with a real estate transaction. MCL 37.1506a(1)(a) also prohibits certain discriminatory acts and provides, in relevant part, that a person shall not, in connection with a real estate transaction, refuse to permit reasonable modifications to existing premises occupied by a person with a disability if those modifications may be necessary to afford the person with a disability full enjoyment of the premises. MCL 37.1501(d) defines "real estate transaction" as "the sale, exchange, rental, or lease of real property, or an interest therein." In these cases, plaintiffs asserted that because the master deed and bylaws provide that a person who acquires an ownership interest has rights to the apartment as well as common elements, plaintiffs held "an interest therein" and satisfied the definition of a real estate transaction. This interpretation was contrary to the language of MCL 37.1501(d). The last-antecedent rule provides that a modifying clause is confined to the last antecedent, but the modifying clause "an interest therein" is separated from the last antecedent by a comma and the word "or." The comma means that the last-antecedent rule did not apply in this case. Pursuant to the rules of statutory interpretation, under MCL 37.1501(d), a "real estate transaction" means the (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein," (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." Applying this definition, plaintiffs did not have a cause of action under the PWDCRA. The alleged discrimination did not have a relationship in fact with a real estate transaction because the alleged discrimination did not pertain to the (1) "sale . . . of real

property, or an interest therein," (2) "exchange . . . of real property, or an interest therein," (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." Additionally, defendants did not allegedly discriminate against the decedent "in the terms, conditions, or privileges of a" (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein" (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." Instead, the alleged discrimination occurred years after Terry purchased the home and after the decedent began residing in the home. Accordingly, the trial court did not err by granting partial summary disposition in favor of defendants.

2. MCL 559.147a(1) addresses improvements or modifications pertaining to persons with disabilities and provides, in pertinent part, that a co-owner may make improvements or modifications to the condominium unit if the purpose of the improvement or modification is to facilitate access to or movement within the unit for persons with disabilities who reside in or regularly visit the unit or to alleviate conditions that could be hazardous to persons with disabilities who reside in or regularly visit the unit. The provisions of the PWDCRA arguably overlap with MCL 559.147a(1) and must be read together to discern legislative intent. MCL 559.147a(1) expressly affords persons with disabilities the right to make improvements or modifications to facilitate access to or movement in the unit; it contains no express limitations or correlation to a "real estate transaction" or the timing of the sale or purchase. Thus, the Legislature's confinement of housing provisions in the PWDCRA to "real estate transactions" does not preclude subsequent legal action after a disabled person completes the real estate transaction in light of MCL 559.147a, and the application of the PWDCRA was not extended beyond real estate transactions. Accordingly, the trial court did not err by granting partial summary disposition in favor of defendants.

Affirmed.

Zelmanski, Danner & Fioritto, PLLC (by *Richard L. Wagner, Jr.*, and *Melissa D. Francis*) for plaintiffs.

Secrest Wardle (by *Drew W. Broaddus* and *Amanda B. Fopma*) for Boulder Bluff Condominiums Units 73-123, 125-145, Inc., and Boulder Bluff Estates Condominium Association.

Bosch Killman VanderWal, PC (by *Joseph P. VanderVeen*) for Gerow Management Company, Inc.

Amici Curiae:

Steve Tomkowiak for the Fair Housing Center of West Michigan, Fair Housing Center of Southwest Michigan, Fair Housing Center of Southeast & Mid-Michigan, and Fair Housing Center of Metropolitan Detroit.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Ron D. Robinson*, Assistant Attorney General, for the Michigan Civil Rights Commission and the Michigan Department of Civil Rights.

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

PER CURIAM. In Docket No. 347653, plaintiffs, Bobbie Jo Kooman, as personal representative for the estate of Robert J. Romig, and Terry Romig, appeal by leave granted[1] the trial court's order granting partial summary disposition in favor of defendant Gerow Management Company, Inc. (Gerow) pursuant to MCR 2.116(C)(10). In Docket No. 348254, plaintiffs appeal by leave granted[2] the trial court's order granting partial summary disposition in favor of defendants Boulder Bluff Condominiums, Units 73-123, 125-146, Inc., doing business as Boulder Bluff Estates Condominium Association, and Boulder Bluff Estates Condominium

[1] *Estate of Romig v Boulder Bluff Condos*, unpublished order of the Court of Appeals, entered July 29, 2019 (Docket No. 347653).

[2] *Estate of Romig v Boulder Bluff Condos*, unpublished order of the Court of Appeals, entered July 29, 2019 (Docket No. 348254).

Association (the Association)[3] pursuant to MCR 2.116(C)(8).[4]

We conclude that the Association's denial of the initial request for installation of a railing as an accommodation to assist a disabled person did not constitute discrimination in a "real estate transaction" as that phrase is defined in the Persons with Disabilities Civil Rights Act (the PWDCRA), MCL 37.1101 *et seq*. Because plaintiffs' claimed violations of the protections delineated in the PWDCRA are limited to "the sale, exchange, rental, or lease of real property, or an interest therein," MCL 37.1501(d), and plaintiffs' request did not arise from such a transaction, the trial court properly granted defendants' motions for partial summary disposition. Therefore, finding no errors warranting reversal, we affirm.

I. BASIC FACTS[5] AND PROCEDURAL HISTORY

In 2009, Terry Romig (Terry) purchased Unit 85 of Boulder Bluff Condominiums, and she lived there with her ex-husband Robert J. Romig (the decedent). The

[3] Plaintiff Bobbie Jo Kooman is the daughter of the decedent, Robert J. Romig, and the personal representative of his estate. Plaintiff Terry Romig is the purchaser and co-owner of the condominium where Robert J. Romig resided before his death. Defendant Boulder Bluff Condominiums, Units 73-123, 125-146, Inc., in effect, does business as Boulder Bluff Estates Condominium Association and is a Michigan nonprofit corporation designed to administer the affairs of Boulder Bluff Condominiums. Gerow Management, Inc., is the corporation that serves as the property manager for the Association.

[4] For efficient administration purposes, the appeals were consolidated. *Estate of Romig v Boulder Bluff Condos*, unpublished order of the Court of Appeals, entered September 4, 2019 (Docket Nos. 347653 and 348254).

[5] There were no depositions or affidavits filed by the parties addressing the facts in the lower court record. Accordingly, our factual summary is drawn from the complaint, the dispositive motion pleadings, and the trial court's written opinion and order.

decedent was disabled and had limited ability to stand and walk. Consequently, in June 2016, Terry submitted an accommodation request to Gerow in accordance with the bylaws of Boulder Bluff Condominiums for permission to install a railing on the front porch and adjacent stairs of Unit 85. With the request, Terry submitted a photograph of the type and kind of railing to be installed. At the request of Gerow's employee, Terry provided additional information regarding the coverage and location of the railing, the installer, and the method of attachment of the railing to the porch. She also advised that installation could occur "around July 4." While waiting for a decision from the board of directors of the Association, the decedent fell down the stairs and was hospitalized. Terry informed Gerow and the board of directors of the decedent's fall. Nonetheless, on July 1, 2016, Gerow notified Terry by letter that the board of directors denied the modification request to install a railing to the porch and stairs of Unit 85. The board denied the request because "the proposed railing would be a permanent change modifying the overall appearance of the unit in comparison to the rest of the association as well as the installation would cause damage to the concrete porch."

In a letter dated July 28, 2016, counsel for Terry and the decedent advised the Association board that the board did not comply with the Association's bylaws because the denial failed to advise Terry of the changes necessary to permit the proposed improvement. The letter also stated that the denial was contrary to federal and state housing law, including MCL 559.147 of the Michigan Condominium Act, MCL 559.101 *et seq*. Counsel attached a letter from Dr. Diana Dillman advising that the decedent was disabled and "need[ed] to have side rails and hand rails for his safety." On August 20, 2016, the decedent

fell a second time while attempting to maneuver the front porch stairs. Once again, he was hospitalized for this fall. In a letter dated August 23, 2016, Gerow advised Terry that her request to install a railing on the front porch adjacent to her unit was approved and delineated the specifications for the installation. On January 31, 2017, the decedent died.

Ultimately, plaintiffs filed a three-count complaint against defendants, alleging that defendants' delay or refusal to allow the disability modification discriminated against the decedent. Specifically, in Counts 1 and 2, plaintiffs alleged that defendants, in delaying or refusing the handrail, violated the PWDCRA. In Count 3, plaintiffs alleged that defendants violated Michigan's Condominium Act. Gerow moved for partial summary disposition, arguing that plaintiffs did not have a cause of action pursuant to MCL 37.1506a(1)(a) or MCL 37.1502(1)(b) because both provisions of the PWDCRA required that the alleged discrimination occur "in connection with a real estate transaction." Gerow claimed that the alleged discrimination did not occur "in connection with a real estate transaction" because Terry owned her condominium unit years before the alleged discrimination occurred. The trial court agreed with Gerow and found that this situation did not fit the PWDCRA's definition of a "real estate transaction." After the trial court granted Gerow's motion, Boulder Bluff Condominiums and the Association filed their own motion for partial summary disposition relying on the "real estate transaction" argument raised by Gerow, and the trial court granted this motion as well. Plaintiffs appeal by leave granted both orders granting defendants' motions for partial summary disposition.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). Summary disposition is proper under MCR 2.116(C)(8) if the opposing party has failed to state a claim upon which relief can be granted. *Brickey v McCarver*, 323 Mich App 639, 641; 919 NW2d 412 (2018). A motion for summary disposition premised on MCR 2.116(C)(8) tests the legal sufficiency of the complaint by solely examining the pleadings. *Sullivan v Michigan*, 328 Mich App 74, 80; 935 NW2d 413 (2019). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmoving party. *Id*. A motion for summary disposition under MCR 2.116(C)(8) should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly uphold a right of recovery. *Brickey*, 323 Mich App at 641-642.

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 challenged 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).

III. STATUTORY INTERPRETATION

"A decision on . . . the interpretation of a statute [is] reviewed de novo." *ADR Consultants, LLC v Mich Land Bank Fast Track Auth*, 327 Mich App 66, 74; 932 NW2d 226

> (2019). Issues involving statutory interpretation present questions of law that are reviewed de novo. *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 714; 909 NW2d 890 (2017). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010). The most reliable evidence of legislative intent is the plain language of the statute. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 360-361; 917 NW2d 603 (2018). If the language of the statute is clear and unambiguous, it is presumed that the Legislature intended the meaning plainly expressed in the statute. *Gardner v Dep't of Treasury*, 498 Mich 1, 6; 869 NW2d 199 (2015). The court's interpretation of a statute must give effect to every word, phrase, and clause. *South Dearborn*, 502 Mich at 361. Further, an interpretation that would render any part of the statute surplusage or nugatory must be avoided. *Id*. Common words and phrases are given their plain meaning as determined by the context in which the words are used, and a dictionary may be consulted to ascertain the meaning of an undefined word or phrase. *Id*. "In construing a legislative enactment we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used." *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977). [*Le Gassick v Univ of Mich Regents*, 330 Mich App 487, 494-496; 948 NW2d 452 (2019).]

Additionally, statutes must be construed as a whole with the provisions read in the context of the entire statute so as to produce a harmonious whole. *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 414; 653 NW2d 415 (2002). "The last-antecedent rule provides that a modifying clause is confined to the last antecedent unless something in the subject matter or dominant purpose [of the statute] requires a different interpretation." *Campbell v Dep't of Treasury*, 331 Mich App 312,

320; 952 NW2d 568 (2020) (quotation marks and citation omitted; alteration in original). "However, this rule does not apply when the modifying clause is set off by punctuation, such as a comma." *Id*. (quotation marks and citation omitted). Additionally, "[a] dependent clause set off by commas from the rest of the sentence is not to be viewed as an independent clause operating separately but, rather, as part of the complex sentence overall." *Id*. (quotation marks and citation omitted). Furthermore, "the word 'or' is a disjunctive word that is used to indicate a disunion, a separation, an alternative." *Id*. (quotation marks and citation omitted).

IV. THE PWDCRA

When this Court construes "the statutory provisions contained in the PWDCRA, [it must] construe the language reasonably, keeping in mind the purpose of the act." *Bachman*, 252 Mich App at 414. "The purpose of the PWDCRA is to ensure that all persons be accorded equal opportunities to obtain housing." *Id*. The PWDCRA "is remedial and is to be liberally construed to effectuate its ends." *Id*. However, in general, "the policy behind a statute cannot prevail over what the text actually says." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005).

"The PWDCRA, which was enacted in 1976 for the protection of persons with disabilities, is divided into six separate articles." *Bachman*, 252 Mich App at 412. Relevant to this case, Article 5 addresses the protected area of housing. *Id*.

Plaintiffs submit that two provisions of the PWDCRA were violated in this case, MCL 37.1502(1)(b) and MCL 37.1506a(1)(a). MCL 37.1502 prohibits certain discriminatory acts and provides, in relevant part, as follows:

> (1) An owner or any other person engaging in a real estate transaction, or a real estate broker or salesman shall not, on the basis of a disability of a buyer or renter, of a person residing in or intending to reside in a dwelling after it is sold, rented, or made available, or of any person associated with that buyer or renter, that is unrelated to the individual's ability to acquire, rent, or maintain property or use by an individual of adaptive devices or aids:
>
> * * *
>
> (b) Discriminate against a person in the terms, conditions, or privileges of a *real estate transaction* or in the furnishing of facilities or services in connection with a *real estate transaction*. [Emphasis added.]

MCL 37.1506a also prohibits certain discriminatory acts and provides, in relevant part, as follows:

> (1) A person shall not do any of the following in connection with a *real estate transaction*:
>
> (a) Refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the person with a disability if those modifications may be necessary to afford the person with a disability full enjoyment of the premises. In the case of a rental, the landlord may, if reasonable, make permission for a modification contingent on the renter's agreement to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted. [Emphasis added.]

MCL 37.1501 provides definitions relevant to Article 5 of the PWDCRA, and MCL 37.1501(d) defines "real estate transaction" as "the sale, exchange, rental, or lease of real property, or an interest therein."

V. ANALYSIS

Plaintiffs allege that the trial court erred in granting partial summary disposition to defendants because

(1) the definition of "real estate transaction" includes the phrase "an interest therein" and the Association's governing documents constitute "an interest therein," (2) the trial court failed to interpret the statute as a whole, and (3) the trial court erred in determining that protections are inapplicable once a real estate purchase or exchange is complete. We disagree.

A. CONDOMINIUM ASSOCIATION MASTER DEED AND BYLAWS

The plain language of MCL 37.1502(1)(b) precludes discrimination against a disabled person "in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection with a real estate transaction." Additionally, the plain language of MCL 37.1506a(1)(a) provides that reasonable modifications cannot be refused when necessary for a disabled person's full enjoyment of premises in connection with a real estate transaction. Again, "real estate transaction" is defined as "the sale, exchange, rental, or lease of real property, or an interest therein." MCL 37.1501(d).

Plaintiffs submit that the Association's master deed provides[6] that a person who acquires an ownership interest has rights to her apartment as well as common elements, and therefore, plaintiffs hold "an interest therein" under MCL 37.1501(d). Accordingly, plaintiffs assert that the master deed and bylaws satisfy the real estate transaction definition. However, plaintiffs' in-

[6] Plaintiffs rely on the following language: "Each person who shall acquire or own an Apartment in the Project (the 'Co-owner' thereof) shall have a particular and exclusive property right to his Apartment and to the limited common elements appurtenant thereto, and an undivided and inseparable right to share with other Co-owners the general common elements of the Project, as set forth in this Consolidating Master Deed."

terpretation of the phrase "real estate transaction" is contrary to the plain language of MCL 37.1501(d). As noted, the last-antecedent rule provides that a modifying clause is confined to the last antecedent, but the modifying clause "an interest therein" is separated from the last antecedent by a comma and the word "or." The comma means that the last-antecedent rule does not apply in this case. See *Campbell*, 331 Mich App at 320. It also demonstrates that the modifying clause "an interest therein" "is not to be viewed as an independent clause operating separately but, rather, as part of the complex sentence overall." *Id*. (quotation marks and citation omitted). Therefore, pursuant to the rules of statutory interpretation, under MCL 37.1501(d), a "real estate transaction" means the (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein," (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein."

Applying this interpretation of the definition of "real estate transaction" to this case, it is evident that plaintiffs do not have a cause of action under the PWDCRA. As stated earlier, plaintiffs raised a claim under MCL 37.1502(1)(b), which prohibits "[d]iscriminat[ion] against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection with a real estate transaction." The Legislature did not define the phrase "in connection with," and this Court may consult a dictionary to determine the meaning of the phrase. See *In re MJG*, 320 Mich App 310, 326; 906 NW2d 815 (2017). Although there are many definitions for the word "connection," the definition relevant in this case is "relationship in fact." *Merriam-Webster's Collegiate Dictionary* (11th ed). See also *MJG*, 320 Mich App at 326.

In this case, the alleged discrimination did not have a relationship in fact with a real estate transaction because the alleged discrimination did not pertain to the (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein," (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." MCL 37.1501(d). Additionally, defendants did not allegedly discriminate against the decedent "in the terms, conditions, or privileges of a" (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein" (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." MCL 37.1502(1)(b); MCL 37.1501(d). Instead, the alleged discrimination occurred years after Terry purchased the home and after the decedent began residing in the home.

Plaintiffs also raised a claim in their complaint pursuant to MCL 37.1506a(1)(a), which prohibits certain discriminatory acts "in connection with a real estate transaction[.]" However, as stated earlier, the alleged discriminatory act did not have a relationship in fact with the (1) "sale . . . of real property, or an interest therein," (2) "exchange . . . of real property, or an interest therein," (3) "rental . . . of real property, or an interest therein," or (4) "lease of real property, or an interest therein." MCL 37.1501(d). The alleged discriminatory act occurred years after Terry had purchased Unit 85 from Boulder Bluff Condominiums.

B. STATUTE AS A WHOLE AND COMPLETED TRANSACTIONS

Plaintiffs also contend that the statute must be examined as a whole and that limiting its protections to instances of sales or leases negates the remedial

"value" of the PWDCRA and renders the statute meaningless or nugatory. However, it must be noted that defendants did not seek summary disposition of Count 3; plaintiffs claimed violation of MCL 559.147a of the Michigan Condominium Act. The following rules address statutes that relate to the same subject matter:

> When two or more statutes arguably relate to the same subject or have the same purpose, the statutes 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 rule of *in pari materia* 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. [*House of Representatives v Governor*, 333 Mich App 325, 350-351; 960 NW2d 125 (2020).]

MCL 559.147a(1) addresses improvements or modifications pertaining to persons with disabilities and provides, in pertinent part:

> A co-owner may make improvements or modifications to the co-owner's condominium unit, including improvements or modifications to common elements and to the route from the public way to the door of the co-owner's condominium unit, at his or her expense, if the purpose of the improvement or modification is to facilitate access to or movement within the unit for persons with disabilities

> who reside in or regularly visit the unit, or to alleviate conditions that could be hazardous to persons with disabilities who reside in or regularly visit the unit.

Although plaintiffs urge this Court to extend the protections of the PWDCRA beyond the "sale, exchange, rental, or lease of real property, or an interest therein," MCL 37.1501(d), " 'we are not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used.' " *Le Gassick v Univ of Mich Regents*, 330 Mich App at 495-496, quoting *Frost-Pack Distrib Co*, 399 Mich at 683. Moreover, provisions of the PWDCRA arguably overlap with MCL 559.147a(1) of the Michigan Condominium Act and must be read together to discern legislative intent. MCL 559.147a(1) expressly affords persons with disabilities the right to make improvements or modifications to facilitate access to or movement in the unit.[7] It contains no express limitations or correlation to a "real estate transaction" or the timing of the sale or purchase. Thus, the Legislature's confinement of housing provisions in the PWDCRA to "real estate transactions" does not preclude subsequent legal action after a disabled person completes the real estate transaction in light of MCL 559.147a, and we will not extend the application of the PWDCRA beyond real estate transactions because it would serve the rationale purpose of protecting a disabled person.

Therefore, the trial court did not err by granting partial summary disposition in favor of defendants. Plaintiffs do not have any claims arising under the PWDCRA.

---

[7] To be clear, we do not address the merits of whether plaintiffs factually satisfy a claim pursuant to MCL 559.147a(1) or the application of that law to these facts.

Affirmed. No taxable costs, a public question being involved.

LETICA, P.J., and K. F. KELLY and REDFORD, JJ., concurred.

PEOPLE v REYNOLDS

Docket No. 345813. Submitted October 6, 2020, at Detroit. Decided October 15, 2020, at 9:10 a.m. Affirmed in part, reversed in part, and remanded 508 Mich 388 (2021).

Nicholas S. Reynolds pleaded no contest to two counts of child sexually abusive activity, MCL 750.145c(2); one count of assault by strangulation, MCL 750.84(1)(b); and one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d (multiple variables). Defendant was sentenced to 160 to 240 months' imprisonment for each conviction of child sexually abusive activity, 72 to 120 months' imprisonment for the assault-by-strangulation conviction, and 108 to 180 months' imprisonment for the CSC-III conviction, with the sentences to run concurrently with each other. Defendant's sentencing guidelines range was calculated on the basis of his CSC-III conviction; the guidelines range was not calculated for any of his other convictions. Defendant moved in the trial court to correct an invalid sentence, arguing that he was entitled to resentencing because his guidelines range was calculated on the basis of his CSC-III conviction and not his convictions for child sexually abusive activity. The trial court, Kathryn A. Viviano, J., denied defendant's motion. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 777.21(2) and MCL 771.14(2)(e)(*ii*), the recommended minimum sentencing guidelines range must be determined for each offense having the highest crime class; the offenses of a lower crime class do not need to be scored. However, when there are multiple convictions of the same crime class and that shared crime class is the highest crime class, each of those convictions must be scored. In this case, under MCL 777.16g and MCL 777.16y, child sexually abusive activity and CSC-III are both Class B crimes against a person. Under MCL 777.16d, assault by strangulation is a Class D crime against a person. Therefore, because defendant's multiple Class B crimes constituted the highest crime class among his multiple total convictions, each of his Class B crimes had to be scored under the sentencing guidelines. The trial court committed legal error by failing to do so and instead scoring only defendant's CSC-III conviction, thereby violating MCL 777.21(2) and MCL 771.14(2)(e)(*ii*).

2. If different guidelines ranges result from scoring each of the offenses of the highest crime class when there are multiple convictions falling within that crime class and concurrent sentences are imposed, the highest guidelines range subsumes the lower guidelines range and thereby provides the applicable guidelines range to be used by the sentencing court. In this case, even assuming defendant was correct that scoring the guidelines on his convictions for child sexually abusive material or activity would have yielded a lower guidelines range than the guidelines range that was based on his CSC-III conviction, the higher guidelines range for the CSC-III conviction would have provided the governing guidelines range to be used by the trial court because defendant's sentences for his convictions were to be served concurrently and the guidelines range for the CSC-III offense therefore would have subsumed the guidelines range for the other offenses (including the other Class B offenses). Because defendant did not show that the trial court's error resulted in an alteration to his appropriate guidelines range, resentencing was not required.

Affirmed.

CRIMINAL LAW — SENTENCING — RECOMMENDED MINIMUM SENTENCING GUIDELINES RANGE — MULTIPLE CONVICTIONS OF THE SAME CRIME CLASS.

Under MCL 777.21(2) and MCL 771.14(2)(e)(*ii*), the recommended minimum sentencing guidelines range must be determined for each offense having the highest crime class; when there are multiple convictions of the same crime class—and that shared crime class is the highest crime class—each of those convictions must be scored; if different guidelines ranges result from scoring each of the offenses of the highest crime class when there are multiple convictions falling within that crime class and concurrent sentences are imposed, the highest guidelines range subsumes the lower guidelines range and thereby provides the applicable guidelines range to be used by the sentencing court.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *John Paul Hunt*, Assistant Prosecuting Attorney, for the people.

Danielle S. Cadoret for defendant.

Before: SWARTZLE, P.J., and JANSEN and BORRELLO, JJ.

BORRELLO, J. Defendant appeals by leave granted,[1] challenging the propriety of his sentence. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant pleaded no contest to two counts of child sexually abusive activity, MCL 750.145c(2); one count of assault by strangulation, MCL 750.84(1)(b); and one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d (multiple variables). Defendant was sentenced to 160 to 240 months' imprisonment for each conviction of child sexually abusive activity, 72 to 120 months' imprisonment for the assault-by-strangulation conviction, and 108 to 180 months' imprisonment for the CSC-III conviction, with the sentences to run concurrently with each other. Defendant's minimum sentencing guidelines range was calculated on the basis of his CSC-III conviction, and the guidelines range was not calculated for any of his other convictions.

In a written opinion and order, the trial court denied defendant's motion to correct an invalid sentence. On appeal, defendant argues that the trial court erred and that he is entitled to resentencing because his guidelines range was calculated on the basis of his CSC-III conviction (which was Count IV) and not his convictions for child sexually abusive activity (which were Counts I and II). Pertinent to the issues before us on appeal, the trial court ruled as follows:

> Counts I and II are Class B offenses against a person. MCL 777.16g(1). Count III is a Class D offense against a

[1] *People v Reynolds*, 505 Mich 868 (2019) (remanding the matter to the Court of Appeals for consideration as on leave granted).

> person. MCL 777.16d. Count IV is a Class B offense against a person. MCL 777.16y. Inasmuch as Counts I, II and IV are all Class B offenses against a person, defendant's argument that he should have been scored under Counts I and II rather than Count III [sic] wholly lacks merit. Indeed, the same prior record variables and offense variables are scored for Counts I, II and III [sic]. MCL 777.21(1)(b) and 777.22(1).[2]

II. STANDARD OF REVIEW

Defendant's appellate challenge presents issues involving the interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq*., which we review de novo as questions of law. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We begin our analysis by reviewing the statutory language, and "[w]here the language is unambiguous, we give the words their plain meaning and apply the statute as written." *Id*. Although we review any factual findings by the trial court in the sentencing context for clear error, the question "[w]hether 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." *People v Rodriguez*, 327 Mich App 573, 576; 935 NW2d 51 (2019) (quotation marks and citation omitted).

III. ANALYSIS

The main issue on appeal concerns how to properly determine defendant's recommended minimum guide

---

[2] It appears that the last two sentences of this paragraph contain a typographical error in which the trial court mistakenly refers to Count III instead of Count IV. Defendant's guidelines range was calculated on the basis of his conviction on Count IV for CSC-III, which is a Class B offense against a person under MCL 777.16y.

lines range in light of his multiple convictions. MCL 777.21(2), contained within the sentencing guidelines, provides that "[i]f the defendant was convicted of multiple offenses, *subject to section 14 of chapter XI*, score *each* offense as provided in this part." (Emphasis added.) Following this instruction, we turn our attention to MCL 771.14, which provides, in pertinent part, as follows:

> (2) . . . A presentence investigation report . . . shall include all of the following:
>
> * * *
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:
>
> (*i*) For each conviction for which a consecutive sentence is authorized or required, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.
>
> (*ii*) Unless otherwise provided in subparagraph (*i*), for *each crime having the highest crime class*, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.
>
> (*iii*) Unless otherwise provided in subparagraph (*i*), the computation that determines the recommended minimum sentence range for the crime having the highest crime class. [Emphasis added.]

These statutes, read together, require that the recommended minimum guidelines range be determined for "*each*" offense "*having the highest crime class*." MCL 777.21(2) (emphasis added); MCL 771.14(2)(e)(*ii*) (emphasis added). This Court has explained that a trial court is "not required to independently score the guidelines for and sentence the defendant on each of his concurrent convictions if the court properly score[s] and sentence[s] the defendant

on the conviction with the highest crime classification" and that "when sentencing on multiple concurrent convictions, the guidelines [do] not need to be scored for the *lower-crime-class offenses* because MCL 771.14(2)(e) provides that presentence reports and guidelines calculations [are] only required for the highest crime class felony conviction." *People v Lopez*, 305 Mich App 686, 690-691; 854 NW2d 205 (2014) (quotation marks and citation omitted; emphasis added). However, when there are multiple convictions of the same crime class and that shared crime class is the highest crime class, "each" of those convictions must be scored. MCL 777.21(2); MCL 771.14(2)(e)(*ii*).

In this case, child sexually abusive activity and CSC-III are both Class B crimes against a person. MCL 777.16g (child sexually abusive activity); MCL 777.16y (third-degree sexual assault). Assault by strangulation is a Class D crime against a person. MCL 777.16d. Because defendant's multiple Class B crimes constituted the highest crime class among his multiple total convictions, *each* of his Class B crimes had to be scored under the sentencing guidelines. MCL 777.21(2); MCL 771.14(2)(e)(*ii*). The trial court committed legal error by failing to do so and instead scoring only defendant's CSC-III conviction, thereby violating the clear statutory language in MCL 777.21(2) and MCL 771.14(2)(e)(*ii*).[3] However, concluding that the trial court erred does not end our analysis.

---

[3] We reject the prosecution's argument that it was sufficient to score one of the convictions among those having the highest crime class merely because all the Class B offenses are Class B offenses against a person that require consideration of the same prior record variables (PRVs) and offense variables (OVs) in scoring them. It does not *necessarily* follow that consideration of the same PRVs and OVs for different offenses will inevitably lead to the same guidelines range because offense variables are to be scored solely by reference to "the sentencing offense"—i.e., the "offense being scored"—unless the "lan-

Defendant asserts—without any further explanation, legal authority, or discussion of factual evidence—that his guidelines range would have been lower if the trial court had scored his convictions for child sexually abusive material as required. However, even if this Court were to concur with defendant's assertions regarding his guidelines range, defendant has failed to demonstrate that he is entitled to resentencing.

In *Lopez*, this Court rejected an argument closely analogous to the argument advanced here. The defendant in *Lopez* argued that the sentencing court erred by relying on the guidelines range determined by his Class A felony conviction in sentencing him on all his convictions, which included convictions for Class E felonies, rather than applying the sentencing guidelines for Class E crimes to his lower-crime-class offenses. *Lopez*, 305 Mich App at 689-690. The *Lopez* Court concluded that when a defendant has been convicted of multiple offenses, the defendant's guidelines range may properly be based solely on the highest-crime-class conviction and that there is no statutory requirement to determine the guidelines range for the lower-crime-class convictions when all the sentences will be served concurrently. *Id*. at 690-691. This Court explained its underlying rationale as follows:

> The rationale for this legislative scheme is fairly clear because, except in possibly an extreme and tortured case,

---

guage of a particular offense variable statute specifically provides otherwise." *People v Sours*, 315 Mich App 346, 348-349; 890 NW2d 401 (2016) (quotation marks and citations omitted). While the prosecution's assumption may prove true in some cases, we have not been provided any basis on which we could conclude that it will hold true in all cases. Additionally, we decline to engage in hypothetical speculation on this point in light of the myriad possible combinations of multiple convictions that could arise in any given case, because we need not resolve this issue in order to decide the issues presented in this appeal.

> the guidelines range for the conviction with the highest crime classification will be greater than the guidelines range for any other offense. Given that the sentences are to be served concurrently, the guidelines range for the highest-crime-class offense would subsume the guidelines range for lower-crime-class offenses, and there would be no tangible reason or benefit in establishing guidelines ranges for the lower-crime-class offenses. Therefore, because the sentences for defendant's lower-crime-class offenses were to be served concurrently with the highest-class-felony sentence, the Class E guidelines did not need to be scored . . . . [*Id*. at 691-692.]

We acknowledge that there is a significant distinction between the instant case and *Lopez* in that *each* of defendant's highest-crime-class convictions were statutorily required to have been scored, which is different from the lack of such a requirement with respect to convictions of a lower crime class. However, we find the logic expressed by this Court in *Lopez* to be persuasive in determining how to navigate the next procedural obstacle presented in the instant case, namely, what happens if different guidelines ranges result from scoring each of the offenses of the highest crime class when there are multiple convictions falling within that crime class and concurrent sentences are imposed. Applying the reasoning set forth in *Lopez*, the highest guidelines range would "subsume" the lower guidelines range and thereby provide the applicable guidelines range to be used by the sentencing court. *Id*.

Hence, in this case, even assuming defendant is correct that scoring the guidelines on his convictions for child sexually abusive material would have yielded a lower guidelines range than the guidelines range that was based on his CSC-III conviction, the higher guidelines range for the CSC-III conviction would have provided the governing guidelines range to be used by the trial court because defendant's sentences for his

convictions were to be served concurrently and the guidelines range for the CSC-III offense therefore would have subsumed the guidelines range for the other offenses (including the other Class B offenses). See *id*.

In so holding, we acknowledge that "[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information," but a defendant must show that "there has been a scoring error or inaccurate information has been relied upon" to be entitled to resentencing if the defendant's "minimum sentence falls within the appropriate guidelines range . . . ." *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *Id*. at 89 n 8. In this case, defendant has not shown that the trial court's error resulted in an alteration to his appropriate guidelines range, and resentencing is therefore not required. *Id*. Accordingly, defendant is not entitled to resentencing.

Finally, our review of defendant's remaining arguments leads us to conclude that these arguments are abandoned. Defendant asserts without citation of any supporting authority that this Court should "consider reinstating the previous version of MCL 777.21 (effective prior to January 9, 2007), which required that all convicted offenses be scored." Defendant does not inform this Court as to the process by which we may "reinstate" prior versions of a statute. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Henry*, 315 Mich App 130, 148; 889 NW2d 1 (2016) (quotation marks and citation omitted). Defendant also asserts in his statement of the questions presented

that his right to the effective assistance of counsel was violated. However, defendant does not devote any portion of the argument section of his brief to this issue, nor does defendant discuss any legal authority relevant to this claim. "Failure to brief a question on appeal is tantamount to abandoning it." *Id*. at 149 (quotation marks and citation omitted). Given our holding relative to defendant's request for resentencing, even presuming ineffective assistance of counsel, defendant cannot demonstrate prejudice. See *People v LeBlanc*, 465 Mich 575, 582-583; 640 NW2d 246 (2002), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Accordingly, defendant is not entitled to relief on any of his additional claims.

Affirmed.

SWARTZLE, P.J., and JANSEN, J., concurred with BORRELLO, J.

AFT v STATE OF MICHIGAN
McMILLAN v PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM
JOHNSON v PUBLIC SCHOOL EMPLOYEES
RETIREMENT SYSTEM

Docket Nos. 345036, 345418, and 345420. Submitted September 1, 2020, at Detroit. Decided October 15, 2020, at 9:15 a.m.

AFT and numerous other labor organizations representing public school employees, and Deborah McMillan, Timothy L. Johnson, and other public school employees, brought actions in the Court of Claims against the state of Michigan and others challenging the constitutionality of 2010 PA 75, which revised the Public School Employees Retirement Act, MCL 38.1301 *et seq*. Specifically, § 43e of the act, former MCL 38.1343e, required public school employees to contribute 3% of their salaries to the Michigan Public School Employees' Retirement System (MPSERS). The court, Clinton Canady III, J., agreed that former MCL 38.1343e was unconstitutional. On appeal, the Court of Appeals, SHAPIRO, P.J., and BECKERING, J. (SAAD, J., concurring in part and dissenting in part), affirmed that former MCL 38.1343e was unconstitutional under the United States and Michigan Constitutions. 297 Mich App 597 (2012) (*AFT Mich I*). In response to the Court of Appeals' decision, the Legislature enacted 2012 PA 300, which altered the scope and effect of MCL 38.1343e but did not repeal it. Plaintiffs challenged 2012 PA 300 in the Court of Claims, and the court, Rosemarie E. Aquilina, J., upheld the constitutionality of 2012 PA 300 and dismissed their claims. On appeal, the Court of Appeals, SAAD, P.J., and K. F. KELLY, J. (GLEICHER, J., concurring), affirmed. 303 Mich App 651 (2014) (*AFT Mich II*). The Supreme Court affirmed the Court of Appeals' decision regarding 2012 PA 300. 497 Mich 197 (2015) (*AFT Mich III*). However, the Supreme Court vacated the Court of Appeals' decision in *AFT Mich I* and remanded for the Court of Appeals to reconsider its decision in light of the enactment of 2012 PA 300 and the Supreme Court's decision upholding it. 498 Mich 851 (2015). On remand, the Court of Appeals concluded that neither the passage of 2012 PA 300 nor the Supreme Court's decision upholding 2012 PA 300 affected the validity of 2010 PA 75, and that 2010 PA 75 and its compulsory-

contribution provision remained unconstitutional. 315 Mich App 602 (2016) (*AFT Mich IV*). In particular, the Court of Appeals held that 2010 PA 75 violated the Contracts Clauses of the United States and Michigan Constitutions. The Supreme Court affirmed the Court of Appeals' holding and additionally held that because 2010 PA 75 was unconstitutional, the funds collected pursuant to that act, before the effective date of 2012 PA 300, had to be refunded to plaintiffs. 501 Mich 939 (2017) (*AFT Mich V*). In January 2018, the Court of Claims, STEPHEN L. BORRELLO, J., ordered defendants to return the subject funds to the relevant employees, and defendants complied. In February 2018, plaintiffs filed a joint motion seeking payment of interest under MCL 600.6455. Plaintiffs argued that they were entitled to statutory interest because they had obtained a "money judgment" and the Court of Appeals had ordered the trial court to return the funds with interest. Defendants argued that the Court of Appeals had issued a declaratory judgment, not a money judgment, so they were not required to pay interest under MCL 600.6455. The Court of Claims, BORRELLO, J., concluded that an order to return involuntarily withheld funds was not a money judgment within the meaning of MCL 600.6455(2) because the order merely restored property to plaintiffs and because it was an order for equitable relief resulting from a declaratory judgment. The court also rejected defendants' argument that governmental or sovereign immunity barred an interest award outside of interest on a money judgment under MCL 600.6455. The trial court determined that the proper rate of interest was the same rate provided for a money judgment in MCL 600.6455(2). Defendants MPSERS and others appealed.

The Court of Appeals *held*:

1. The law-of-the-case doctrine precluded consideration of defendants' argument that plaintiffs' claims should be dismissed because plaintiffs failed to comply with the requirements of MCL 600.6431. Under the doctrine, once an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions determined by the appellate court will not be differently determined on a subsequent appeal when the facts remain materially the same. An issue is decided if the court expresses an opinion on the merits. In these cases, both the Court of Appeals and the Supreme Court had expressed opinions on the merits of plaintiffs' claims. Both courts ruled that former MCL 38.1343e violated the Contracts Clauses of the United States and Michigan Constitutions and ordered the return of the funds. By ruling that plaintiffs were entitled to the

return of their wrongly taken wages, both courts implicitly determined that plaintiffs had a cause of action. Therefore, although defendants correctly asserted that a claim cannot proceed against the state unless a claimant complies with the requirements of MCL 600.6431, the law-of-the-case doctrine precluded consideration of that issue.

2. The Court of Claims Act, MCL 600.6401 *et seq*., provides for statutory interest on money judgments recovered in a civil action. The act does not define "money judgment," but caselaw has interpreted this phrase as used in MCL 600.6013. Because both MCL 600.6013 and MCL 600.6455 are part of the Revised Judicature Act, MCL 600.101 *et seq*., the meaning of money judgment in a civil action is construed the same in MCL 600.6455(2) as in MCL 600.6013(1). Caselaw interpreting the phrase "money judgment" in MCL 600.6013 makes it clear that a judgment is not a money judgment simply because money is granted as part of that judgment. Rather, a money judgment is a judgment that orders the payment of a sum of money, as distinguished from an order directing that an act be undertaken or property be restored or transferred. Our Supreme Court has further held that an order directing the return of seized funds to a claimant was not an adjudication of an action for money damages but rather one for the delivery of property that had been the subject of a forfeiture action. The Court reasoned that the return of seized property is an act of restoration, not an award of monetary compensation for damages suffered by a party. In these cases, the January 2018 order directed the return of personal property and was not an award of monetary compensation for damages. Because no money judgment was entered, the trial court properly declined to award statutory interest to plaintiffs under MCL 600.6455(2).

3. Governmental agencies are immune from civil liability unless the Legislature has pulled back the veil of immunity by consenting to the lawsuit. Although the Legislature has not created an exception to immunity for a constitutional tort, the Supreme Court has held that a claim for damages against the state arising from a violation of the Michigan Constitution may be recognized in "appropriate" cases. In *Mays v Governor*, 506 Mich 157 (2020), the lead opinion set forth factors for assessing a damages inquiry for a constitutional violation, including: (1) the existence and clarity of the constitutional violation itself; (2) the degree of specificity of the constitutional protection; (3) support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provi-

sion; (4) the availability of another remedy; and (5) various other factors militating for or against a judicially inferred damages remedy. In these cases, as to the first factor, the Court of Appeals and the Supreme Court determined that plaintiffs established a clear violation of the Contracts Clauses of the United States and Michigan Constitution; therefore, this factor weighed in favor of a judicially inferred damages remedy. Regarding the second and third factors, US Const, art I, § 10, and Const 1963, art 1, § 10, both prohibit the enactment of a statute that impairs a contract. However, not every constitutional violation merits damages, and historically, the federal Contracts Clause has not provided a damages remedy. Rather, the United States Supreme Court has held that a plaintiff who asserts that a state law violates the federal Contracts Clause has a right only to a judicial determination, i.e., declaratory or injunctive relief. Therefore, the second and third factors weighed against recognition of a damages remedy. The fourth factor also weighed against recognition of a damages remedy. Plaintiffs in these cases clearly enjoyed an alternative remedy in that they were able to bring equitable claims, on which they recovered. Although the existence of alternative remedies is not dispositive, it weighs against recognition of a damages remedy. Finally, regarding the fifth factor, there were no other relevant circumstances that supported a conclusion that damages should be inferred for a Contracts Clause violation. Therefore, on the basis of these factors, damages should not be inferred for a Contracts Clause violation.

4. Michigan has long recognized the common-law doctrine of awarding interest as an element of damages, and caselaw supports that the purpose of common-law interest is to compensate plaintiffs for the loss of the use of their funds and to allow full compensation. Because money damages were not available to plaintiffs for the constitutional tort, they were also not entitled to equitable interest if the award of equitable interest amounted to an award of damages. Plaintiffs sought interest in order to be fully compensated for their losses, and the trial court awarded equitable interest, in part, because plaintiffs had been deprived of the use of their funds, affecting their ability to pay for the daily necessities of life. Thus, the interest awarded was a compensatory damage, and was therefore awarded in error.

5. In a September 2010 stipulated order, the trial court ordered the funds that were taken from plaintiffs by defendants pursuant to former MCL 38.1343e be placed in a separate interest-bearing account. If it was determined that MCL 38.1343e was unconstitutional or unenforceable, then the money would be repaid to

plaintiffs by defendants, plus any interest earned on their respective contributions in the separate interest-bearing account. In *AFT Mich IV*, the Court of Appeals ordered the return of the funds with interest to the relevant employees, and the Supreme Court also ordered the return of the funds in accordance with the Court of Appeals' judgment. Construing the judgments together, the Court of Appeals' reference to interest meant the interest from the interest-bearing account, not some other form of interest. Therefore, plaintiffs are not entitled to interest beyond the interest earned in the interest-bearing account on the basis of the orders of the Court of Appeals and the Supreme Court.

Affirmed in part and reversed in part.

CIVIL ACTIONS — COURT OF CLAIMS ACT — MONEY JUDGMENTS — STATUTORY INTEREST.

MCL 600.6455(2) of the Court of Claims Act, MCL 600.6401 *et seq*., provides for statutory interest on money judgments; a "money judgment" is a judgment that orders the payment of a sum of money, as distinguished from an order directing an act to occur or property to be restored or transferred; an order directing the return of seized property in the form of money is not a money judgment but rather an act of restoration, and a plaintiff is not entitled to payment of statutory interest under MCL 600.6455(2) for such a judgment.

Mark H. Cousens for AFT and others.

White Schneider PC (by *Timothy J. Dlugos*, *James A. White*, and *Andrew J. Gordon*) and Michigan Education Association (by *Michael M. Shoudy*) for Deborah McMillan and others.

Miller Cohen, PLC (by *Robert D. Fetter*, *Bruce A. Miller*, and *Keith D. Flynn*) for Timothy L. Johnson and others.

Dykema Gossett PLLC (by *Gary P. Gordon*, *W. Alan Wilk*, *Jason T. Hanselman*, and *Hilary L. Vigil*), Special Assistant Attorneys General, for the state of Michigan and others.

Before: JANSEN, P.J., and K. F. KELLY and CAMERON, JJ.

CAMERON, J. In these three cases consolidated for appeal, defendants-appellants (defendants) appeal and plaintiffs-appellees (plaintiffs) cross-appeal a July 24, 2018 order of the Court of Claims. That order directed defendants to pay equitable judgment interest on funds collected under MCL 38.1343e, as amended by 2010 PA 75 (former MCL 38.1343e). The July 24, 2018 order also denied plaintiffs' request for statutory interest under MCL 600.6455. We affirm in part and reverse in part.

I. BACKGROUND

On May 19, 2010, the Legislature enacted 2010 PA 75, which revised the Public School Employees Retirement Act, MCL 38.1301 *et seq*. In relevant part, § 43e of 2010 PA 75 required public school employees to contribute 3% of their salaries to the Michigan Public School Employees' Retirement System (MPSERS). The funds were to be placed in an irrevocable trust that funded retiree health care benefits.

Plaintiffs brought suits contesting the constitutionality of 2010 PA 75 on various grounds. In July 2010, the trial court ordered that "[t]he 3% levy from the wages of all members of the [MPSERS] pursuant to 2010 [PA] 75 shall not be placed in the irrevocable trust . . . ." The trial court instead ordered that the money would be "placed in a separate interest bearing account" and that the money could "not be spent or otherwise disbursed" until further order of the court. Additionally, in September 2010, the trial court entered a stipulated order that provided as follows:

> Defendants agree that if the final Court to rule in this case finds MCL 38.1343e to be unconstitutional, otherwise

> illegal, or unenforceable as a result of a breach of contract, Defendant [MPSERS] . . . will repay to each member of MPSERS who contributed under MCL 38.1343e the amount of their individual contributions, plus any interest earned thereon in the separate interest-bearing account.

The trial court ultimately concluded that former MCL 38.1343e was unconstitutional. On appeal, this Court held that former MCL 38.1343e was unconstitutional under multiple provisions of the Michigan and United States Constitutions. *AFT Mich v Michigan*, 297 Mich App 597; 825 NW2d 595 (2012) (*AFT Mich I*), vacated by 498 Mich 851 (2015). In response to this Court's decision, the Legislature enacted 2012 PA 300, which altered the scope and effect of MCL 38.1343e but did not repeal it. All of the plaintiffs challenged 2012 PA 300, and the trial court dismissed their claims. This Court affirmed the trial court's decision in *AFT Mich v Michigan*, 303 Mich App 651; 846 NW2d 583 (2014) (*AFT Mich II*), and the Michigan Supreme Court affirmed this Court's decision regarding 2012 PA 300, *AFT Mich v Michigan*, 497 Mich 197; 866 NW2d 782 (2015) (*AFT Mich III*). However, our Supreme Court vacated this Court's decision in *AFT Mich I* and remanded with instructions for this Court to reconsider its decision in light of the enactment of 2012 PA 300 and in light of the Supreme Court's "decision upholding that Act." *AFT Mich v Michigan*, 498 Mich 851, 851 (2015).

On remand, this Court concluded that neither the passage of 2012 PA 300 nor our Supreme Court's decision to uphold 2012 PA 300 affected the validity of 2010 PA 75. *AFT Mich v Michigan (On Remand)*, 315 Mich App 602; 893 NW2d 90 (2016) (*AFT Mich IV*), vacated in part by 501 Mich 939 (2017). This Court concluded that 2010 PA 75 and its compulsory-contribution provision remained unconstitutional for

several reasons. *AFT Mich IV*, 315 Mich App at 611-612. In Part II of the opinion, this Court held that "2010 PA 75, from its effective date until the completed transition to a voluntary system, violated" the Contracts Clauses of the United States and Michigan Constitutions. *Id*. at 621. This Court remanded the case to the trial court "with the direction to return the subject funds, with interest, to the relevant employees." *Id*. at 612.

Our Supreme Court affirmed this Court's "holding that 2010 Public Act 75 violated the respective Contract Clauses of both the federal and state constitutions . . . ." *AFT Mich v Michigan*, 501 Mich 939, 939 (2017) (*AFT Mich V*). Our Supreme Court additionally held that, "[b]ecause 2010 Public Act 75 is unconstitutional, the funds collected pursuant to that act before the effective date of 2012 Public Act 300 must be refunded to the plaintiffs in accordance with the Court of Appeals judgment." *Id*.

On January 22, 2018, the trial court entered an order, noting that it had been directed to order the "return of the subject funds, with interest, to the relevant employees." The trial court ordered defendants to disburse the funds "together with the interest earned on the amounts in the interest-bearing account." Defendants complied with the trial court's order.

In February 2018, plaintiffs filed a joint motion seeking the payment of interest under MCL 600.6455. Plaintiffs argued that they had obtained a money judgment and that this Court had ordered the trial court to return the funds "with interest." Plaintiffs argued that because the interest on the money held in escrow was "less than one percent of the principal in total," they would not be made whole if the trial court did not order defendants to pay statutory interest. In

the alternative, plaintiffs moved the trial court to award interest as a matter of equity. Plaintiffs argued that absent defendants' unconstitutional actions, plaintiffs would have received full payment for their earned compensation. Plaintiffs argued that they should be paid "in *today's dollars* for the compensation which they should have been receiving between 2010 and 2012." Defendants opposed the motion, arguing that plaintiffs had waived any additional interest award under contract principles and that defendants were not required to pay interest under MCL 600.6455 because the case had resulted in a declaratory judgment, not a money judgment. Defendants also argued that governmental immunity barred payment of equitable interest and that, under the circumstances, plaintiffs were not entitled to an award of equitable interest.

The trial court rejected defendants' argument that plaintiffs had waived entitlement to interest. The trial court then concluded that an order to return the involuntarily withheld funds was not a "money judgment" within the meaning of MCL 600.6455(2) because the order merely restored property to plaintiffs and because the order was for equitable relief resulting from a declaratory judgment. The trial court also disagreed that governmental immunity or sovereign immunity barred an interest award outside of interest on a money judgment under MCL 600.6455. The trial court reasoned that governmental immunity was not available in the underlying action because it was not a tort action. Additionally, the trial court noted that common-law sovereign immunity had been replaced by governmental immunity under the governmental tort liability act ("GTLA"), MCL 691.1401 *et seq*., and that an award of equitable interest was not a tort subject to the GTLA.

Finally, the trial court held that an award of equitable interest was warranted. The court noted that in equitable actions, it had discretion to award judgment interest even if interest was not mandated by statute. When considering the totality of the circumstances, the trial court declined to "punish" plaintiffs for prudently obtaining injunctive relief. The trial court found that defendants "played no small role in the protracted nature of the appellate proceedings . . . ." While the fact that *AFT Mich I* was pending on application for nearly two years contributed to the delay, the trial court noted that defendants had sought leave to appeal after the Attorney General decided to no longer pursue the matter. The trial court also considered that plaintiffs were deprived of the use of their taken wages for nearly seven years. The trial court determined that the proper rate of interest was the same rate that MCL 600.6455(2) provided for interest on a money judgment, less the amount of interest the escrow account had actually earned. These appeals followed.

II. ANALYSIS

A. LAW-OF-THE-CASE DOCTRINE

Defendants first argue that plaintiffs' claims should be dismissed because plaintiffs failed to comply with the requirements of MCL 600.6431. Although defendants are correct that "a claim cannot proceed against the state" unless a claimant complies with the mandates outlined in MCL 600.6431, *Fairley v Dep't of Corrections*, 497 Mich 290, 293; 871 NW2d 129 (2015), we conclude that the law-of-the-case doctrine precludes consideration of this issue.

The law-of-the-case doctrine provides that once "an appellate court has passed on a legal question and

remanded the case for further proceedings, the legal questions . . . determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." See *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000) (quotation marks and citation omitted). "[A]s a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals." *Id*. at 260.

The purpose of the doctrine is to promote consistency and to "avoid reconsideration of matters once decided during the course of a single lawsuit." See *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). The doctrine promotes finality and prevents forum-shopping as well. See *Int'l Union v Michigan*, 211 Mich App 20, 24; 535 NW2d 210 (1995). The doctrine is also founded on an appellate court's lack of jurisdiction to modify its own judgments except on rehearing. See *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). The law-of-the-case doctrine is, in a sense, the "analytical cousin of the doctrines of claim and issue preclusion." *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991). However, the law-of-the case doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Lopatin*, 462 Mich at 260. An issue is decided if this Court expresses an opinion on the merits. See *id*. (ruling that the doctrine did not apply because the Court had not addressed the issue on the merits).

In this case, both this Court and the Michigan Supreme Court have expressed opinions on the merits of plaintiffs' claims. Specifically, this Court previously held that former MCL 38.1343e violated the Contracts

Clauses of the United States and Michigan Constitutions. *AFT Mich IV*, 315 Mich App at 621; US Const, art I, § 10; Const 1963, art 1, § 10. As a result of this holding, this Court ordered the return of plaintiffs' funds. *Id*. at 628. Our Supreme Court also ruled that former MCL 38.1343e violated the Contracts Clauses and ordered the return of the funds. *AFT Mich V*, 501 Mich at 939. By ruling that plaintiffs were entitled to their wrongly taken wages, both this Court and the Supreme Court implicitly decided that plaintiffs had a cause of action. Furthermore, when a higher court has remanded a case, it is the duty of the lower court to comply with the remand order. *Rodriguez v Gen Motors Corp (On Remand)*, 204 Mich App 509, 514; 516 NW2d 105 (1994). The trial court was ordered to distribute the funds, *AFT Mich IV*, 315 Mich App at 628; *AFT Mich V*, 501 Mich at 939, and it was required to do so. Therefore, we decline to decide whether plaintiffs' claims were barred by virtue of plaintiffs' alleged failure to verify their respective complaints.

B. STATUTORY INTEREST

Plaintiffs argue that the trial court erred by ruling that the January 2018 order was not a money judgment. We disagree.

This Court reviews de novo whether a statute applies in a given case. See *In re Forfeiture of $176,598*, 465 Mich 382, 385; 633 NW2d 367 (2001). Generally, "[e]ntitlement to interest on a judgment is purely statutory and must be specifically authorized by statute." *Dep't of Transp v Schultz*, 201 Mich App 605, 610; 506 NW2d 904 (1993). "[A]n award of interest is mandatory in all cases to which [a] statute applies." *Everett v Nickola*, 234 Mich App 632, 639; 599 NW2d 732 (1999).

Plaintiffs argue that interest must be awarded on the wrongfully withheld funds under MCL 600.6455(2) of the Court of Claims Act, MCL 600.6401 *et seq*., which provides as follows:

> Except as otherwise provided in this subsection, for complaints filed on or after January 1, 1987, interest *on a money judgment* recovered in a civil action shall be calculated from the date of filing the complaint at a rate of interest which is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section. [Emphasis added.]

As noted by the trial court and acknowledged by the parties, the key phrase in MCL 600.6455(2) is "on a money judgment." Plaintiffs argue that because the crux of this case involved the payment of money, it necessarily involved a "money judgment." We disagree.

The phrase "money judgment" is not defined in the Court of Claims Act, and the caselaw interpreting MCL 600.6455(2) is limited. However, like MCL 600.6455(2), MCL 600.6013(1) "applies to money judgments recovered in a civil action." *Olson v Olson*, 273 Mich App 347, 350; 729 NW2d 908 (2006). The meaning of "money judgment" within MCL 600.6013(1) has been interpreted by Michigan courts. When engaging in statutory interpretation, "the statute must be read as a whole," and this Court should read phrases "in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012). This Court also reads subsections of cohesive statutory provisions together. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). Because both MCL 600.6013 and MCL 600.6455 are part of the Revised Judicature Act, MCL 600.101 *et seq*., and

because both provisions refer to money judgments in civil actions, we will construe the meaning of money judgment in a civil action the same in MCL 600.6455(2) as in MCL 600.6013(1).

Caselaw interpreting the phrase "money judgment" in MCL 600.6013(1) makes it clear that a judgment is not a money judgment simply because money is granted as part of that judgment. Under MCL 600.6013(1), a money judgment in a civil action is a judgment "that orders the payment of a sum of money, as distinguished from an order directing an act to be done or property to be restored or transferred." *In re Forfeiture*, 465 Mich at 386.

In *In re Forfeiture*, the police seized $176,598 from the claimant's home and from another residence on the suspicion that the money was related to drug trafficking. *Id*. at 383-384. The claimant ultimately prevailed in a forfeiture action that was brought by the prosecutor. *Id*. at 384. Thereafter, the claimant moved in the trial court for the return of the money and statutory judgment interest under MCL 600.6013. *Id*. at 383-384. The trial court ordered the prosecutor to return the money to the claimant, but it denied the request for statutory interest. *Id*. at 385. This Court reversed on appeal, holding "that the decree directing return of the funds was a money judgment in a civil action" which entitled the claimant to interest under MCL 600.6013(1). *Id*.

In affirming the trial court's denial of statutory interest under MCL 600.6013, our Supreme Court concluded that the order directing the return of the seized funds to the claimant was not a money judgment in a civil action. *Id*. at 389. The Court observed that "[t]he trial court's order was not an adjudication of an action for money damages, but rather one for the

delivery of property that had been the subject of a forfeiture action." *Id*. at 388. Further, the Court reasoned that money is "property" subject to forfeiture and that the trial court simply ordered the return of specific personal property. *Id*. at 386-387. It noted that wrongfully seized currency is generally treated like any other wrongfully seized property. *Id*. at 386 n 10. Specifically, our Supreme Court reasoned that "[t]he return of seized property is treated as an act of *restoration*, rather than as an award of monetary compensation for damages suffered by a party." *Id*.

We conclude that the January 2018 order at issue in this case directed the return of specific personal property and was not an award of monetary compensation for damages. As already discussed, defendants took money from plaintiffs' paychecks and that specific money was ordered to be placed into an account. This Court ordered that the money be "return[ed] . . . to the relevant employees," *AFT Mich IV*, 315 Mich App at 612, and our Supreme Court ordered that the funds collected "must be refunded to the plaintiffs," *AFT Mich V*, 501 Mich at 939. Consistently with these holdings, the trial court ordered as follows:

> The funds currently held in the separate interest-bearing accounts will be dispersed by Defendants on January 22, 2018 to the reporting units, or Local Education Agencies (LEAs), from which the funds were received, together with the interest earned on the amounts in the interest-bearing account.

Accordingly, the January 2018 order did not order the payment of a sum of money. Rather, the order directed an act to be done, i.e., that plaintiffs' property be transferred "to the reporting units" or LEAs "from which the funds were received." Thus, like in *In re Forfeiture*, the order represented the return of specific

property that defendants wrongfully took from plaintiffs. Because a money judgment was not entered, the trial court properly declined to award statutory interest to plaintiffs under MCL 600.6455(2).

C. EQUITABLE INTEREST

Defendants argue that the trial court erred by awarding plaintiffs equitable interest. Specifically, defendants argue that plaintiffs' request for compensation for their loss of use of the money taken by defendants was a claim for common-law damages to which defendants have not waived immunity.[1] We agree.

From the time of Michigan's statehood, our Supreme Court's jurisprudence has recognized that the state, as sovereign, is immune from suit unless it consents to the lawsuit. *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942). See also *Odom v Wayne Co*, 482 Mich 459, 477; 760 NW2d 217 (2008). Thus, "a governmental agency is immune unless the Legislature has pulled back the veil of immunity and allowed suit by citizens against the government." *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002). Tort immunity is granted to governmental agencies in MCL 691.1407(1), which provides, in pertinent part, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental

[1] We note that defendants argue that "sovereign immunity" bars plaintiffs' claims. However, Michigan has abrogated common-law sovereign immunity. *Pittman v City of Taylor*, 398 Mich 41, 49; 247 NW2d 512 (1976). Furthermore, our Supreme Court has explained that while the terms "sovereign immunity" and "governmental immunity" have been used interchangeably over the years, the terms are not synonymous. *Pohutski v City of Allen Park*, 465 Mich 675, 682; 641 NW2d 219 (2002).

function." Thus, "[i]mmunity from tort liability, as provided by MCL 691.1407 . . . , is expressed in the broadest possible language—it extends immunity to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000) (emphasis omitted). However, the GTLA also provides several exceptions to this broad grant of immunity, *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84; 746 NW2d 847 (2008), none of which pertains to a claim for damages arising from the violation of a constitutional right.

"The Legislature has never created an exception to immunity for a constitutional tort." *Mays v Governor*, 506 Mich 157, 187; 954 NW2d 139 (2020) (opinion by BERNSTEIN, J.). Nonetheless, in *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), our Supreme Court held that "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." However, as recently recognized by our Supreme Court in *Mays*, 506 Mich at 196 (opinion by BERNSTEIN, J.),

> [t]his Court has never explicitly endorsed a test for assessing a damages inquiry for a constitutional violation. However, we agree with the Court of Claims and the Court of Appeals that the multifactor test elaborated in Justice BOYLE's separate opinion in *Smith* provides a framework for assessing the damages inquiry. Under that test, we weigh various factors, including (1) the existence and clarity of the constitutional violation itself; (2) the degree of specificity of the constitutional protection; (3) support for the propriety of a judicially inferred damages remedy in any text, history, and previous interpretations of the specific provision; (4) the availability of another remedy; and (5) various other factors militating for or against a

judicially inferred damages remedy. See *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part and dissenting in part).

As to the first factor, as already discussed in detail, this Court and our Supreme Court have determined that plaintiffs have established a clear violation of the Contracts Clauses of the United States and Michigan Constitutions. See *AFT Mich IV*, 315 Mich App at 621; *AFT Mich V*, 501 Mich at 939. Thus, this factor weighs in favor of a judicially inferred damages remedy.

With respect to the second and third factors, US Const, art I, § 10 and Const 1963, art 1, § 10 both prohibit the enactment of a statute that impairs a contract, and the two provisions are interpreted similarly. *In re Certified Question*, 447 Mich 765, 776-777; 527 NW2d 468 (1994). However, "[n]ot every constitutional violation merits damages." *Mays*, 506 Mich at 196 (opinion by BERNSTEIN, J.). Importantly, the federal Contracts Clause has not historically provided a damages remedy. See *Carter v Greenhow*, 114 US 317, 322; 5 S Ct 928; 29 L Ed 202 (1885). Rather, the United States Supreme Court has held that a plaintiff who asserts that a state law violated the Contracts Clause has only "a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution." *Id*. Thus, the remedy available for a Contracts Clause violation is generally declaratory or injunctive relief. See *id*. We therefore conclude that the second and third factors weigh against recognition of a damages remedy.

With respect to the fourth factor, "[t]he existence of alternative remedies is given considerable weight, but it is not dispositive." *Mays*, 506 Mich at 197 (opinion by BERNSTEIN, J.) (citation omitted). Importantly, in this

case, plaintiffs clearly enjoyed an alternative remedy in that they were able to bring equitable claims. Not only were plaintiffs able to bring equitable claims, they also recovered on these claims. As already discussed in depth, plaintiffs' remedy in this case specifically included the distribution of the balance of an escrow account. See *AFT Mich IV*, 315 Mich App at 628; *AFT Mich V*, 501 Mich at 939. Therefore, this factor weighs against recognition of a damages remedy. Finally, as to the fifth factor, which requires us to assess all other relevant considerations, we can discern no other relevant circumstances that would support a conclusion that damages should be inferred for a Contracts Clause violation. Indeed, as already stated, the federal Contracts Clause has not historically provided a damages remedy, and equitable relief was available to plaintiffs. On the basis of these factors, we conclude that it is unwarranted to conclude that damages should be inferred for a Contracts Clause violation.

Because money damages are not available to plaintiffs for the constitutional tort, we must next consider whether the equitable interest awarded in this case amounted to an award of damages. We find it helpful to first consider the meaning of the word "interest." Various caselaw definitions of the term "interest" make reference to its relationship to the use of money. The United States Supreme Court stated in *Deputy v Du Pont*, 308 US 488, 497-498; 60 S Ct 363; 84 L Ed 416 (1940), that the "usual import of the term" "interest" "is the amount which one has contracted to pay for the use of borrowed money" and added that " 'interest on indebtedness' means compensation for the use or forbearance of money." (Some quotation marks and citations omitted.) "Interest" has also been defined as "the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for

its detention." *Marion v Detroit*, 284 Mich 476, 484; 280 NW 26 (1938) (quotation marks and citation omitted). Additionally, in *Balch v Detroit Trust Co*, 312 Mich 146, 152; 20 NW2d 138 (1945), our Supreme Court stated that "interest" "is paid for the use of money . . . or given for the delay in the payment of money." (Quotation marks and citations omitted.)

Dictionaries define "interest" similarly to our caselaw. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "interest" as "a charge for borrowed money generally a percentage of the amount borrowed." *Random House Webster's College Dictionary* (1997) defines "interest" as "a sum paid or charged for the use of money or for borrowing money," or "such a sum expressed as a percentage of the amount borrowed to be paid over a given period . . . ." Thus, interest is compensation for the use of another's money.

Importantly,

> Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money has a "use value" and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds. Furthermore, the decision whether to award interest as an element of damages is not dependent upon a contractual promise to pay interest . . . . [T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation. [*Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 499; 475 NW2d 704 (1991) (citations omitted).]

Accordingly, in Michigan, the purpose of common-law interest is to compensate plaintiffs for loss of use of their funds and to "allow full compensation." *Id*. Indeed, courts have long recognized equitable prejudgment interest as "an element of [a litigant's] complete compensation." *Osterneck v Ernst & Whinney*, 489 US 169, 175; 109 S Ct 987; 103 L Ed 2d 146 (1989)

(quotation marks and citation omitted). "Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered." *Monessen Southwestern R Co v Morgan*, 486 US 330, 335; 108 S Ct 1837; 100 L Ed 2d 349 (1988). See also *Library of Congress v Shaw*, 478 US 310, 321; 106 S Ct 2957; 92 L Ed 2d 250 (1986) (adopting the view that "[p]rejudgment interest . . . is considered as damages, not a component of 'costs' "); *Gen Motors Corp v Devex Corp*, 461 US 648, 655-656 n 10; 103 S Ct 2058; 76 L Ed 2d 211 (1983) (stating that "prejudgment interest represents 'delay damages' and should be awarded as a component of full compensation"); *Miller v Robertson*, 266 US 243, 258; 45 S Ct 73; 69 L Ed 265 (1924) ("[I]n order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages.").

In this case, plaintiffs sought interest in order to be fully compensated for their losses, i.e., the deprivation of the benefit of possessing and using the funds during the years prior to judgment. Plaintiffs claimed that because the interest on the money held in escrow was "less than one percent of the principal in total," they would not be made whole if the trial court did not order defendants to pay interest. When determining that it was proper to award equitable interest, the trial court noted that plaintiffs "were deprived of the use of the funds." The trial court also noted that defendants' taking of a portion of plaintiffs' wages hindered "plaintiffs' respective abilities to provide for and 'meet the daily necessities of life.' " Based in part on these facts, the trial court found that it was proper to award interest and applied MCL 600.6455(2) in order to calculate the amount of interest owed to plaintiffs. Thus, the interest awarded in this case was a compen-

satory damage in that it compensated plaintiffs for the delay and expense that resulted from the loss of use of their property. Consequently, the trial court erred by awarding equitable interest.

Finally, plaintiffs in Docket No. 345418 argue that they are entitled to interest beyond that of the interest earned in the interest-bearing account because this Court and the Michigan Supreme Court specifically ordered that the funds be returned "with interest." We disagree.

Courts should interpret the terms in a judgment in the same manner as courts interpret contracts. *Smith v Smith*, 278 Mich App 198, 200; 748 NW2d 258 (2008). We construe contractual terms in context, *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 356-357; 596 NW2d 190 (1999), and this Court generally construes together agreements that are related to the same subject matter, *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983). Courts should not read language into contracts, *In re Smith Trust*, 274 Mich App 283, 288-289; 731 NW2d 810 (2007), or rewrite clear contractual language, *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372; 817 NW2d 504 (2012).

In this case, the trial court ordered that the money was to be "placed in a separate interest bearing account" and not spent or disbursed until further order of the court. Additionally, the September 2010 stipulated order provided that if it was determined that former MCL 38.1343e was unconstitutional or unenforceable, defendants would "repay to each member of MPSERS who contributed under MCL 38.1343e the amount of their individual contributions, plus any interest earned thereon in the separate interest-bearing account." In *AFT Mich IV*, 315 Mich App at 628, this Court ordered that the trial court "shall direct the

return of the subject funds, with interest, to the relevant employees." The Michigan Supreme Court ordered that the funds be refunded to plaintiffs in accordance with this Court's judgment. *AFT Mich V*, 501 Mich at 939. Construing the judgments together, like this Court would construe contracts together, we conclude that this Court's reference to interest means the interest from the interest-bearing account, not some other form of interest. Indeed, had this Court wished to order the payment of judgment interest, it would have done so. Consequently, we decline to read the word "judgment" before the word "interest" into this Court's previous decision.[2] See *AFT Mich IV*, 315 Mich App at 628.

We affirm in part and reverse in part. We do not retain jurisdiction.

JANSEN, P.J., and K. F. KELLY, J., concurred with CAMERON, J.

---

[2] Given this holding, the remainder of the parties' arguments on appeal are rendered moot and need not be considered. See *Attorney General v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2006).

MICHIGAN ALLIANCE FOR RETIRED AMERICANS v SECRETARY OF STATE

Docket No. 354993. Submitted October 9, 2020, at Lansing. Decided October 16, 2020, at 9:00 a.m.

The Michigan Alliance for Retired Americans, Detroit/Downriver Chapter of the A. Philip Randolph Institute, and three individuals, Charles Robinson, Gerard McMurran, and Jim Pedersen (collectively, plaintiffs) brought an action in the Court of Claims against the Secretary of State and the Attorney General, seeking declaratory and injunctive relief related to the handling and counting of absent-voter ballots for the 2020 general election. Plaintiffs subsequently filed an amended complaint, asserting facial and as-applied challenges to the constitutionality of three laws: (1) a deadline requiring that ballots submitted by absent voters must be received by election officials before polls close at 8:00 p.m. on election day in order to be counted, MCL 168.759b and MCL 168.764a; (2) a ballot-handling provision that restricts who, other than the voter, may possess, solicit, or deliver an absent voter's ballot, MCL 168.932(f); and (3) a requirement that voters who choose to submit their ballot by mail must first affix the necessary postage to their envelope to ensure delivery, MCL 168.764a. In relevant part, plaintiffs alleged that these laws, in combination with the anticipated delay in mail delivery due to the COVID-19 pandemic, imposed unconstitutional burdens on plaintiffs' right to vote absentee in violation of Const 1963, art 1, § 2. Plaintiffs later requested that the Court of Claims issue a preliminary injunction, and the Court of Claims, CYNTHIA D. STEPHENS, J., did so in part. Plaintiffs and defendants filed competing motions for summary disposition. The Court of Claims granted partial relief to plaintiffs, concluding that plaintiffs had established two as-applied constitutional violations of plaintiffs' right to vote absentee in the 2020 general election. The Court of Claims issued an order enjoining the operation of two election laws: the deadline for mail-in absent-voter ballots and the restriction limiting who can lawfully possess, solicit, and deliver another person's ballots. The Court of Claims ordered that mail-in ballots received after the polls closed on election night would now be eligible to be counted up to 14 days later, provided that the "ballot

is postmarked *before* election day" and received by the clerk within 14 days of the election. The Court of Claims also suspended the ballot-handling restrictions regarding third parties possessing and delivering absentee ballots as long as the third party's conduct occurred from 5:01 p.m. on the Friday before the 2020 general election until the polls closed, so long as the absent voter gave his or her approval. The Court of Claims rejected plaintiffs' final claim that the state was constitutionally required to provide prepaid postage for absent voters to use after completing their ballots and granted summary disposition in favor of defendants with respect to this claim only. After defendants elected not to appeal, the Michigan Senate and the Michigan House of Representatives (the Legislature) successfully intervened and filed the instant appeal. The Republican National Committee and the Michigan Republican Party appeared as amici on appeal.

The Court of Appeals *held*:

1. The Legislature had standing to file an appeal, and it was assumed without deciding that plaintiffs had standing to bring suit. A litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. The appellate litigant must show a concrete and particularized injury. In this case, plaintiffs argued that the Legislature did not have standing on appeal. However, the Legislature—a body that is subject to the election procedures at issue in this case and that is composed of elected officials of the citizens of Michigan—undoubtedly had a significant interest in the instant appeal. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156 (2020) (*League I*), was distinguishable. The Legislature in *League I* sought—as a plaintiff—a declaratory judgment to enforce particular legislation; in doing so, the Legislature was challenging the actions of members of the executive branch. In this case, however, the Legislature sought to intervene after defendants, constitutional officers within the executive branch, declined to appeal the Court of Claims decision. The Legislature essentially took the place of defendants in this case. Accordingly, the Legislature had standing to appeal. Furthermore, it was assumed without deciding that plaintiffs had standing to bring suit; given the exigent circumstances in this case and given that plaintiffs asserted their members' status as elderly or disabled individuals—some of whom had underlying health conditions that made them more vulnerable to COVID-19—plaintiffs had standing.

2. The Court of Claims erred by granting summary disposition in favor of plaintiffs on its declaratory action. Plaintiffs requested relief that was not confined only to plaintiffs but would apply to all Michigan voters who choose to cast their ballots by mail. The ballot-deadline relief extended well beyond the circumstances of the individual plaintiffs and their organizations, reaching all Michigan voters who, for whatever reason, would benefit from more time in which to mail their ballots. Furthermore, lifting the restrictions and criminal penalties concerning who may handle absent-voter ballots would apply to all Michigan voters as long as the conduct in question occurred after 5:00 p.m. on the Friday before the election. While plaintiffs' challenge arose only in relation to a specific fact pattern—the November 3, 2020 election during the COVID-19 pandemic and slow mail delivery—the relief plaintiffs sought would apply to every Michigan absent voter. Therefore, the substance of plaintiffs' amended complaint was a facial challenge of the relevant statutes, and the Court of Claims erred by failing to analyze the claims accordingly. 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 statute would be valid. *League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 29-30 (2020) (opinion by SAWYER, P.J.); *id*. at 32 (RIORDAN, J., concurring), held that the 8:00 p.m. ballot-receipt deadline survived a facial challenge and did not violate Const 1963, art 2, § 4. Accordingly, the ballot-receipt deadline was not unconstitutional. Furthermore, the ballot-handling restrictions of MCL 168.932(f) also survived a facial challenge. The ballot-handling restrictions are intended to combat voter fraud; imposing limits on whether third parties can possess or collect ballots simply reflects a policy decision by a duly elected Legislature, where the Constitution places responsibility to regulate and preserve the purity of elections. In sum, the restrictions in MCL 168.932(f) were reasonable, nondiscriminatory, and warranted to further the important regulatory interest of protecting against voter fraud. Furthermore, the requirement that clerks provide voter assistance only until 5:00 p.m. on the Friday before an election—in addition to the COVID-19 pandemic and the asserted delivery slowdown at the United States Postal Service (the USPS)—did not impose an unconstitutional burden on the right to vote absentee. Even with the 5:00 p.m. limit, voters were not deprived of the choice to vote absentee; they retained all the options of delivering their ballots in person to the clerk, using one of over 1,000 drop boxes in the state, using community satellite voter centers, if available, or relying on any family member or household resident to deliver their ballots. Additionally, the clerk is

required to assist voters with returning their ballots if the voters request such assistance before 5:00 p.m. on the Friday before an election, and the clerk may continue to provide door-to-door delivery service for qualified absent voters after that time. Given the variety of options, the ballot-handling restrictions did not impermissibly burden the right to vote absentee. And even if plaintiffs' claims could be considered as-applied challenges, those claims did not survive. The Court of Claims concluded that returning the ballot by mail was the "only realistic option" for those with underlying health conditions who wished to vote absentee; however, that finding was unsupported given the additional ballot-delivery options available to absentee voters. Additionally, as pointed out by amici, the pandemic and resulting USPS mail-delivery slowdowns were not attributable to the state. Although those factors could complicate plaintiffs' voting process, they did not automatically amount to a loss of the right to vote absentee. Accordingly, the Court of Claims erred by granting summary disposition in favor of plaintiffs on its declaratory action.

3. The Court of Claims abused its discretion by entering the preliminary injunction given plaintiffs' failure to establish a likelihood of success on the merits and plaintiffs' failure to establish irreparable harm. And because the Court of Claims erred by concluding that a constitutional violation existed, it necessarily followed that the Court of Claims abused its discretion by entering the permanent injunction.

Reversed and remanded for the immediate entry of summary disposition in favor of defendants.

BOONSTRA, J., concurring, fully agreed with the opinion of the Court but wrote separately to express his concerns about judicial overreach in recent years. For instance, in this case, the Court of Claims ordered oral argument on plaintiff's request for a preliminary injunction even though plaintiffs had not filed a motion for injunctive relief. Additionally, Judge BOONSTRA observed that in the face of an adverse decision on the constitutional issue raised in *League of Women Voters of Mich*, 333 Mich App 1, plaintiffs in this case embarked on a creative effort to dodge the effect of that decision, taking advantage of expedited briefing on a "motion" that had never been filed, oral argument on a "motion" that had never been filed, a reframing of plaintiffs' arguments to sidestep the adverse decision in *League of Women Voters of Mich*, 333 Mich App 1, the "augmentation" of plaintiffs' complaint to conform to those reframed arguments, and errors on the merits as outlined in the opinion of the Court. Furthermore, Judge BOONSTRA believed thatif circumstances had permitted the examination of the

question of standing, the Court might have come to the conclusion that plaintiffs lacked standing because, in bringing a facial constitutional challenge, it could plausibly be argued that plaintiffs were not asserting a special injury or right—or substantial interest—that would be detrimentally affected in a manner different from the citizenry at large. Plaintiffs should have sought the remedy of mandamus but did not do so. As a result, it could be argued that plaintiffs lacked standing.

1. ELECTION LAW — ABSENT-VOTER BALLOTS — BALLOT-RECEIPT DEADLINE.

MCL 168.759b and MCL 168.764a provide that ballots submitted by absent voters must be received by election officials before polls close at 8:00 p.m. on election day in order to be counted; the 8:00 p.m. ballot-receipt deadline does not violate Const 1963, art 2, § 4.

2. ELECTION LAW — ABSENT-VOTER BALLOTS — BALLOT-HANDLING RESTRICTIONS.

MCL 168.764a and MCL 168.932(f) are ballot-handling provisions that restrict who, other than the voter, may possess, solicit, or deliver an absent voter's ballot; the restrictions in MCL 168.932(f) are reasonable, nondiscriminatory, and warranted to further the important regulatory interest of protecting against voter fraud.

Perkins Coie LLP (by *Marc E. Elias*, *Uzoma N. Nkwonta*, *Courtney A. Elgart*, *Jyoti Jasrasaria*, and *Reina Almon-Griffin*) and *Salvatore Prescott Porter & Porter* (by *Sarah S. Prescott*) for the Michigan Alliance for Retired Americans, Detroit/Downriver Chapter of the A. Philip Randolph Institute, Charles Robinson, Gerard McMurren, and Jim Pedersen.

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 and the Attorney General.

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

Amici Curiae:

Butzel Long, PC (by *Kurtis T. Wilder*, *Joseph E. Richotte*, and *Steven R. Eatherly*) for the Michigan Republican Party and the Republican National Committee.

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

CAMERON, P.J. Intervening defendants, the Senate and the House of Representatives (collectively, the Legislature), appeal by right a September 30, 2020 opinion and order of the Court of Claims that granted declaratory and injunctive relief in favor of plaintiffs with respect to the receipt deadline for absentee ballots and ballot-handling restrictions that limit who may lawfully possess another voter's ballot. For the reasons stated in this opinion, we reverse.

I. FACTS AND PROCEDURE

In June 2020, plaintiffs filed a complaint against defendant Secretary of State (the Secretary) and defendant Attorney General, seeking declaratory and injunctive relief related to the handling and counting of absent-voter ballots for the 2020 general election.[1] Plaintiffs later filed an amended complaint, asserting

[1] Plaintiffs' original complaint requested preliminary and permanent injunctive relief. The Court of Claims later entered the following scheduling order: "**IT IS HEREBY ORDERED**: that oral argument on Plaintiff's request for Declaratory and Injunctive relief is scheduled for **Wednesday, July 08, 2020 at 11:00 a.m. via Zoom**. Plaintiff's brief shall be filed by Friday, June 26, 2020 at 12:00p.m. Defendant's response is due by Friday, July 03, 2020 at 12:00p.m. No replies are permitted." Thereafter, plaintiffs filed a brief entitled "BRIEF IN SUPPORT OF PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF IN COMPLIANCE WITH THE COURT'S 6/19/20 SCHEDULING ORDER" in support of their demand for preliminary

facial and as-applied challenges to the constitutionality of three laws: (1) a deadline requiring that ballots submitted by absent voters must be received by election officials before polls close at 8:00 p.m. on election day in order to be counted; (2) a ballot-handling provision that restricts who, other than the voter, may possess, solicit, or deliver an absent voter's ballot; and (3) a requirement that voters who choose to submit their ballot by mail must first affix the necessary postage to their envelope to ensure delivery. In relevant part, plaintiffs alleged that these laws, in combination with the anticipated delay in the delivery of mail due to the COVID-19 pandemic, impose unconstitutional burdens on plaintiffs' right to vote absentee in violation of Const 1963, art 1, § 2. Plaintiffs urged the Court of Claims to declare these laws unconstitutional and to suspend the enforcement of these election laws for the 2020 general election. Plaintiffs further asked the court to order that all absent-voter ballots postmarked before election day and received within 14 days of election day must be counted, to suspend the ballot-handling restrictions, and to require that Michigan provide prepaid postage to all voters who requested an absentee ballot.

Plaintiffs later requested that the Court of Claims issue a preliminary injunction, and the Court of Claims did so in part. Thereafter, plaintiffs and defendants filed competing motions for summary disposition. Ultimately, the Court of Claims granted partial relief to plaintiffs, concluding that plaintiffs had established two as-applied constitutional violations of plaintiffs' right to vote absentee in the 2020 general election. The

injunctive relief. In defendants' response, defendants noted that plaintiffs had not moved for a preliminary injunction before the trial court issued its scheduling order.

Court of Claims issued an order enjoining the operation of two election laws: the deadline for mail-in absent-voter ballots and the restriction limiting who can lawfully possess, solicit, and deliver another person's ballots. The Court of Claims ordered that mail-in ballots received after the polls closed on election night would now be eligible to be counted up to 14 days later, provided that the "ballot is postmarked *before* election day" and received by the clerk within 14 days of the election.[2] The Court of Claims also suspended the ballot-handling restrictions regarding third parties possessing and delivering absentee ballots as long as the third party's conduct occurs from 5:01 p.m. on the Friday before the 2020 general election until polls close, so long as the absent voter gives his or her approval. The Court of Claims rejected plaintiffs' final claim that the state was constitutionally required to provide prepaid postage for absent voters to use after completing their ballots and granted summary disposition in favor of defendants with respect to this claim only.

After defendants elected not to appeal, the Legislature, which had appeared as amicus in the Court of Claims proceedings, successfully intervened and filed the instant appeal. The Republican National Committee and the Michigan Republican Party appear on appeal as amici.[3]

---

[2] The Court of Claims held, in relevant part: "Consistent with MCL 168.822, the timely postmarked ballot must be received by the clerk's office no later than 14 days after the election has occurred, so as not to interfere with the board of county canvassers' duty to certify election results by the fourteenth day after the election."

[3] *Mich Alliance for Retired Americans v Secretary of State*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354993).

II. LEGAL BACKGROUND

Michigan law formerly required voters to designate one of six reasons to support a request to vote absentee. In November 2018, Michigan voters approved Proposal 3, which bestowed a constitutional right to "no-reason" absentee voting on all Michigan voters. Const 1963, art 2, § 4(1)(g) now provides that Michigan voters shall have the right "to vote an absent voter ballot without giving a reason . . . ." The Legislature then enacted 2018 PA 603, which amended the Michigan Election Law accordingly.

Under the Michigan Election Law, MCL 168.1 *et seq*., registered voters may apply for an absentee ballot by completing an application to receive an absentee ballot. The application from an already-registered voter must be made before "4 p.m. on the day before the election." MCL 168.761(3). An unregistered voter, however, may apply for an absentee ballot as late as "before 8 p.m. on election day" provided that he or she does so in person at the clerk's office. MCL 168.761(3). Notably, if a voter applies for an absentee ballot after 5:00 p.m. on the Friday before an election, "[t]he clerk of a city or township shall not send by first-class mail an absent voter ballot . . . ." MCL 168.759(2). The Secretary has issued instructions to clerks to transmit a ballot to a voter by mail only when adequate time exists for the voter to receive the ballot by mail, vote, and return the ballot before 8:00 p.m. on election day.

By law, an absent-voter ballot contains the following instructions to the voter: (1) read the voting instructions; (2) after voting, place the ballot in the secrecy sleeve or fold it to conceal the votes; (3) place the ballot in the return envelope and seal it; (4) sign and date the envelope and, if assistance in voting was required, mark

that on the envelope; and (5) use one of four methods to deliver the return envelope to the clerk. MCL 168.764a.

Step Five of the instructions provides four methods of delivering completed absent-voter ballots to the clerk. First, voters may deposit ballots in "the United States mail or with another public postal service, express mail service, parcel post service, or common carrier." MCL 168.764a, Step 5(a). Voters who choose to use the United States mail or a delivery service must "[p]lace the necessary postage upon the return envelope . . . ." MCL 168.764a, Step 5(a). Second, a voter may deliver the completed absentee ballot in person. MCL 168.764a, Step 5(b). Third, a voter may mail or deliver his or her ballot through "a member of the immediate family of the voter including a father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandparent, or grandchild or an individual residing in the voter's household . . . ." MCL 168.764a, Step 5(c). But a person who is not a member of a voter's immediate family or who does not reside in the voter's household is prohibited from possessing another person's ballot; indeed, to do so subjects the person to prosecution for a five-year felony. MCL 168.764a; MCL 168.761; MCL 168.932(f); MCL 168.935. The fourth and final method is that a voter who is unable to return his or her absent-voter ballot by any of the other authorized methods may "request by telephone that the clerk who issued the ballot provide assistance in returning the ballot." MCL 168.764a, Step 5(d). When the proper request is made before "5 p.m. on the Friday immediately preceding the election," the clerk's office is required to pick up and deliver the absent-voter ballot.[4] MCL 168.764a, Step

[4] The pertinent sentence reads, "The clerk is required to provide assistance if you are unable to return your absent voter ballot as

5(d); see also MCL 168.764b(4)(c). When the request occurs after 5:00 p.m. on the Friday immediately preceding the election, the clerk may—but is not duty bound—to pick up and deliver the absent-voter ballot.[5]

Notably, if an absent voter's ballot is returned to the clerk's office in an unauthorized manner, the ballot will not be "invalidated solely because the delivery to the clerk was not in compliance" with the statutes. MCL 168.764b(7). Rather, the ballot will be processed as a challenged ballot. MCL 168.764b(7). Completed ballots must be received by the clerk "before the close of the polls on election day."[6] MCL 168.764a, Step 6. Furthermore, MCL 168.759b provides, in relevant part, that "[t]o be valid, ballots must be returned to the clerk in time to be delivered to the polls prior to 8 p.m. on election day." Ballots not received by 8:00 p.m. on election day are not counted. MCL 168.764a, Step 6

---

specified in (a), (b), or (c) above, if it is before 5 p.m. on the Friday immediately preceding the election, and if you are asking the clerk to pick up the absent voter ballot within the jurisdictional limits of the city, township, or village in which you are registered." MCL 168.764a, Step 5(d). Therefore, under the plain language of the statute, a voter need only call the clerk before 5:00 p.m. on the Friday immediately preceding the election to trigger the clerk's duty to provide ballot-delivery service for eligible absent voters.

[5] The clerk's obligations found in MCL 168.764b(4) and (5) are essentially the same except that MCL 168.764b(5) reduces the clerk's responsibility to provide ballot-delivery services from a "shall" to "may" if the request for assistance is made after 5:00 p.m. on the Friday immediately preceding the election. Although not particularly relevant to this appeal, MCL 168.764b(5) also removes the restriction that, during this narrow window, the absent-voter ballot be within the jurisdictional limits in which the absent voter is registered; election officials therefore may provide ballot-delivery service for absent voters under MCL 168.764b(5) even if the ballot is outside of those jurisdictional limits.

[6] The polls close at 8:00 p.m. MCL 168.720.

("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.").

III. ANALYSIS

A. STANDING

Plaintiffs argue that the Legislature does not having standing to file an appeal in this matter. We disagree.

Whether a party has standing is a question of law subject to review de novo. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011). In *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 168-169; 952 NW2d 491 (2020) (*League I*), aff'd in part and vacated in part 506 Mich 561 (2020), this Court observed as follows:

> [T]his Court has jurisdiction over appeals by right "filed by an aggrieved party." MCR 7.203(A). *Black's Law Dictionary* (11th ed) defines "aggrieved party" as "[a] party entitled to a remedy; [especially], a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006) (quotation marks and citation omitted).
>
> * * *
>
> " 'Standing is the legal term used to denote the existence of a party's interest in the outcome of the litigation; an interest that will assure sincere and vigorous advocacy.' " *Allstate Ins Co v Hayes*, 442 Mich 56, 68; 499 NW2d 743 (1993) (citations omitted).

Furthermore, our Supreme Court has ruled, in pertinent part, that "a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Federated Ins Co*, 475 Mich at 292. Therefore, the appellate litigant also must show a "concrete and particularized injury." *Id*. at 291.

Here, plaintiffs argue that the Legislature has not met its heavy burden of establishing that it has standing on appeal. In so arguing, however, plaintiffs overlook the Legislature's interests given that the Legislature is "an entity that certainly has an interest in defending its own work." *League of Women Voters of Mich v Secretary of State*, 506 Mich 905, 911 n 1 (2020) (MCCORMACK, C.J., dissenting). This is particularly the case here given that the Legislature is defending the constitutionality of several of its statutes, as well as the manner in which future elections are to be conducted in this state. The Legislature—a body that is subject to these election procedures and that is composed of elected officials of the citizens of this state—undoubtedly has a significant interest in the instant appeal. Indeed, it is difficult to envision interests that would assure more sincere and vigorous advocacy.

Although plaintiffs oppose the Legislature's standing on the basis of *League I*, we conclude that *League I* is distinguishable. The Legislature in *League I* sought—as a plaintiff—a declaratory judgment to enforce particular legislation; in doing so, the Legislature was "plainly challenging the actions of members of the Executive Branch." *League I*, 331 Mich App at 173. In this case, however, the Legislature sought to intervene after defendants, constitutional officers within the Executive Branch, declined to appeal the Court of

Claims decision. The Legislature, as a body made up of the elected representatives of the citizens of Michigan, is essentially taking the place of defendants in this case to ensure an actual controversy with robust contrary arguments. Indeed, the Court of Claims initially denied the Legislature's motion to intervene and only permitted intervention after the Executive Branch abdicated its role in this litigation. As noted by this Court in *League of Women Voters of Mich v Secretary of State*, 333 Mich App 1, 11; 959 NW2d 1 (2020) (*League II*) (opinion by SAWYER, P.J.),

> 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.

For these reasons, we conclude that the Legislature has standing to appeal.

Amici also challenge plaintiffs' standing to bring suit, arguing that plaintiffs have not shown a special injury. However, plaintiffs in this action include the Michigan Alliance for Retired Americans (MARA), which is a nonprofit corporation with over 200,000 members, many of whom are elderly and/or disabled, and the Detroit/Downriver Chapter of the A. Philip Randolph Institute, the senior constituency group of the AFL-CIO. The individual plaintiffs, Charles Robinson, Gerard McMurran, and Jim Pedersen, are all members of MARA, are over the age of 61, and are retired union members. Given the exigent circumstances here and given that plaintiffs have asserted their members' status as elderly or disabled individuals—some of whom have underlying health

conditions that make them more vulnerable to COVID-19—we assume without deciding that plaintiffs have standing. See *House of Representatives v Governor*, 333 Mich App 325, 343; 960 NW2d 125 (2020) ("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."), rev'd in part on other grounds 506 Mich 934 (2020).

B. DECLARATORY RELIEF

The Legislature argues that the Court of Claims erred by granting summary disposition in favor of plaintiffs on its declaratory action. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition in an action seeking declaratory relief. *League I*, 331 Mich App at 167. The constitutionality of a statute presents a question of law that this Court reviews de novo. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009).

The Legislature first argues that the Court of Claims should have analyzed plaintiffs' declaratory claims as a facial attack on the election laws because plaintiffs' allegations do not amount to an as-applied challenge. An "as-applied" challenge "considers the specific application of a facially valid law to individual facts," while a "facial" constitutional challenge considers the plain language of the challenged provision (i.e., on its face). *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). In other words, a facial challenge is a claim that the law is "invalid *in toto*—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In contrast, "[a]n as-applied challenge, to be distinguished from a facial challenge, alleges a

present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014) (quotation marks and citation omitted).

Frequently, as here, litigants describe their challenges as both facial and as-applied challenges. This is unsurprising given that elements of the two can overlap. See *Citizens United v Fed Election Comm*, 558 US 310, 331; 130 S Ct 876, 893; 175 L Ed 2d 753 (2010) (stating that "the distinction between facial and as-applied challenges is not so well defined"). However, as a general rule, substance prevails over the particular wording used in a complaint. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 481; 642 NW2d 406 (2002). Thus, a litigant's labels are not what matter.

In *John Doe No 1 v Reed*, 561 US 186, 194; 130 S Ct 2811; 177 L Ed 2d 493 (2010), the United States Supreme Court examined whether a claim was a facial challenge or an as-applied challenge. In analyzing the issue, the *Reed* Court examined the substance of the plaintiffs' claim, which contained elements of a facial challenge because it was not limited to the plaintiffs' specific case, but it also resembled an as-applied challenge because it did not seek to strike the challenged statute in its entirety. *Id*. The *Reed* Court then examined the plaintiffs' requested relief: an injunction barring the Secretary of State " 'from making referendum petitions available to the public.' " *Id*. (citation omitted). The *Reed* Court declared that the label attached to the claim was not dispositive; rather, the Court held that the deciding factor was that the relief the plaintiffs sought would "reach beyond the particular circumstances of these plaintiffs." *Id*. The *Reed* Court ruled that the plaintiffs must "satisfy our standards for a

facial challenge to the extent of that reach." *Id*., citing *United States v Stevens*, 559 US 460, 472-473; 130 S Ct 1577; 176 L Ed 2d 435 (2010).

On casual inspection, plaintiffs' allegations appear to be as-applied challenges because they refer to plaintiffs' particular vulnerability given the facts—COVID-19 and an alleged mail slowdown—as infringements on their right to vote only in the November 2020 general election. A reading of plaintiffs' request for relief, however, brings into focus the breadth of their requests, which are not confined only to plaintiffs. Specifically, the relief plaintiffs seek would apply to *all* Michigan voters who choose to cast their ballots by mail—not just to the elderly and disabled members of plaintiffs' organizations. Therefore, the ballot-deadline relief extends well beyond the circumstances of the individual plaintiffs and their organizations and would reach all Michigan voters who, for whatever reason, would benefit from more time in which to mail their ballots. Furthermore, lifting the restrictions and criminal penalties concerning who may handle absent-voter ballots would apply to all Michigan voters as long as the conduct in question occurs after 5:00 p.m. on the Friday before the election. While plaintiffs' challenge arises only in relation to a specific fact pattern—the November 3, 2020 election during the COVID-19 pandemic and slow mail delivery—the relief plaintiffs seek applies to every Michigan absent voter. Therefore, the substance of plaintiffs' amended complaint is a facial challenge of the relevant statutes, and the Court of Claims erred by failing to analyze the claims accordingly.[7]

---

[7] We reject plaintiffs' argument that the fact that the changes would apply only to the November 2020 election removes this case from a facial analysis. Because the relief would extend to all Michigan absent

That said, we must next consider whether plaintiffs were entitled to summary disposition on their declaratory action. As already stated, plaintiffs alleged that the ballot-receipt deadline required by MCL 168.759b and MCL 168.764a and the ballot-handling restrictions required by MCL 168.932(f) violate Const 1963, art 2, § 4(1)(g), which guarantees voters the right to vote by absentee 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." Importantly, because Const 1963, art 2, § 4 is a self-executing constitutional provision, the Legislature is not permitted to impose additional undue obligations. *Durant v Dep't of Ed*, 186 Mich App 83, 98; 463 NW2d 461 (1990).

The guiding framework for an examination of the constitutionality of a statute begins with the presumption that statutes are constitutional, and "courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127 (2003). "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." *In re*

---

voters—not just plaintiffs—in the November 2020 election, it does not survive the *Reed* analysis. Plaintiffs also contend that even if the relief extends beyond their circumstances, reversal still is not required because courts often invalidate laws facially on the basis of their impact on certain communities and subgroups. For example, plaintiffs cite *Crawford v Marion Co Election Bd*, 553 US 181; 128 S Ct 1610; 170 L Ed 2d 574 (2008), in which the United States Supreme Court considered a law's impact on identifiable subgroups for whom the burden may be most severe. For the reasons already explained, however, we conclude that the relief plaintiffs seek is not tailored to a subgroup or subgroups. Instead, the relief plaintiffs seek would apply to all absent voters.

Request for Advisory Opinion, 479 Mich at 11 (quotation marks, citations, and brackets omitted).

With regard to plaintiffs' arguments concerning the ballot-receipt deadline, we need not analyze this point. In this Court's divided opinion in *League II*, this Court held that the 8:00 p.m. ballot-receipt deadline survives a facial challenge and does not violate Const 1963, art 2, § 4. *League II*, 333 Mich App at 29-30 (opinion by SAWYER, P.J.); *id*. at 32 (RIORDAN, J., concurring). We are not only bound by that holding, but we fully agree with it. MCR 7.215(J)(1).

Although this Court in *League II* did not address the statutory provisions that provide ballot-handling restrictions, we conclude that MCL 168.932(f) also survives a facial challenge. As noted in *League II*:

> In [*In re Request for Advisory Opinion*, 479 Mich at 35,] . . . 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. [*League II*, 333 Mich App at 27-28 (opinion by SAWYER, P.J.).]

Indeed, although "the right to vote is an implicit fundamental political right that is preservative of all rights," that right is not absolute. *Promote the Vote v Secretary of State*, 333 Mich App 93, 119-120; 958 NW2d 861 (2020) (quotation marks and citation omit-

ted). "[S]tates have a compelling interest in preserving the integrity of their election processes . . . ." *In re Request for Advisory Opinion*, 479 Mich 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). Our Supreme Court has described the *Burdick* test as balancing between protecting the citizens' right to vote and protecting against fraudulent voting. *Id*. at 35. It has commented as follows regarding application of the *Burdick* test:

> [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. 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 . . . ." [*In re Request for Advisory Opinion*, 479 Mich at 21-22 (citation omitted).]

In this case, the Legislature argues that the ballot-handling restrictions are intended to combat voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. . . . While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v Marion Co Election Bd*, 553 US 181, 196; 128 S Ct 1610; 170 L Ed 2d 574 (2008).

Indeed, designing adjustments to our election-integrity laws is the responsibility of our elected policy-makers, not the judiciary. See Const 1963, art 2, § 4(2) ("[T]he legislature shall enact laws to regulate the time, place and manner of all . . . 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."). To be sure, the pandemic has caused considerable change in our lives, but election officials have taken considerable steps to alleviate the potential effects by making no-reason absent voting easier for the 2020 election. For instance, after Proposal 3, municipalities across Michigan now have installed more than 700 ballot drop boxes available for absent voters who do not want to use the mail to deliver their ballot, and the Secretary has reported that there will be more than 1,000 drop boxes available by election day.[8] Additionally, satellite election centers embedded in some communities allow eligible persons to register to vote, receive a ballot, vote, and drop off their completed ballot all on site.[9] Our Legislature has addressed the expected increase of absent-voter ballots by empowering clerks to begin processing absent-voter ballots earlier in an effort to provide a final vote tally after polls close for the 2020 election. MCL 168.765a(8). While plaintiffs

[8] Campbell, *Absentee Ballot Drop Boxes Boom in Michigan, Despite Controversy Elsewhere*, Bridge Michigan (October 5, 2020) <https://www.bridgemi.com/michigan-government/absentee-ballot-drop-boxes-boom-michigan-despite-controversy-elsewhere?amp> (accessed October 15, 2020) [https://perma.cc/V8UJ-ARL3].

[9] Warikoo, *Detroit Prepares for Historic Election with Early Voting Options*, Detroit Free Press (October 9, 2020) <https://www.freep.com/story/news/local/michigan/detroit/2020/10/09/city-early-voting-satellite-centers-drop-off-boxes/3597687001/> (accessed October 15, 2020) [https://perma.cc/5NPR-4LKV].

might view these efforts as inadequate first steps, there is no reason to believe that these specific efforts are constitutionally required, even in the midst of a pandemic. Instead, they reflect the proper "exercise of discretion, the marshaling and allocation of resources, and the confrontation of thorny policy issues" that the people have reserved exclusively for our legislative and executive branches to exercise. *League II*, 333 Mich App at 39 (RIORDAN, J., concurring). Imposing limits on whether third parties can possess or collect ballots simply reflects a policy decision by a duly elected Legislature, where the Constitution places responsibility to regulate and preserve the purity of elections.

Although record evidence in the Court of Claims supported that voter fraud is very rare, our Supreme Court has ruled that "there is no requirement that the Legislature 'prove' that significant in-person voter fraud exists before it may permissibly act to prevent it." *In re Request for Advisory Opinion*, 479 Mich at 26. Even so, the Secretary acknowledges in its brief on appeal that voter fraud has occurred in the past in relation to voter assistance and that "[t]he challenged statutes . . . were amended in 1995 because investigations by election officials revealed abuse of that process." Indeed, until 1995, the statutes permitted any registered voter to return another voter's completed absentee ballot, but that "led to abuse by campaign workers who were eager to 'assist' absentee voters." *People v Pinkney*, unpublished per curiam opinion of the Court of Appeals, issued July 14, 2009 (Docket Nos. 282144 and 286992), p 15, citing House Legislative Analysis, HB 4242 (October 17, 1995). In sum, we conclude that the restrictions in MCL 168.932(f) are reasonable and nondiscriminatory and that the restrictions are warranted to further an important regulatory interest: protecting against voter fraud.

However, the state's interest in protecting against voter fraud must be balanced against the voter's interest in the right to vote. The Court of Claims concluded that because the clerk's office was not *required* to pick up and deliver ballots after 5:00 p.m. on the Friday immediately preceding the election, there was an unacceptable risk that during this brief time before the election some homebound absent voters would be disenfranchised by a voter-fraud provision that limits who the voters may entrust to possess and deliver their ballots. Thus, the question before this Court is whether the requirement that clerks provide voter assistance only until 5:00 p.m. on the Friday before an election—in addition to the COVID-19 pandemic and the asserted delivery slowdown at the United States Postal Service (the USPS)—imposes an unconstitutional burden on the right to vote absentee. We conclude that it does not. First, even with the 5:00 p.m. limit, voters are not deprived of the choice to vote absentee; they retain all the options of delivering their ballots in person to the clerk, using one of over 1,000 drop boxes in the state, using community satellite voter centers, if available, or relying on any family member or household resident to deliver their ballots.[10] Additionally, as pointed out by defendants, the clerk is required to assist voters with returning their ballots if the voters request such assistance before 5:00 p.m. on the Friday before an election, and the clerk may continue to provide door-to-door delivery service for qualified absent voters after that time. See MCL 168.764b(5) (providing that, under

[10] In view of those other options, voters are not compelled to deliver their ballots in person, which likely would be found unconstitutional as a severe burden. See generally *Deleeuw v State Bd of Canvassers*, 263 Mich App 497, 502 n 1; 688 NW2d 847 (2004) (noting that to require a candidate for a federal position in public office to file her petition in person would be violative of the United States Constitution).

certain circumstances, the clerk may make arrangements to collect a ballot from a voter personally or by an authorized assistant). In furtherance of this effort, a clerk may appoint assistants to accept delivery of absentee ballots at any location within the city or township. MCL 168.764b(3).[11] That option, which has not been suspended during the pandemic, further mitigates the burden on voters who need assistance. Amici additionally point out that local clerks may provide "curbside voting," where registered voters can vote in their cars at the polling place on election day. Given those varied options, we cannot conclude that the ballot-handling restrictions impermissibly burden the right to vote absentee. On balance, the ballot-handling restrictions pass constitutional muster given the state's strong interest in preventing fraud.

Furthermore, even if plaintiffs' claims could be considered an as-applied challenge, those claims do not survive. In light of the COVID-19 pandemic, the Court of Claims concluded that returning the ballot by mail is the "only realistic option" for those with underlying health conditions who wish to vote absentee. That finding is unsupported given the additional ballot-delivery options available to absentee voters. Additionally, as pointed out by amici, the pandemic and resulting USPS mail delivery slowdowns are not attributable to the state. Although those factors may complicate plaintiffs' voting process, they do not automatically amount to a loss of the right to vote absentee. The

[11] That section provides, in relevant part: "The clerk of a city or township may appoint the number of assistants necessary to accept delivery of absent voter ballots at any location in the city or township. An appointment as assistant to accept delivery of absent voter ballots must be for 1 election only. An assistant appointed to receive ballots at a location other than the office of the clerk must be furnished credentials of authority by the clerk."

letter from USPS General Counsel Thomas J. Marshall, which indicated that the law creates an "incongruity" and a "mismatch" between mail delivery standards and deadlines for casting mail-in ballots in Michigan, is not dispositive. The cited incongruity is not dependent on the COVID-19 pandemic or the USPS slowdown; Marshall's conclusion was on the basis of the USPS ideal delivery rates rather than those experienced during COVID-19. The fact that the Legislature drafted the statutes without accounting for USPS deadlines does not mean that the statutes are unconstitutional as applied. Because plaintiffs retain other options for delivering their completed ballots, they have not lost their constitutional right to vote absentee.

C. INJUNCTIVE RELIEF

The Legislature next challenges the Court of Claims' entry of the preliminary and permanent injunctions. This Court reviews for an abuse of discretion a trial court's decision to grant injunctive relief. *Taylor v Currie*, 277 Mich App 85, 93; 743 NW2d 571 (2007); *Schadewald v Brulé*, 225 Mich App 26, 39; 570 NW2d 788 (1997). "A court abuses its discretion when a decision falls outside the range of reasonable and principled outcomes." *House of Representatives*, 333 Mich App at 363.

The Legislature first argues that the Court of Claims' "preliminary-injunction analysis was deeply flawed" and that this Court should reverse the September 18, 2020 opinion and order. However, we conclude that this argument is moot. "The objective of a preliminary injunction is to maintain the status quo pending a final hearing regarding the parties' rights." *Alliance for the Mentally Ill of Mich v Dep't of Community Health*, 231

Mich App 647, 655-656; 588 NW2d 133 (1998). In this case, the Court of Claims granted plaintiffs' request for a preliminary injunction in its September 18, 2020 opinion and order. Thereafter, on September 30, 2020, the Court of Claims granted a permanent injunction. Because a permanent injunction was entered after the Court of Claims held "a final hearing regarding the parties' rights," the Legislature's challenge to the preliminary injunction is moot and need not be addressed. See *id*. Nonetheless, we have briefly considered the argument and conclude that the Court of Claims abused its discretion by entering the preliminary injunction given plaintiffs' failure to establish a likelihood of success on the merits and plaintiffs' failure to establish irreparable harm. See *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148; 809 NW2d 444 (2011).

The Legislature also challenges the Court of Claims' entry of the permanent injunction. In the September 30, 2020 opinion and order, the Court of Claims concluded that it was proper to grant a permanent injunction. In doing so, the Court of Claims addressed some of the factors required to be considered before a permanent injunction can be entered and "incorporate[d] its reasoning from the September 18, 2020 opinion and order that . . . the ballot receipt deadline and the voter assistance ban violate art 2, § 4." The Court of Claims further incorporated into its September 30, 2020 "opinion and order the narrow injunctive relief granted in the Court's September 18, 2020 opinion and order." "It is beyond reasonable dispute that a trial court has the authority, and, in appropriate cases, the duty, to enter permanent injunctive relief against a constitutional violation." *Mich Coalition of State Employee Unions v Mich Civil Serv Comm*, 465 Mich 212, 219; 634 NW2d 692 (2001)

(emphasis omitted). Because the Court of Claims erred by concluding that a constitutional violation existed, it necessarily follows that the Court of Claims abused its discretion by entering the permanent injunction.

We reverse and remand for the immediate entry of summary disposition in favor of defendants. This opinion has immediate effect. MCR 7.215(F)(2). We do not retain jurisdiction.

BOONSTRA and GADOLA, JJ., concurred with CAMERON, P.J.

BOONSTRA, J. (*concurring*). I fully concur in the opinion of the Court. I write separately to underscore that judicial overreach is just as pernicious as executive overreach. The judicial overreach in this case requires that we reverse the Court of Claims, vacate its order granting summary disposition in favor of plaintiffs as well as its preliminary and permanent injunctions, and remand with instructions to immediately enter an order granting summary disposition in favor of defendants.

I. INTRODUCTION

The genius of our Founding Fathers in establishing a system of three separate and coequal branches of government was in recognizing that it is the checks and balances of such a system that serve to preserve our liberty. As I recently observed in *Slis v Michigan*, 332 Mich App 312, 378; 956 NW2d 569 (2020) (BOONSTRA, J., concurring), lv den 506 Mich 912 (2020), preservation of liberty "is why legislatures enact laws and why it is up to the executive to sign them (or not). And it is why the judiciary defers to the legislature on matters of public policy." Without question, such a system creates certain

inefficiencies in government. After all, it would be much easier if a benevolent dictator could simply rule by decree without having to endure the inconvenience of others' input. But those inefficiencies are there by design; they are the natural and intended consequence of our system of checks and balances. And those inefficiencies are therefore the price we willingly pay so that we may live under the banner of freedom in the United States of America.

The tensions between the branches of government have existed since our nation's founding, and the relative power of any given branch has ebbed and flowed over time. Sometimes it is the executive branch that engages in governmental overreach. See, e.g., *Slis*, 332 Mich App at 357-358 (opinion of the Court) (affirming the preliminary injunction of emergency rules banning the sale of flavored nicotine vapor products); *id*. at 393 (BOONSTRA, J., concurring) ("As the adage goes, 'Give them an inch, and they'll take a mile.' Amidst the COVID-19 pandemic, that adage has new meaning. It even applies to vaping."). And sometimes the Legislature is, perhaps unwittingly, complicit in executive overreach. See *In re Certified Questions from the US Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332, 338; 958 NW2d 1 (2020) (holding that the Emergency Powers of the Governor Act of 1945, MCL 10.31 *et seq*., "is an unlawful delegation of legislative power to the executive branch in violation of the Michigan Constitution" and accordingly that "the executive orders issued by the Governor in response to the COVID-19 pandemic now lack any basis under Michigan law").

Alexander Hamilton once said that the judicial branch of government, lacking "influence over either the sword or the purse," was "the weakest of the

three" branches of government. The Federalist No. 78 (Hamilton) (Rossiter ed, 1961), p 433. He continued:

> [T]hough individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments[.] [*Id*. at 434 (citation omitted).]

But in recent years (or decades), the judicial branch has often also overreached. Too often those who have been unsuccessful in advancing their political agenda through the political process, i.e., through the legislative and executive branches, have turned to the judiciary to achieve their political ends. And too often they have found judges who are induced, under the cloak of a robe, to impose policy preferences by judicial fiat. But policymaking under the guise of judicial decision-making is simply tyranny by another name. See *Morrison v Olson*, 487 US 654, 712; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (Scalia, J., dissenting) (stating that judicial forays into policymaking result in a government that is "not only not the government of laws that the Constitution established; it is not a government of laws at all"). Courts are not mini-legislatures, and judges are not policymakers. See, e.g., *Kyser v Kasson Twp*, 486 Mich 514, 536; 786 NW2d 543 (2010) (noting that "policymaking is at the core of the legislative function"); *Myers v Portage*, 304 Mich App 637, 644; 848 NW2d 200 (2014) ("[M]aking public policy is the province of the Legislature, not the courts."); see also *Morrison*,

487 US at 697 (Scalia, J., dissenting), quoting Mass Const 1780, art XXXX, Part 1 (" 'In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.' ").

II. PROCEDURAL BACKGROUND

A. *LEAGUE OF WOMEN VOTERS*

Recently, in a sister case to this one, this Court considered a complaint for mandamus in which the plaintiffs[1] alleged that the statutory requirement that absentee ballots be received by the local election clerk by 8:00 p.m. on election day[2] (the ballot-receipt deadline) violated Const 1963, art 2, § 4, as amended by the passage of Proposal 3[3] in November 2018. See *League of Women Voters of Mich v Secretary of State*, 333 Mich

[1] The plaintiffs in that case were the League of Women Voters of Michigan and three individuals who were League members and registered Michigan voters.

[2] This requirement is set forth in MCL 168.764a and MCL 168.764b.

[3] See Proposition No. 18-3 (2018). Proposal 3 granted all Michigan voters the constitutional right to vote by absentee ballot without stating a reason. Before the passage of Proposal 3, the right was a statutory one, provided that certain conditions were met. Specifically, before the passage of Proposal 3 and the subsequent enactment of 2018 PA 603, MCL 168.759 provided six grounds for requesting an absentee ballot: (1) being absent from the community on election day; (2) being physically unable to attend the polls without the assistance of another; (3) being unable to attend the polls because of the tenets of the voter's religion; (4) serving as an election inspector in a different precinct; (5) being 60 years of age or older; or (6) being confined to jail awaiting arraignment or trial.

App 1; 959 NW2d 1 (2020) (*League II*),[4] lv den 506 Mich 886 (2020), recon den 506 Mich 905 (2020).

I note that while the complaint in *League II* did briefly refer to the ballot-receipt deadline as "facially den[ying] voters their express constitutional right 'to choose' to submit their absentee ballots 'by mail' at any time within 40 days of election day," that complaint also cited the COVID-19 pandemic as the reason why expedited relief was necessary. It stated:

> Even before COVID-19 struck Michigan, voting by mail was set to play an unprecedented role in this year's elections, and its role will be magnified exponentially given the personal and public health risks of voting in person at a polling place. Michigan's absentee ballot voting process is simply not ready to meet its biggest test ever in the 2020 primary and general elections, when Michigan voters by the millions will attempt to vote by absentee ballot. This Complaint is an action for mandamus to compel the Secretary of State to perform her clear state constitutional duties in the administration of absentee ballot voting in Michigan, to protect the fundamental rights of the Plaintiffs and over 7 million Michigan voters.

This Court in *League II* denied the complaint for mandamus, notwithstanding the fact that defendant Secretary of State concurred with plaintiffs that the ballot-receipt deadline was unconstitutional. *League II*, 333 Mich App at 25-26. Our Supreme Court denied leave to appeal and denied reconsideration of that denial, with Justice VIVIANO observing that "this lawsuit appears to be a friendly scrimmage brought to obtain a binding result that both sides desire. Nearly from the start, the defendant Secretary of State has agreed with plaintiffs that the deadline must be struck

[4] I use the "*League II*" nomenclature for purposes of consistency with the opinion of the Court. The parties and the Court of Claims sometimes refer to that decision as "*LWV*."

down as unconstitutional." *League of Women Voters of Mich v Secretary of State*, 506 Mich 905, 905 (2020) (VIVIANO, J., concurring). He further observed: "This is not the way the judiciary works. In our adversary system, the parties' competing interests lead to arguments that sharpen the issues so that courts will 'not sit as self-directed boards of legal inquiry and research . . . .' " *Id*. at 906 (citation omitted).

B. PROCEEDINGS IN THE COURT OF CLAIMS

Although we briefly outline the procedural history of this case in the opinion of the Court, it is worthy of some further explication here because, in my judgment, a full description of the manner in which this case proceeded in the Court of Claims serves to highlight my concerns about judicial overreach. In doing so, I reserve judgment about how that overreach occurred, reiterate my great respect for all concerned, and cast aspersions on no one; my focus instead is on how and why the process did not, in my judgment, serve us or our judicial system well.

On June 2, 2020, i.e., 11 days after *League II* was filed in this Court but before *League II* was decided, plaintiffs filed this action in the Court of Claims, seeking injunctive and declaratory relief, again claiming (as was claimed in *League II*) that the ballot-receipt deadline was unconstitutional and additionally claiming that aspects of MCL 168.932(f) (the ballot-handling restrictions) were unconstitutional.[5] Like the complaint for mandamus in *League II*, plaintiffs' complaint

[5] In pertinent part, MCL 168.932(f) prohibits persons from attempting to influence how an absent voter should vote and limits those third persons who may return an absent-voter ballot to mail carriers and "member[s] of the immediate family of the absent voter including father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law,

in this case expressed concerns about the impact of COVID-19 on voting:

> Even in ordinary times, it would be reasonable to expect the shift toward absentee voting to continue in Michigan. But these are not ordinary times. Over the past few months, life in the United States has changed rapidly as the result of a highly infectious, novel coronavirus, which as of the date of this filing, has infected over 1.85 million and killed over 107,000 people across the country. The pandemic has hit Michigan particularly hard, infecting Michiganders from Detroit to the Upper Peninsula. To date, there have been over 57,500 confirmed cases of coronavirus in Michigan, and over 5,500 deaths from the respiratory illness it causes, COVID-19.

Plaintiffs' original complaint in this case did not specifically characterize its claims as presenting "facial" or "as-applied" constitutional challenges. But it did state:

> The ballot receipt deadline thus, *on its face*, denies voters their self-executing right "to choose" to submit their absentee ballots "by mail" at any time within 40 days of Election Day. [Citation omitted; emphasis added.]

---

daughter-in-law, grandparent, or grandchild; or a person residing in the absent voter's household . . . ." The reason for enacting these ballot-handling restrictions was described by the House Legislative Analysis Section in its analysis of HB 4242 of 1995 (which ultimately was adopted as 1995 PA 261 and codified as MCL 168.932(f)), as follows:

> Election officials say the current system is subject to abuse by campaign workers eager to "assist" voters. Without strict limits on who can handle absentee ballots, it is difficult to track their safe return and it is difficult to enforce laws against soliciting the return of absentee ballots, coercion and intimidation in filling out ballots, and tampering. Election officials have recommended stricter control over who can handle an absentee ballot and stiffer penalties for violations as a means of enhancing the integrity of the process. [See House Legislative Analysis, HB 4242 (October 17, 1995), p 1.]

Moreover, plaintiffs' complaint stated that "[i]n the face of the continuing pandemic, Michigan must take steps now to protect the fundamental voting rights of *all Michiganders*." (Emphasis added.) Further, it claimed, "With the primary and general elections fast approaching, the time to act is now, to prevent *widespread disenfranchisement* and effectuate the will of the voters so that *all* will have a safe and meaningful opportunity to participate in Michigan's elections." (Emphasis added.) It continued, "Flatly rejecting *all* absentee ballots that arrive after 8 p.m. on Election Day, *disenfranchises Michigan voters*—many of whom also lack reasonable access to safe, in-person voting options during the pandemic—for reasons entirely beyond their control." (Emphasis added.)

On June 15, 2020, and notwithstanding that plaintiffs had not yet filed a motion for preliminary injunction,[6] the Court of Claims issued an order directing defendants to file a "reply brief" to plaintiffs' complaint[7] by June 18, 2020, and scheduling a "hearing for the Preliminary Injunction" to occur on June 22, 2020.[8] The Court of Claims denied motions to intervene filed by the Michigan House of Representatives and the

[6] MCR 3.310(A)(1) provides that "[e]xcept as otherwise provided by statute or these rules, an injunction may not be granted before a hearing on a motion for a preliminary injunction or on an order to show cause why a preliminary injunction should not be issued." MCR 3.310(A)(3) provides that "[a] motion for a preliminary injunction must be filed and noticed for hearing in compliance with the rules governing other motions unless the court orders otherwise on a showing of good cause."

[7] Upon the filing of a complaint, a defendant generally is obligated to file either an answer to the complaint, MCR 2.110, or a motion for summary disposition, MCR 2.116. The Michigan Court Rules do not provide for the filing of a brief in response to a complaint.

[8] On June 19, 2020, the Court of Claims rescheduled the hearing for July 8, 2020, and ordered that plaintiffs file a brief by June 26, 2020, and that defendants file a response brief by July 3, 2020.

Michigan Senate (collectively, the Legislature), and by the Republican National Committee and the Michigan Republican Party, but granted them amici status.[9] It then held oral argument on plaintiffs' injunctive-relief request on July 8, 2020. It did so despite defendants'[10] expressed confusion in light of the fact that plaintiffs had not yet filed a motion for injunctive relief (and instead had only filed a complaint that included a prayer for such relief).[11]

On July 14, 2020, this Court issued its opinion in *League II*, and the Court of Claims therefore ordered the parties to file supplemental briefs "[i]n light of the release of" that decision. In their supplemental brief, defendants argued that "the *LWV* decision forecloses granting injunctive relief here on the duplicate claims" and that "[b]ased on the *LWV* decisions, only Plaintiffs' request for injunctive relief regarding the absent voter ballot delivery statutes appears to be a live issue before the Court." The Legislature concurred in that assessment. Plaintiffs, however, argued for the first time that *League II* presented purely a "facial" constitutional challenge, whereas plaintiffs in this case were present ing both "facial" and "as-applied" constitutional challenges.

---

[9] The Legislature moved for reconsideration of the Court of Claims' denial of their motion to intervene. The Court of Claims denied the motion for reconsideration. The Republican National Committee and the Michigan Republican Party filed in this Court an application for leave to appeal the Court of Claims' denial of their motion to intervene. This Court denied that motion. Our Supreme Court denied a further application for leave to appeal in that Court; a motion for reconsideration is now pending.

[10] Named as defendants were the Secretary of State and the Attorney General of Michigan.

[11] Indeed, defendants contended that plaintiffs were not entitled to preliminary injunctive relief in part because they had yet moved for such relief. They also argued that plaintiffs' request for preliminary injunctive relief should be denied on the merits.

On August 8, 2020, the Court of Claims issued an order that mistakenly referred to a pending "Motion for Preliminary Injunction" and then stated, "The plaintiffs raised both a facial and as applied challenge to several election statutes." It suggested that the experience of the just-completed August 2020 primary election "may or may not affect the nature of the as-applied arguments" and invited the parties to "augment their pleadings . . . ."[12]

Plaintiffs then filed an amended complaint that for the first time expressly alleged (as their original complaint had not) that they were presenting both facial and as-applied constitutional challenges. Plaintiffs contemporaneously filed a "Renewed Motion for Preliminary Injunction" (which, given the lack of any prior motion, apparently served to supplement the prior prayer for injunctive relief contained in plaintiffs' complaint) as well as a supplemental brief in support of their request for a preliminary injunction, now arguing that the ballot-receipt deadline was unconstitutional "as applied to the upcoming November [3, 2020] election." In response, defendants observed that "[*i*]*n response to the Court's suggestion in its order*, Plaintiffs' Amended Complaint makes clear that Plaintiffs are alleging facial and 'as-applied to the November election' claims." (Emphasis added.) Defendants nonetheless argued that this Court's ruling in *League II* "precludes Plaintiffs' facial and as-applied arguments under article 2, § 4." Further, they stated:

> Plaintiffs' as-applied claims appear to be indistinguishable from the facial claim raised in *LWV*. The facial challenge rejected by the *LWV* Court was also based on

[12] I note that defendants had not yet answered plaintiffs' complaint and therefore had not yet filed any "pleadings." MCR 2.110(A).

> different treatment in mail service for voters. If the Court determines that to be the case, it would mean that Plaintiffs' as-applied claims are likewise precluded by the decision in *LWV*.[13]

On August 31, 2020, defendants moved for summary disposition. Other than generically incorporating the arguments of their brief, they did not in any fashion address the constitutionality of the ballot-receipt deadline. They argued that the ballot-handling restrictions were constitutional. Plaintiffs filed a cross-motion for summary disposition on both issues.

On September 18, 2020, the Court of Claims issued an opinion and order that described our holding in *League II* as addressing a "facial" constitutional challenge and as conclusively resolving plaintiffs' facial challenge to the ballot-receipt deadline. Consistently with plaintiffs' newly taken position (as well as defendants' own invitation in their preliminary-injunction briefing), the Court of Claims then construed plaintiffs' challenge to the ballot-receipt deadline in this case as an "as-applied" challenge and held that "the ballot receipt deadline is unconstitutional as-applied in light of the ongoing COVID-19 pandemic." The Court of Claims further held that the ballot-handling restrictions of MCL 168.932(f) "create[] an unnecessary burden that tends to unduly restrict the rights enshrined in art 2, § 4," that the statute therefore was "unconstitutional as applied" to the several days preceding election day, and that during that time an absentee voter must be allowed "to seek assistance from a third

---

[13] Yet, defendants did an about-face in the concluding paragraph of their brief, requesting that the Court of Claims "consider granting [preliminary injunctive] relief as to the absent voter ballot receipt deadline statutes if not precluded from doing [so] by the Court's decision in *LWV* . . . ."

party of their choosing." The Court of Claims issued a preliminary injunction accordingly.

On September 21, 2020, the Legislature filed an emergency renewed motion to intervene so that it could file an interlocutory appeal of the Court of Claims' preliminary-injunction order. On September 28, 2020, plaintiffs filed a brief opposing that motion, and defendants, noting that they had decided not to appeal the Court of Claims' preliminary-injunction order, concurred in the renewed motion to intervene.

On September 25, 2020, defendants responded to plaintiffs' motion for summary disposition and requested, in light of the likelihood of an appeal of the Court of Claims' preliminary-injunction order or its order denying intervention, that the Court of Claims hold the parties' motions for summary disposition in abeyance until any such appeal was resolved;[14] alternatively, they requested the denial of plaintiffs' motion for summary disposition.

On September 30, 2020, the Court of Claims issued an opinion and order that incorporated the reasoning of its September 18, 2020 preliminary-injunction opinion and order. Holding that "as applied under the current circumstances and on the record before this Court, the ballot receipt deadline and the voter assistance ban violate art 2, § 4," the Court of Claims granted summary disposition in favor of plaintiffs as to both the ballot-receipt deadline and the ballot-handling restrictions, effectively granting a permanent

[14] I note that appeals of preliminary-injunction orders or orders denying intervention, which are not "final orders," may proceed only upon the granting of an application for leave to appeal, whereas an appeal from an order granting summary disposition may proceed by right. MCR 7.202; MCR 7.203.

injunction. It also granted the Legislature's renewed motion to intervene. This appeal then ensued.

III. ANALYSIS

I agree entirely with the opinion of the Court that plaintiffs raise a facial—not an as-applied—constitutional challenge in this case. I will not repeat the rationale (with which I concur) but would instead additionally observe that in the face of an adverse decision on the constitutional issue raised in *League II* with respect to the ballot-receipt deadline, plaintiffs in this case embarked on a creative effort to dodge the effect of that decision and took advantage of proceedings that featured:

- Expedited briefing on a "motion" that had never been filed
- Oral argument on a "motion" that had never been filed
- A reframing of plaintiffs' arguments to sidestep the adverse decision in *League II*
- The "augmentation" of plaintiffs' complaint to conform to those reframed arguments
- Errors on the merits as described in the opinion of the Court

To quote Justice VIVIANO, "This is not the way the judiciary works." *League of Women Voters of Mich v Secretary of State*, 506 Mich at 906 (VIVIANO, J., concurring). The judiciary's role is to decide actual controversies. Particularly in an era of excessive politicization, the judiciary should not be hijacked to achieve political ends outside of the legislative process. And the judiciary, which cannot "function both as an advocate and as an adjudicator," *In re Knight*, 333 Mich App 681, 691; 963 NW2d 676 (2020), should not allow itself to be hijacked.

The Constitution is not suspended or transformed even in times of a pandemic, and judges do not somehow become authorized in a pandemic to rewrite statutes or to displace the decisions made by the policymaking branches of government.

IV. COROLLARY

Because this matter has been expedited and time is of the essence, circumstances do not permit us to fully examine the question whether plaintiffs have standing to bring this action for injunctive and declaratory relief.[15] We consequently have properly assumed for purposes of our decision that plaintiffs do have standing. I believe, however, that the question is a significant one and that, if circumstances permitted us to fully examine the question, it might lead to the conclusion that plaintiffs lack standing. And I believe that conclusion may follow from our conclusion that plaintiffs' constitutional challenge is a facial one.

Our Supreme Court has held that "[w]here a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Lansing Sch Ed Ass'n MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). The statutory scheme here does not imply that the Legislature intended to confer

[15] The parties have not raised or addressed this issue on appeal. The Republican National Committee and the Michigan Republican Party do argue in their amicus brief that plaintiffs lack standing, although their argument does not track what I outline here.

standing on plaintiffs. The pertinent question, therefore, is whether plaintiffs have a "special injury or right, or substantial interest, that will be detrimentally affected in a manner *different from the citizenry at large* . . . ." *Id*. (emphasis added).

It seems to me that, in bringing a facial challenge, it could plausibly be argued that plaintiffs necessarily are not asserting a "special injury or right, or substantial interest, that will be detrimentally affected in a manner *different from the citizenry at large* . . . ." *Id*. (emphasis added). Rather, they are asserting the *same* injury, right, or interest as that of the citizenry at large—being subject to a law that is incapable of any valid, constitutional application. See *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In that event, absent some exception, plaintiffs would not have standing. An exception to the standing requirement has been recognized for certain forms of vagueness and overbreadth challenges in the context of the regulation of free speech. See, e.g., *Mich Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 170; 533 NW2d 339 (1995). But here, although Count IV of plaintiffs' complaint does allege a violation of the right to free speech under Const 1963, art 1, § 5, plaintiffs have not alleged that the challenged statutes "sweep[] too broadly, covering a substantial amount of protected free speech" or that they create an "unreasonable risk of censorship" by vesting " 'unbridled discretion in a government official over whether to permit or deny expressive activity . . . .' " *Id*., quoting *Lakewood v Plain Dealer Publishing Co*, 486 US 750, 755-756; 108 S Ct 2138; 100 L Ed 2d 771 (1988). And if plaintiffs have not adequately alleged an exception to the standing requirement, then they would not seem to have standing to bring this action in its current form.

That would not mean, however, that plaintiffs (or anyone else in the citizenry at large) would have no recourse. This Court has held:

> Michigan jurisprudence recognizes the special nature of election cases and the standing of ordinary citizens to enforce the law in election cases. *Deleeuw v Bd of State Canvassers*, 263 Mich App 497, 505-506; 688 NW2d 847 (2004). See also *Helmkamp v Livonia City Council*, 160 Mich App 442, 445; 408 NW2d 470 (1987) ("[I]n the absence of a statute to the contrary, . . . a private person . . . *may enforce by mandamus* a public right or duty relating to elections without showing a special interest distinct from the interest of the public." [Quotation marks omitted.]). The general interest of ordinary citizens to enforce the law in election cases is sufficient to confer standing *to seek mandamus relief*. See *Citizens Protecting Michigan's Constitution* [*v Secretary of State*], 280 Mich App [273, 282; 761 NW2d 210 (2008)] (permitting a ballot question committee to challenge a petition). [*Protect MI Constitution v Secretary of State*, 297 Mich App 553, 566-567; 824 NW2d 299 (2012) (emphasis added), rev'd on other grounds, 492 Mich 860 (2012).]

See also *League II*, 333 Mich App at 8 (" '[M]andamus is the proper remedy for a party seeking to compel election officials to carry out their duties.' "), quoting *Citizens Protecting Michigan's Constitution v Secretary of State*, 324 Mich App 561, 583; 922 NW2d 404 (2018), aff'd 503 Mich 42 (2018).

In other words, the plaintiffs in *League II* pursued the proper remedy in an election case, i.e., mandamus. Plaintiffs in this case did not seek mandamus. As a result, they might lack standing. Nonetheless, because the circumstances of this appeal do not permit our full consideration of the standing issue and the parties have not developed the arguments on appeal, it is not properly before us to decide at this juncture.

V. CONCLUSION

For the reasons stated in the opinion of the Court and for these additional reasons, I concur in our determination to reverse the Court of Claims, to vacate its order granting summary disposition in favor of plaintiffs as well as its preliminary and permanent injunctions, and to remand with instructions to immediately enter an order granting summary disposition in favor of defendants.

ESTATE OF LINDA HORN v SWOFFORD

Docket No. 349522. Submitted October 13, 2020, at Detroit. Decided October 22, 2020, at 9:00 a.m.

The estate of Linda Horn brought a negligence action in the Oakland Circuit Court against Michael J. Swofford, D.O., and Southfield Radiology Associates, PLLC, alleging medical malpractice in connection with the care the decedent received before her death. Horn, who was 24 years old when she died, had a history of pseudotumor cerebri, which causes increased pressure inside the skull. To address this condition, a shunt catheter was implanted in her head on February 22, 2013, to remove cerebrospinal fluid. On February 26, 2013, Horn went to the emergency room after experiencing a headache, nausea, and vomiting. A cranial computerized tomography (CT) scan indicated that the shunt appeared to be stable and functioning properly, and Horn was given pain medication and discharged. On March 2, 2013, Horn went to the emergency room by ambulance after her symptoms returned. The emergency room physician ordered another CT scan, a radiologist dictated the scan, and Dr. Swofford verified the results of the scan, which was interpreted as indicating a malfunctioning shunt. After receiving the interpretation of the CT scan, the emergency room doctor performed a lumbar puncture to remove cerebrospinal fluid and relieve pressure on Horn's brain. Nevertheless, Horn's condition continued to deteriorate, and she died on March 4, 2013. Plaintiff attached an affidavit of merit executed by Scott B. Berger, M.D., Ph.D., a licensed medical physician who was a board-certified specialist in the field of neuroradiology, and the affidavit of merit contained averments that mirrored the allegations in the complaint. Defendants filed their answer and an affidavit of meritorious defense executed by Dr. Swofford, in which he averred that he was a board-certified diagnostic radiologist at the time of the events giving rise to plaintiff's action and that he had provided treatment equivalent to that performed by a reasonable board-certified diagnostic radiologist of ordinary learning, judgment, and skill under the same or similar circumstances with respect to the interpretation of Horn's cranial CT scan. Plaintiff moved to confirm that neuroradiology was the one most relevant specialty

or subspecialty for purposes of qualifying an expert. The trial court, Cheryl A. Matthews, J., denied plaintiff's motion and ruled that the one most relevant specialty in this case was diagnostic radiology. The court denied plaintiff's motion for reconsideration, and plaintiff appealed.

The Court of Appeals *held*:

1. MCL 600.2912d(1) requires a medical malpractice plaintiff to file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under MCL 600.2169. In pertinent part, MCL 600.2169(1)(a) provides that in an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and, if the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. MCL 600.2169(1)(a) further states that if the party against whom or on whose behalf the testimony is offered is a specialist who is board-certified, the expert witness must be a specialist who is board-certified in that specialty. Under *Woodard v Custer*, 476 Mich 545 (2006), the plaintiff's expert does not have to match all of the defendant physician's specialties; rather, the plaintiff's expert only has to match the one most relevant specialty, which is the specialty engaged in by the defendant doctor during the course of the alleged malpractice. *Woodard* defined "specialty" as a particular branch of medicine or surgery in which one can potentially become board-certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board-certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery. Further, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action.

2. Dr. Swofford was undisputedly a board-certified diagnostic radiologist when he interpreted Horn's cranial CT scan on March 2, 2013, and he testified that he would not hold himself out to be a neuroradiologist. Dr. Berger was board-certified in diagnostic radiology, received a certificate of added qualification in neuroradiology in 2000, renewed the certificate in 2010, and was in the process of once again renewing the certificate of

added qualification in neuroradiology at the time of his 2019 deposition, and he testified that he spends the vast majority of his time practicing neuroradiology. According to Dr. Berger, while every diagnostic radiologist is trained to interpret cranial CT scans, neuroradiologists have more expertise on the matter than diagnostic radiologists. Because the branch of medicine known as diagnostic radiology is one that provides or allows for board certification, diagnostic radiology is a "specialty" and a diagnostic radiologist is a "specialist" for purposes of MCL 600.2169(1). Taking into consideration the deposition testimony and recognizing that a physician can effectively become board-certified in neuroradiology by receiving a certificate of added qualification, it is clear that neuroradiology is also a "specialty" under the statute and more particularly a "subspecialty" of diagnostic radiology. In this case, Dr. Swofford was, in fact, practicing neuroradiology when he examined and interpreted neuroimages—the CT scan of Horn's skull—and he potentially could obtain, as he had done in the past, a certificate of special qualification in neuroradiology, which constitutes a board certification in neuroradiology under our caselaw. Therefore, Dr. Swofford was acting or practicing as a "specialist" or "subspecialist" in neuroradiology, at least for purposes of MCL 600.2169(1) as interpreted by *Woodard*. Although Dr. Swofford was also practicing diagnostic radiology when he interpreted Horn's CT scan, considering that diagnostic radiologists are credentialed to interpret neuroimages, neuroradiology was the one most relevant specialty.

Reversed and remanded for further proceedings.

BOONSTRA, J., concurring, wrote separately to encourage the Supreme Court to clarify this complex area of the law in this or another appropriate case, particularly in light of the confusing nature of the four-opinion decision in *Woodard* and the disagreement regarding whether the Supreme Court's order in *Estate of Jilek v Stockson*, 490 Mich 961 (2011), implicitly overruled *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622 (2007).

Sommers Schwartz, PC (by *Kenneth T. Watkins* and *Ramona C. Howard*) for plaintiff.

Collins Einhorn Farrell PC (by *Michael J. Cook*) for defendants.

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. This is a medical malpractice action involving the death of Linda Horn allegedly caused by the negligence of defendant Michael J. Swofford, D.O., with respect to his interpretation of a cranial computerized tomography (CT) scan and his communications to other medical personnel based on that interpretation. Horn's estate, through personal representative Joelynn T. Stokes, commenced the suit and now appeals by leave granted[1] the trial court's order denying its motion to confirm that the one most relevant specialty in this case for purposes of qualifying an expert witness is neuroradiology. Instead, the trial court sided with defendants and concluded that diagnostic radiology is the one most relevant specialty. We reverse and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

According to plaintiff, Horn, who was 24 years old when she died, had a history of pseudotumor cerebri, which occurs when pressure inside the skull increases for no obvious reason. As a result, Horn suffered frequent headaches. To address her medical condition, a "posterior parietal approach shunt catheter" was implanted in her head on February 22, 2013, to remove cerebrospinal fluid (CSF). On February 26, 2013, Horn went to the emergency room complaining of a headache, nausea, and vomiting. A cranial CT scan was performed, and the shunt appeared to be stable and functioning properly. Horn was given pain medication and discharged. On March 2, 2013, Horn returned to the emergency room by ambulance. She was experiencing a

[1] *Estate of Horn v Swofford*, unpublished order of the Court of Appeals, entered October 10, 2019 (Docket No. 349522).

severe headache, nausea, and vomiting. Another cranial CT scan was performed. The emergency room physician ordered the CT scan, a radiologist dictated the scan, and Dr. Swofford verified the results of the scan. The CT scan was interpreted as showing that the "[b]ilateral lateral ventricles ha[d] increased in size since [the] prior study, especially the right," which "[c]orrelate[d] clinically for [a] malfunctioning shunt." After receiving the interpretation of the CT scan, the emergency room doctor performed a lumbar puncture to remove CSF and relieve pressure on Horn's brain.[2] Unfortunately, Horn's condition continued to deteriorate, and on March 4, 2013, she died. An autopsy report indicated that Horn showed "diffuse brain swelling" and "no evidence of inflammation or infection . . . ."

Plaintiff filed a complaint alleging medical malpractice by Dr. Swofford and his practice group, defendant Southfield Radiology Associates, PLLC (SRA). Plaintiff alleged as follows regarding Dr. Swofford:

> That Defendant SWOFFORD . . . was negligent *inter alia* in the following particulars in that a licensed and practicing Neuroradiologist, when encountering a patient exhibiting the history, signs and symptoms such as those demonstrated by [Horn] had a duty to timely and properly:
>
> a. Possess the degree of reasonable care, diligence, learning, judgment and skill ordinarily and/or reasonably exercised and possessed by a board certified Neuro Radiologist under the same or similar circumstances;
>
> b. Eevaluate [sic], interpret, report and intervene regarding Ms. Horn's head CT of March 2, 2013;
>
> c. Acknowledge the CT scan of March 2, 2013[,] showed a dramatic change when compared to the February 26, 2013 CT scan, that required neurological emergent surgery, intervention;

---

[2] While at the hospital on March 2, 2013, Horn suffered three seizures.

d. Acknowledge and appreciate that the CT scan of March 2, 2013[,] showed that the ventricular system had become severely dilated with subtle areas of low density adjacent to the ventricles that suggest shunt obstruction and the transependymal flow of CSF;

e. Acknowledge and appreciate that findings on the CT scan of March 2, 2013[,] indicated acute obstructive hydrocephalus which is a neurological emergency;

f. Acknowledge, appreciate and communicate that the brain in the CT scan of March 2, 2013[,] demonstrated downward transtentorial herniation and diffuse cerebral edema, all of which porten[d] a devastating neurological injury in the absence of an urgent neurosurgical intervention;

g. Urgently communicate the head CT findings to the ordering physician and advise the ER physician that the patient must be treated by neurosurgery;

h. Notify and consult with neurosurgery;

i. Immediately advise the ER doctor that the findings on the March 2, 2013 CT of the head must be emergently addressed by neurosurgery tapping of the shunt or a placement of an EVD [external ventricular drain] and that he should avoid performance of a lumbar puncture because it would likely exacerbate herniation; [and]

j. Refrain from other acts of negligence which may become known through the course of discovery.

Plaintiff attached an affidavit of merit executed by Scott B. Berger, M.D., Ph.D., in which he asserted that he was a licensed medical physician specializing and board-certified in the field of neuroradiology. Dr. Berger averred that he had spent the majority of his professional time in the year before the incident practicing neuroradiology or teaching neuroradiology. The affidavit of merit contained averments that mirrored the allegations in the complaint quoted above. Defendants filed their answer and an affidavit of meritorious

defense executed by Dr. Swofford in which he averred that he was a board-certified diagnostic radiologist at the time of the events giving rise to plaintiff's action. Dr. Swofford contended that the standard of care in this matter required him to provide treatment equivalent to that performed by a reasonable board-certified diagnostic radiologist of ordinary learning, judgment, and skill under the same or similar circumstances. Dr. Swofford opined that he had complied with the appropriate standard of care with respect to the interpretation of Horn's cranial CT scan and his communications based on that interpretation.

Plaintiff moved to confirm that neuroradiology was the one most relevant specialty or subspecialty for purposes of qualifying an expert. Defendants argued in response that the one most relevant specialty was diagnostic radiology, not neuroradiology. The trial court denied plaintiff's motion and ruled that the one most relevant specialty in this case was diagnostic radiology. The court denied plaintiff's motion for reconsideration, and this appeal ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

This case turns on the interpretation of MCL 600.2169, and "[t]he construction of MCL 600.2169 presents a question of law subject to de novo review." *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 531; 937 NW2d 380 (2019); see also *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). We review for an abuse of discretion a trial court's decision concerning the qualifications of a proposed expert witness to testify. *Crego*, 327 Mich App at 531. When a trial court's decision falls outside the range of prin-

cipled and reasonable outcomes, the court abuses its discretion. *Id*. A court necessarily abuses its discretion when a particular ruling constitutes an error of law. *Id*.

B. STATUTORY CONSTRUCTION

The *Crego* panel recited the principles that govern the construction of a statute, explaining as follows:

> When interpreting a statute, the primary rule of construction is to discern and give effect to the Legislature's intent, the most reliable indicator of which is the clear and unambiguous language of the statute. Such language must be enforced as written, giving effect to every word, phrase, and clause. Further judicial construction is only permitted when statutory language is ambiguous. When determining the Legislature's intent, statutory provisions are not to be read in isolation; rather, they must be read in context and as a whole. [*Crego*, 327 Mich App at 531 (quotation marks and citations omitted).]

C. DISCUSSION

1. MEDICAL MALPRACTICE—GOVERNING LAW

"The plaintiff in a medical malpractice action bears the burden of proving: (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 Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002) (quotation marks and citation omitted). Failure to establish any one of these four elements is fatal to a plaintiff's medical malpractice suit. *Id*. The "standard of care is founded upon how other doctors in that field of medicine would act and not how any particular doctor would act." *Cudnik v William Beaumont Hosp*, 207 Mich App 378, 382; 525 NW2d 891 (1994) (quotation marks and citation omitted).

MCL 600.2912d(1) requires a medical malpractice plaintiff to "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." And in pertinent part, MCL 600.2169 provides:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c) [which is inapplicable to this case], during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (*i*) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (*ii*) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

2. CONSTRUCTION OF MCL 600.2169—THE MICHIGAN SUPREME COURT'S OPINION IN *WOODARD*

"[I]f a defendant physician is a specialist, the plaintiff's expert witness must have specialized in the same specialty as the defendant physician at the time of the alleged malpractice." *Woodard*, 476 Mich at 560-561. Additionally, plaintiff's expert is required to hold the same board certification as the defendant doctor if in fact the physician is board-certified in the pertinent specialty. *Id*. at 560. While specialties and board certifications must match, not *all* of them are required to match. *Id*. at 558. "Because an expert witness is not required to testify regarding an inappropriate or irrelevant standard of medical practice or care, § 2169(1) should not be understood to require such witness to specialize in specialties and possess board certificates that are not relevant to the standard of medical practice or care about which the witness is to testify." *Id*. at 559. The *Woodard* Court noted that the language of MCL 600.2169(1) only requires a single specialty to match, not multiple specialties. *Id*. In other words, "the plaintiff's expert does not have to match all of the defendant physician's specialties; rather, the plaintiff's expert only has to match the *one most relevant specialty*." *Id*. at 567-568 (emphasis added). The specialty engaged in by the defendant doctor during the course of the alleged malpractice constitutes the one most relevant specialty. *Id*. at 560.

In *Woodard*, our Supreme Court explored the meaning of the terms "specialty" and "specialist" as used in MCL 600.2169(1)(a), along with examining the concept of a subspecialty, stating:

> Both the dictionary definition of "specialist" and the plain language of § 2169(1)(a) make it clear that a physician can be a specialist who is not board certified. They also make it clear that a "specialist" is somebody who can

> potentially become board certified. Therefore, a "specialty" is a particular branch of medicine or surgery in which one can potentially become board certified. Accordingly, if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery.
>
> Plaintiffs argue that § 2169(1)(a) only requires their expert witnesses to have specialized in the same specialty as the defendant physician, not the same subspecialty. We respectfully disagree. . . . [A] "subspecialty" is a particular branch of medicine or surgery in which one can potentially become board certified that falls under a specialty or within the hierarchy of that specialty. A subspecialty, although a more particularized specialty, is nevertheless a specialty. Therefore, if a defendant physician specializes in a subspecialty, the plaintiff's expert witness must have specialized in the same subspecialty as the defendant physician at the time of the occurrence that is the basis for the action. [*Woodard*, 476 Mich at 561-562.]

3. DR. SWOFFORD AND DR. BERGER—CREDENTIALS AND DIAGNOSTIC RADIOLOGY VERSUS NEURORADIOLOGY

There is no dispute that Dr. Swofford was a board-certified diagnostic radiologist when he interpreted Horn's cranial CT scan on March 2, 2013. Dr. Swofford graduated from medical school in 1992, was a resident in diagnostic radiology at a hospital from 1993 to 1997, participated in a one-year fellowship in neuroradiology from July 1997 to June 1998, was employed as a staff radiologist from 1998 to 2006 at a couple of hospitals, began working at SRA in 2006, and was currently a partner at SRA. Dr. Swofford obtained a certificate of added qualification in neuroradiology in 2002, but the certificate had expired absent renewal by the time he interpreted Horn's CT scan. Dr. Swofford was chief of neuroradiology during a hospital stint from 2002 to 2006.

In his deposition, Dr. Swofford testified, "I read approximately 25 percent of neurology-related . . . studies, and 75 percent based on diagnostic general radiology." He additionally testified that radiologists at SRA interpret neuroimages even though they have no extra certification in neuroradiology. The parties agree that diagnostic radiologists are certified and permitted to interpret neuroimages. Dr. Swofford testified that he would not hold himself out to be a neuroradiologist.

Dr. Berger is board-certified in diagnostic radiology, received a certificate of added qualification in neuroradiology in 2000, renewed the certificate in 2010, and was in the process of once again renewing the certificate of added qualification in neuroradiology at the time of his 2019 deposition.[3] Dr. Berger testified that he spends the "vast majority" of his time practicing neuroradiology. In his deposition, he indicated that 90% to 95% of his practice consisted of neuroradiology and that the vast majority of his 25-year career had been focused on neuroradiology. Dr. Berger explained that "a CT scan of the head would fall into the category of a neuroimaging study." There is no dispute over that assertion. According to Dr. Berger, while every diagnostic radiologist is trained to interpret cranial CT scans, neuroradiolo-

[3] Dr. Berger testified that technically there is no board certification in neuroradiology. Instead, a certificate of added qualification in neuroradiology is available. But the *Woodard* Court ruled that for purposes of MCL 600.2169, there effectively is no difference between being board-certified and having a certificate of added or special qualification:

> Because a certificate of special qualifications is a document from an official organization that directs or supervises the practice of medicine that provides evidence of one's medical qualifications, it constitutes a board certificate. Accordingly, if a defendant physician has received a certificate of special qualifications, the plaintiff's expert witness must have obtained the same certificate of special qualifications in order to be qualified to testify under § 2169(1)(a). [*Woodard*, 476 Mich at 565.]

gists have more expertise on the matter than diagnostic radiologists.[4] To obtain and maintain a certificate of added qualification in neuroradiology, a radiologist must have a "certain amount of reads per year" relative to neuroimages and must pass an examination establishing that he or she has a high level of proficiency in reading neuroradiological images.

4. APPLICATION OF FACTS TO LAW

Because the branch of medicine known as diagnostic radiology is one that provides or allows for board certification, diagnostic radiology is a "specialty" and a diagnostic radiologist is a "specialist" for purposes of MCL 600.2169(1). See *Woodard*, 476 Mich at 561-562. Taking into consideration the deposition testimony and recognizing that a physician can effectively become board-certified in neuroradiology by receiving a certificate of added qualification, see *id*. at 562, 565, it is clear that neuroradiology is also a "specialty" under the statute and more particularly a "subspecialty" of diagnostic radiology. The difficulty that arises in this case is that while no longer a board-certified neuroradiologist or its equivalent, Dr. Swofford was undoubtedly engaged in interpreting a neuroimage when he examined Horn's CT scan on March 2, 2013. Horn's CT scan could have been interpreted by a neuroradiologist or a diagnostic radiologist. We conclude that *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622; 736 NW2d 284 (2007), provides some guidance. In *Reeves*, this Court addressed the following set of circumstances:

---

[4] Dr. Berger did testify that it was his "opinion that when it comes to a head CT, . . . the standard of care that applies to a neuroradiologist or a diagnostic radiologist is the same, because they are trained to interpret those studies as a resident."

> Catherine R. and Anthony L. Reeves filed this medical malpractice action against several defendants, including Lynn Squanda, D.O., who is board-certified in family medicine, but was working in the emergency room at the time of the alleged malpractice. The Reeveses claimed that Dr. Squanda and others were negligent in failing to timely diagnose and treat Catherine Reeves's ectopic pregnancy. The Reeveses filed an affidavit of merit signed by Eric Davis, M.D., who is board-certified in emergency medicine, but not board-certified in family medicine. [*Id*. at 623.]

The trial court in *Reeves* ruled that Dr. Davis was not qualified to give expert testimony against Dr. Squanda, but this Court vacated the trial court's order. *Id*. at 624. The *Reeves* panel reasoned and held:

> In sum, because Dr. Squanda was practicing emergency medicine at the time of the alleged malpractice and potentially could obtain a board certification in emergency medicine, she was a "specialist" in emergency medicine under the holding in *Woodard*. Thus, plaintiffs would need a specialist in emergency medicine to satisfy MCL 600.2169; Dr. Davis, as a board-certified emergency medicine physician, would satisfy this requirement. However, the specialist must have also devoted the majority of his professional time during the preceding year to the active clinical practice of emergency medicine or the instruction of students. Because there is no information in the record regarding what comprised the majority of the expert's professional time, a remand for a determination on this issue is necessary. [*Id*. at 630.][5]

---

[5] Defendants argue that *Reeves* is distinguishable because there the defendant doctor was practicing outside her board certification, and it did not involve, as here, the overlap between a specialty and a subspecialty. We disagree. The whole point of *Reeves* is that if a defendant physician was practicing a particular branch of medicine when the malpractice allegedly occurred, and board certification was available for the practice of that branch of medicine, then the physician was engaged in a "specialty" for purposes of MCL 600.2169, and the plaintiff's expert

Indeed, as we quoted earlier, the Supreme Court in *Woodard*, 476 Mich at 561-562, observed that "if the defendant physician practices a particular branch of medicine or surgery in which one can potentially become board certified, the plaintiff's expert must practice or teach the same particular branch of medicine or surgery."

In this case, Dr. Swofford was, in fact, practicing neuroradiology when he examined and interpreted neuroimages—the CT scan of Horn's skull—and he potentially could obtain, as he had done in the past, board certification in neuroradiology. And therefore Dr. Swofford was acting or practicing as a "specialist" or "subspecialist" in neuroradiology, at least for purposes of MCL 600.2169(1) as interpreted by *Woodard*. Although Dr. Swofford was also practicing diagnostic radiology when he interpreted Horn's CT scan, considering that diagnostic radiologists are credentialed to interpret neuroimages, neuroradiology was the one most relevant specialty.

We do find it necessary to distinguish the facts in this case from those presented in *Woodard*. In *Woodard*, the defendant physician was board-certified in pediatrics and also had certificates of special qualifications in pediatric critical-care medicine and neonatal-perinatal medicine, but the plaintiff's proposed expert was only board-certified in pediatrics and had no certificates of special qualifications. *Woodard*, 476 Mich at 554-555. The Supreme Court held that the one most relevant specialty in the case was pediatric critical-care medi-

---

must have practical or teaching experience in that specialty. We see no difference in relation to the analysis between a case that entails a defendant family doctor actually practicing emergency medicine and a case that involves a diagnostic radiologist actually practicing, more specifically, neuroradiology—the overlap in the latter is not a basis to jettison the principle.

cine; therefore, the plaintiff's expert did not satisfy the same-specialty requirement of MCL 600.2169(1)(a). *Id*. at 576. In this lawsuit, Dr. Swofford did not practice a specialty or have a board certification that Dr. Berger lacked.

In *Hamilton v Kuligowski*, the companion case to *Woodard*, the underlying facts were as follows:

> Plaintiff alleges that the defendant physician failed to properly diagnose and treat the decedent while she exhibited prestroke symptoms. The defendant physician is board certified in general internal medicine and specializes in general internal medicine. Plaintiff's proposed expert witness is board certified in general internal medicine and devotes a majority of his professional time to treating infectious diseases, a subspecialty of internal medicine. [*Woodard*, 476 Mich at 556.]

Our Supreme Court held that the plaintiff's proposed expert did not qualify to give testimony on the standard of care under MCL 600.2169, noting that the expert himself acknowledged that he was " 'not sure what the average internist sees day in and day out.' " *Id*. at 578. As opposed to the situation in *Hamilton* in which the expert witness's subspecialty in treating infectious diseases was not pertinent to diagnosing prestroke symptoms, Dr. Berger's credentials as a neuroradiologist were extremely relevant to the interpretation of neuroimages. Dr. Berger certainly knows what the average radiologist sees day in and day out. Stated differently, the defendant doctor in *Hamilton* was not practicing infectious-disease medicine in treating the decedent, but Dr. Swofford was plainly practicing neuroradiology in interpreting decedent Horn's CT scan.

Finally, although it is an unpublished opinion, we feel compelled to touch on this Court's decision in

Higgins v Traill, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 343664), because it is a very similar case. In *Higgins*, this Court affirmed the trial court's ruling in the context of the following facts:

> In October 2013, plaintiff, Joan Higgins, collapsed in her home. When Emergency Medical Services (EMS) arrived, Higgins could not speak, had right-sided weakness, and was experiencing facial droop. Higgins was transported to St. John Macomb-Oakland Hospital. Relevant to this appeal, plaintiffs argue that Dr. Fry read a CT angiogram of Higgins's head as normal when it actually showed an occlusion in the middle cerebral artery. Plaintiffs contend that Dr. Fry's failure to properly read the CT angiogram delayed Higgins's treatment, which caused her to experience the full effect of an ischemic stroke and resulted in her sustaining permanent neurological deficits.
>
> Following discovery, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiffs' experts, Dr. Meyer and Dr. Zoarski, were not qualified to provide standard-of-care testimony under MCL 600.2169. Specifically, defendants asserted that the specialty that Dr. Meyer and Dr. Zoarski spent the majority of their time practicing—neuroradiology—did not match Dr. Fry's specialty—diagnostic radiology—so they were not qualified to testify against Dr. Fry. Plaintiffs, however, maintained that the specialty matched because at the time of the alleged malpractice Dr. Fry was practicing neuroradiology, not diagnostic radiology. The trial court agreed with plaintiffs, holding that Dr. Meyer and Dr. Zoarski were qualified to testify as experts against Dr. Fry under MCL 600.2169 and MRE 702, and denying defendants' motion for summary disposition. [*Higgins*, unpub op at 2.]

As we did above, the *Higgins* panel relied on *Woodard* and *Reeves* in affirming the trial court's ruling. *Higgins*, unpub op at 4-6. The Court observed that when defen-

dant Dr. Fry was reading the brain angiogram, "he was engaged in the practice of neuroradiology." *Id*. at 4. The Court held that it could "discern no error in the court's determination that the relevant specialty was neuroradiology because that was what Dr. Fry was practicing when he read the CT angiogram." *Id*. We agree with this Court's ruling and reasoning in *Higgins*.[6] Moreover, on application for leave to appeal in *Higgins*, three justices voted to deny leave, three justices voted to direct oral argument on just the application, and one justice did not participate because of a familial relationship. *Higgins v Traill*, 505 Mich 1046 (2020). Accordingly, the application for leave to appeal was denied. *Id*. Having considered the facts and the caselaw, we conclude at this juncture that MCL 600.2169(1), as construed in *Woodard*, *Reeves*, and *Higgins*, supports our ruling.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, plaintiff may tax costs under MCR 7.219.

FORT HOOD, J., concurred with MARKEY, J.

BOONSTRA, P.J. (*concurring*). I concur in the majority opinion. I write separately simply to encourage our Supreme Court, in this or another appropriate case, to clarify the law in this area. I note that while this case turns largely on the Supreme Court's decision in

[6] "Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). Additionally, we agree with the *Higgins* panel's reasoning in rejecting the contention that the Supreme Court implicitly overruled *Reeves* in an order in *Estate of Jilek v Stockson*, 490 Mich 961 (2011). *Higgins*, unpub op at 6.

Woodard v Custer, 476 Mich 545; 719 NW2d 842 (2006), by which we are bound, that decision featured no fewer than four opinions, including three concurring opinions—one of which was authored by the same justice who wrote the four-justice majority opinion, and one of which maintained that it actually was the majority opinion (by virtue of the second concurrence), see *id*. at 591-592 (TAYLOR, C.J., concurring). Moreover, this Court's unpublished decision in *Higgins v Traill*, unpublished per curiam opinion of the Court of Appeals, issued July 30, 2019 (Docket No. 343664), featured a separate concurring opinion by Judge GLEICHER in which she maintained that *Woodard*'s analysis was faulty in certain respects and should be reconsidered. Although the Supreme Court subsequently denied leave to appeal in *Higgins*, it did so on an evenly split 3-3 vote, with one justice not participating. And there remains disagreement—which the Supreme Court could put to rest, one way or another—about whether its order in *Estate of Jilek v Stockson*, 490 Mich 961 (2011), implicitly overruled *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622; 736 NW2d 284 (2007).

For these reasons, I concur in the majority opinion but encourage our Supreme Court to provide much-needed clarity in this complex area of law.

In re MOTA, MINORS

Docket No. 351830. Submitted October 14, 2020, at Detroit. Decided October 22, 2020, at 9:05 a.m.

The Department of Health and Human Services (DHHS) filed a petition in the Lenawee Circuit Court, Family Division, seeking to terminate respondent's parental rights on the basis of an allegation that he had sexually abused his minor children's seven-year-old half-sister. The petition asserted that jurisdiction was proper under MCL 712A.2(b)(1) and (2), that grounds for termination existed under MCL 712A.19b(3)(b)(i), (j), and (k)(*ix*), and that termination of respondent's parental rights was in the children's best interests. The trial court, Catherine A. Sala, J., authorized the petition and placed the children with their mother. Before the termination proceedings began, the DHHS moved under MCR 3.972(C)(2) to admit statements LP had made to her maternal grandmother regarding the sexual abuse. After a tender-years hearing under MCR 3.972(C)(2)(a), the trial court granted the motion, allowing for the admission of LP's statements into evidence at trial. The trial court then held a combined adjudication trial and dispositional hearing, at which a Sexual Assault Nurse Examiner (SANE) testified that she had physically examined LP and concluded that LP had injuries that were "highly suggestive" of sexual abuse. After the proofs were submitted, the court found a basis to exercise jurisdiction under MCL 712A.2(b)(1) and (2), and it terminated respondent's parental rights to the minor children, primarily on the basis of its finding that respondent had sexually abused LP. Respondent appealed by right.

The Court of Appeals *held*:

1. The trial court committed procedural errors in conducting the adjudicative and dispositional phases of the case; however, respondent failed to show that the errors required reversal. MCR 3.973 indicates that an adjudication trial is to be followed by a dispositional hearing, even if there is no space of time between the trial and the hearing, and MCR 3.977(E) clearly contemplates two separate proceedings—a trial or plea relative to adjudication and a dispositional hearing for purposes of termination. MCR 3.977(E)(3) does allow a court, at the initial disposition hearing, to rely on

evidence admitted at the adjudication trial to support termination. Reading MCR 3.973(A), (B), and (C) in conjunction with MCR 3.977(E)(3) indicates that, when an adjudication trial is conducted and the DHHS requests termination at the initial dispositional hearing, the following process should apply. First, an adjudication trial is to be conducted with the court allowing the introduction of legally admissible evidence that is relevant to the exercise of jurisdiction under MCL 712A.2(b). At the conclusion of the adjudication trial, the court, in a bench trial, is to determine whether the DHHS established by a preponderance of the evidence a basis for jurisdiction under MCL 712A.2(b). If jurisdiction is not established, the proceeding is concluded. If the trial court finds that it has jurisdiction, the dispositional hearing in which termination is sought may immediately be commenced. MCR 3.977 provides that at the termination hearing, the trial court may take into consideration any evidence that had been properly introduced and admitted at the adjudication trial, as well as any additional relevant and material evidence that is received by the court at the termination hearing. In this case, the trial court did not separate the adjudication trial from the dispositional hearing, and it issued rulings in regard to jurisdiction and termination after all the proofs were submitted. However, this error did not require reversal because respondent did not establish that his substantial rights were affected or that the integrity, fairness, or public reputation of the proceedings were seriously affected by the court's procedural errors. With regard to respondent's arguments regarding the SANE's testimony and report, the record reflected that, to the extent that the court relied on the report and testimony, it was for purposes of both adjudication and termination, and the statements LP made to the SANE were admissible under MRE 803(4). Respondent's contention that the trial court made no factual findings lacked merit. The trial court, relying on legally admissible evidence, expressly found that respondent sexually abused LP, that there was penetration, and that there was a substantial risk of harm to the minor children in light of the sexual assault committed by respondent against LP, and these findings were used to support the exercise of jurisdiction and the termination of parental rights.

2. The performance of respondent's trial counsel in failing to object to the process used in this case fell below an objective standard of reasonableness. However, because the results of the adjudication and disposition would have been the same had the court followed the proper procedures, reversal was unwarranted.

3. The trial court did not clearly err by finding that terminating respondent's parental rights was in the children's best inter-

ests. Although there was only evidence of one act of sexual abuse, it was an especially egregious violation of a child who had looked to respondent for care and protection. The trial court did not clearly err by finding that this single act of sexual abuse revealed a side of respondent that posed a serious danger to his minor children. With respect to the purported bond between respondent and his children, there was also evidence of a bond between LP and respondent, yet that did not prevent respondent from sexually exploiting and abusing her. Furthermore, there was nothing in the record to support respondent's argument that he was not a danger to boys, and the fact that respondent provided some assistance to his children did not suffice to overcome the danger that he posed to them.

Affirmed.

1. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS.

Under the procedures set forth in the juvenile code, MCL 712A.1 *et seq*., and Subchapter 3.900 of the Michigan Court Rules, child protective proceedings comprise an adjudicative phase and a dispositional phase; generally, a court determines whether it can take jurisdiction over a child during the adjudicative phase and, if so, the court then determines during the dispositional phase what course of action will ensure the child's safety and well-being.

2. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — ADJUDICATION TRIALS — DISPOSITIONAL HEARINGS — TERMINATION OF PARENTAL RIGHTS.

When the Department of Health and Human Services (DHHS) requests the termination of a respondent's parental rights at the initial dispositional hearing in a child protective proceeding, first, an adjudication trial is to be conducted with the court allowing the introduction of legally admissible evidence that is relevant to the exercise of jurisdiction under MCL 712A.2(b); at the conclusion of the adjudication trial, the court, in a bench trial, is to determine whether the DHHS established by a preponderance of the evidence a basis for jurisdiction under MCL 712A.2(b); if the trial court finds that it has jurisdiction, the dispositional hearing in which termination is sought may immediately be commenced; at the termination hearing, the trial court, in rendering its termination decision under MCL 712A.19b, may take into consideration any evidence that had been properly introduced and admitted at the adjudication trial under MCR 3.977(E) along with any additional relevant and material evidence that the court received at the termination hearing under MCR 3.977(H)(2).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *R. Burke Castleberry, Jr.*, Prosecuting Attorney, and *Jennifer L. Bruggeman*, Chief Appellate Prosecuting Attorney, for the petitioner.

Michael H. Dzialowski for the respondent.

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. Respondent father appeals by right the trial court's order terminating his parental rights to his three minor children pursuant to MCL 712A.19b(3)(b)(*i*) (a sibling of the children suffered sexual abuse caused by the parent's act), (j) (reasonable likelihood that children will be harmed if returned to parent's home), and (k)(*ix*) (parent sexually abused a sibling of the children and there is a reasonable likelihood of harm to the children if returned to parent's care). On appeal, respondent presents three arguments. First, he contends that the trial court erred by combining the adjudication trial with the initial disposition hearing, resulting in one indistinguishable court proceeding. Second, respondent argues that his attorney was ineffective for failing to object to the trial court's merging the adjudicative and dispositional phases of the case. Third, respondent maintains that the trial court erred by finding that it was in the children's best interests to terminate respondent's parental rights. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In February 2019, the petitioner, the Department of Health and Human Services (DHHS) filed a petition to remove the minor children from respondent's care and to terminate his parental rights. Although the minor

children's mother was listed as a respondent in the petition, she was subsequently dismissed from the case absent any adjudication relative to her parental rights. In the petition, the DHHS alleged that respondent had sexually abused the minor children's half-sister, LP, by taking photographs of her anal and vaginal areas while LP pretended to be asleep. The petition asserted that jurisdiction was proper under MCL 712A.2(b)(1) and (2), that grounds for termination existed under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*ix*), and that termination of respondent's parental rights was in the children's best interests. The trial court authorized the petition and placed the children with their mother.

In June 2019, the DHHS moved under MCR 3.972(C)(2) to admit statements LP had made to her maternal grandmother, Cynthia Johnson, regarding the sexual abuse. The DHHS argued that the statements LP made to Johnson satisfied the criteria for admissibility set forth in MCR 3.972(C)(2).[1] On October 24, 2019, the trial court conducted a tender-years hearing under MCR 3.972(C)(2)(a). At the hearing, Johnson testified that LP was seven years old when she made

[1] MCR 3.972(C) provides, in relevant part, as follows:

> (2) Any statement made by a child under 10 years of age . . . regarding an act of . . . sexual abuse . . . may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.
>
> (a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.
>
> (b) If the child has testified, a statement denying such conduct may be used for impeachment purposes as permitted by the rules of evidence.

statements to Johnson concerning the acts respondent allegedly committed. When Johnson was playfully tickling LP, LP told Johnson that respondent had entered LP's bedroom the night before while LP was in bed. According to LP, respondent pulled down LP's pants and underwear and touched her buttocks. LP also told Johnson that respondent spread LP's buttocks apart, that he had a flashlight or a phone light that was turned on at the time, and that she believed that respondent took photographs of her. Johnson testified that LP indicated that she was scared and did not know what to do, so she pretended to be asleep even when respondent turned her over. LP appeared nervous to Johnson, but Johnson believed that this was because LP did not know how Johnson would react to LP's assertions. Johnson noted that respondent had helped raise LP since before she was age one and that LP referred to respondent as "dada."

Kevin Sellers, who was employed by the DHHS, testified that he conducted a forensic interview of LP regarding her allegations of sexual abuse by respondent. LP informed Sellers that she was sleeping on her back when a light woke her up. LP told Sellers that she knew that it was respondent in her room with a light and that she pretended to be sleeping. According to LP, respondent pulled LP's pants and underwear down with the light still on. LP explained to Sellers that respondent turned LP over onto her stomach and moved the light down to her buttocks area. As she had told Johnson, LP indicated to Sellers her belief that respondent was taking photographs of her. Sellers testified that LP informed him that respondent spread her buttocks apart and "toward her . . . vaginal area."

At the conclusion of the testimony by Johnson and Sellers and following arguments by the parties on the

DHHS's tender-years motion, the trial court granted the motion, allowing for the admission of LP's statements into evidence at trial. The court found that LP was under 10 years of age when the statements were made, that the statements were sufficiently trustworthy, that LP made the statements spontaneously, and that LP had behaved appropriately under the circumstances. Accordingly, the criteria in MCR 3.972(C)(2) were satisfied. The trial court further concluded that LP's statements were made to someone she trusted, that subsequent assertions LP made to Sellers were consistent with those made to Johnson, that there was nothing to suggest LP had a motive to lie about the incident, and that the terminology used by LP to describe the events was consistent with the language one would expect of a child her age.

After the trial court granted the DHHS's motion and a half-hour recess, the court commenced a combined adjudication trial and dispositional hearing. Rachelle VanAken, a Sexual Assault Nurse Examiner (SANE), testified that she physically examined LP around the time of the disclosure of sexual abuse. VanAken prepared a report concerning her examination, which included various statements LP made to VanAken. The DHHS sought to admit the SANE report into evidence; respondent objected on the basis that the report contained information and directions that were supposedly given to the "patient" but were actually provided to Johnson. VanAken explained that some information and directions normally given to a patient are often given to the patient's caregiver when the patient is a minor. The trial court overruled respondent's objection.

When VanAken physically examined LP, she observed some bruises on LP's shins, which LP thought had been caused by bumping into something. VanAken

testified that there was white discharge between LP's labia and hymen, a tear where LP's labia come together posteriorly, and a small abrasion on the outside of LP's anus. LP reported to VanAken that her buttocks hurt "a little." VanAken opined that the injuries were "highly suggestive" of sexual abuse. VanAken explained:

> Due to the fact that she was saying that he spread her apart and depending on the force that was used or the pressure that was put on you can actually tear that tissue by spreading the areas around the vaginal area if you use your hands to spread that open you can actually tear that tissue and the same thing can kind of happen with the anal area. Any force that is used to spread open the anal area can cause injuries.

According to VanAken, LP told her that respondent checked LP's buttocks with a flashlight while she pretended to sleep. VanAken believed that LP's version of events was consistent with her physical injuries. Respondent raised a hearsay objection, which was overruled by the trial court on the basis of the medical treatment or diagnosis exception to hearsay, MRE 803(4). LP also informed VanAken about a history of domestic violence in the family home, describing several events, including one in which respondent had choked the children's mother, which resulted in intervention by Johnson and her husband and a call to the police.

Johnson was once again called to testify about the statements LP made to her. Johnson's testimony was consistent with the testimony she gave during the tender-years' hearing, with a few clarifications. On the basis of her discussion with LP, Johnson was unsure whether respondent had successfully turned LP over onto her back or if he had only attempted to do so. In

addition, LP told Johnson that respondent did not put anything inside of her and had only touched her buttocks. Johnson did not believe that the minor children were bonded with respondent because he rarely engaged in activities with the children. Whenever Johnson saw them together, the children were playing by themselves while respondent played video games.

Jill Heilmann, a children's protective services worker, testified to her belief that the minor children were likely to be harmed if returned to respondent's care. She was concerned about respondent's having access to the children considering his sexual abuse of LP. Heilmann also noted that respondent had provided very little support for the minor children. Heilmann further expressed concern regarding the alleged domestic violence, but the trial court struck this testimony when respondent objected on the ground that it constituted hearsay. In Heilmann's opinion, the minor children had a heightened need for stability and permanency due to their ages—they were all under six years old. To the best of Heilmann's knowledge, respondent had neither been arrested nor charged for the alleged sexual abuse of LP.

Heilmann testified that before proceedings were commenced, the minor children had lived with their four older siblings, their mother, and respondent in a rental unit. At some point between the initiation of this case and trial, the family was evicted from the rental home and the children and their mother had moved in with Johnson and Johnson's husband. According to Heilmann, the children were all bonded with each other.

The children's mother testified that respondent moved out of their home after LP made the allegations against respondent. She also touched on the alleged history of domestic violence, claiming that while respon-

dent had not physically assaulted her, he would stand in her way and prevent her from leaving a room. The children heard some of their arguments, although the children's mother testified that she did not intend to argue in front of them. According to the children's mother, respondent sometimes yelled at the children and spanked them for disciplinary purposes but never in a way that she deemed inappropriate. She never saw respondent physically mistreat any of the minor children. Because of the age of the youngest child, the children's mother did not believe that the child and respondent had bonded. But the other two children talked about respondent often and said that they missed him. In the mother's view, one child was having behavioral issues caused or exacerbated by respondent's absence. When the child was angry with the children's mother, the child would cry and ask for respondent.

After the proofs were submitted, there was a power outage, so the court adjourned the matter for the day. A week later the case was reconvened, and the trial court issued its ruling from the bench. The trial court found a basis to exercise jurisdiction under MCL 712A.2(b)(1) and (2), and it terminated respondent's parental rights to the minor children. The petition had alleged grounds for termination under MCL 712A.19b(3)(b)(*i*), (j), and (k)(*ix*), and while the court's ruling was a bit vague, it appeared that the court found that all three provisions had been proven by clear and convincing evidence. The primary premise of the court's decision was its finding that there was "sexual abuse in this case." The trial court concluded that the evidence even revealed some penetration.

In finding a basis to exercise jurisdiction and to terminate respondent's parental rights, the trial court determined that the minor children would be at a

substantial risk of harm by respondent for two reasons related to respondent's sexual abuse of LP. First, there was a direct risk of respondent's engaging in similar conduct with his children and, second, there was a risk to the children's mental, physical, and emotional well-being in being raised by someone who would do such things. The trial court also found that termination was in the minor children's best interests because they needed permanency, stability, and an environment safe from potential victimization. Furthermore, the court determined that the bond between the children and respondent, while significant, actually posed a danger to the children because they could be abused or learn negative behaviors and a lack of impulse control. The trial court also noted that the children were safe with their mother, who reported LP's allegations immediately and continued to provide a good environment for the children. Respondent appeals by right.

II. ANALYSIS

A. ADJUDICATION AND DISPOSITION IN A SINGLE COMBINED PROCEEDING

Respondent argues that the trial court erred when it combined the adjudication trial and the initial disposition hearing, resulting in a single indistinguishable proceeding. Respondent contends that "the record does not reflect that a separate hearing was conducted by the trial court to determine whether or not there was a preponderance of . . . evidence" to establish jurisdiction. Respondent further maintains that the SANE report prepared by VanAken was inadmissible because the medical treatment or diagnosis exception to hearsay, MRE 803(4), did not apply. Respondent similarly posits that some of VanAken's testimony was based on hearsay statements LP made to VanAken and that LP

herself stated that there was no penetration. And, according to respondent, there is no indication in the record whether the trial court used the SANE report and VanAken's testimony for purposes of the adjudication or instead used the evidence to decide the issue of termination as part of the dispositional phase of the case. Respondent also argues that the trial court made no factual findings and thus it is unclear whether the court properly adjudicated respondent with legally admissible evidence.

1. STANDARD OF REVIEW

"[F]amily division procedure under the court rules . . . [is] reviewed de novo." *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Respondent, however, did not preserve his argument below with an objection to the procedure employed by the trial court. Therefore, our review is for plain error affecting respondent's substantial rights, and to justify reversal the plain error must also seriously affect the integrity, fairness, or public reputation of the judicial proceedings. *In re Ferranti*, 504 Mich 1, 30; 934 NW2d 610 (2019).

2. INTERPRETATION OF THE COURT RULES

"When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation." *Haliw v Sterling Hts*, 471 Mich 700, 704; 691 NW2d 753 (2005); see also *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). "Court rules should be interpreted to effect the intent of the drafter, the Michigan Supreme Court." *Fleet Business*, 274 Mich App at 591. Clear and unambiguous language contained in a court rule must be given its plain meaning and is enforced as written. *Id*. We may consult a dictionary to

determine the plain meaning of an undefined term used in the court rules. *Wardell v Hincka*, 297 Mich App 127, 132; 822 NW2d 278 (2012).

3. DISCUSSION

The DHHS, following an investigation, may petition a court to take jurisdiction over a child. *In re Ferranti*, 504 Mich at 15, citing MCR 3.961(A). The petition must contain essential facts that, if proven, would permit the court to assume and exercise jurisdiction over the child. MCR 3.961(B)(3); MCL 712A.2(b); *In re Ferranti*, 504 Mich at 15. If a petition is authorized, the adjudication phase of the proceedings takes place, and the "question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15.

In *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014), the Michigan Supreme Court explained:

> A brief review of the court rules and statutes governing child protective proceedings is helpful here. The juvenile code, MCL 712A.1 *et seq*., establishes procedures by which the state can exercise its *parens patriae* authority over minors. These procedures are reflected in Subchapter 3.900 of the Michigan Court Rules. In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. [Citations omitted.]

If a trial is held regarding adjudication, the respondent is entitled to a determination of the facts by the

jury or judge, the rules of evidence apply, and jurisdiction must be established by a preponderance of the evidence. *In re AMAC*, 269 Mich App at 536. "The dispositional phase involves a determination of what action, if any, will be taken on behalf of the child." *Id*. at 537. "Unlike the adjudicative [trial], at the initial dispositional hearing the respondent is not entitled to a jury determination of the facts and, generally, the Michigan Rules of Evidence do not apply, so all relevant and material evidence is admissible." *Id*., citing MCR 3.911, MCR 3.973(E), and MCR 3.977(A)(3). "Termination of parental rights may be ordered at the initial dispositional hearing." *In re AMAC*, 269 Mich App at 537, citing MCR 3.977(E) and MCL 712A.19b(4).[2] "If permanent termination of parental rights is sought, the petitioner bears the burden of proving the statutory basis for termination by clear and convincing evidence." *In re AMAC*, 269 Mich App at 537; see also MCL 712A.19b(3).

MCR 3.973 addresses procedural and substantive aspects of dispositional hearings, and Subrule (A) provides:

> A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult, *once the court has determined following trial*, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true. [Emphasis added.]

The language of MCR 3.973(A) indicates that a dispositional hearing is to be conducted following or after a trial in which jurisdiction is established pursuant to

[2] "If a petition to terminate the parental rights to a child is filed, the court may enter an order terminating parental rights . . . at the initial dispositional hearing." MCL 712A.19b(4).

statute. MCR 3.973(B) provides that "[u]nless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." This language plainly envisions the dispositional hearing taking place "after" the adjudication trial, whether immediately thereafter or later. MCR 3.973(C) provides, in relevant part, that "[t]he *interval*, if any, *between* the trial and the dispositional hearing is within the discretion of the court." (Emphasis added.) An "interval" is "a space of time between events or states." *Merriam-Webster's Collegiate Dictionary* (11th ed). And even if there is no space of time "between" a trial and a dispositional hearing, which is permissible under MCR 3.973(C), the sequence of events nonetheless entails an adjudication trial followed by a dispositional hearing.

MCR 3.977 addresses the termination of parental rights in the dispositional phase of the proceedings, and Subrule (E) provides, in pertinent part, as follows:

> The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if
>
> (1) the original, or amended, petition contains a request for termination;
>
> (2) *at the trial or plea proceedings*, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;
>
> (3) *at the initial disposition hearing*, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination . . . .

The language of MCR 3.977(E) clearly envisions or contemplates two separate proceedings—a trial or plea relative to adjudication *and* a dispositional hearing for purposes of termination. MCR 3.977(E)(3) indicates that at an initial disposition hearing, a court can terminate parental rights on the basis of legally admissible evidence that had previously been introduced at the adjudication trial or legally admissible evidence presented for the first time at the dispositional hearing.[3] Thus, MCR 3.977(E)(3) does allow a court, at the initial disposition hearing, to rely on evidence admitted at the adjudication trial to support termination. In that sense, MCR 3.977(E)(3) creates some murkiness with respect to the line of demarcation between an adjudication trial and an initial dispositional hearing.

Reading MCR 3.973(A), (B), and (C) in conjunction with MCR 3.977(E)(3), we conclude that the following described process honors the intent of the court rules promulgated by our Supreme Court and applies when an adjudication trial is conducted and the DHHS requests termination at the initial dispositional hear-

[3] In *In re Utrera*, 281 Mich App 1, 17-18; 761 NW2d 253 (2008), this Court noted that the "petitioner sought termination of respondent's parental rights at the initial disposition in the amended petition, and MCR 3.977(E) provides that clear and convincing, *legally admissible evidence* was required." (Emphasis added.) Thus, while generally the "Michigan Rules of Evidence do not apply at the initial dispositional hearing," MCR 3.973(E)(1), when termination is sought at the initial dispositional hearing, legally admissible evidence is required, MCR 3.977(E)(3). When termination of parental rights is not being sought at the initial dispositional hearing or on the basis of circumstances that are new or different from those that led the court to originally take jurisdiction, "[t]he Michigan Rules of Evidence do not apply, other than those with respect to privileges . . . ." MCR 3.977(H)(2).

ing under circumstances such as those posed in this case. First, an adjudication trial is to be conducted with the court allowing the introduction of legally admissible evidence that is relevant to the exercise of jurisdiction under MCL 712A.2(b). At the conclusion of the adjudication trial, the court, in a bench trial, is to determine whether the DHHS established by a preponderance of the evidence a basis for jurisdiction under MCL 712A.2(b). If jurisdiction is not established, the proceeding is, of course, concluded. If the trial court finds that it has jurisdiction, the dispositional hearing in which termination is sought may immediately be commenced. At the termination hearing, the trial court, in rendering its termination decision under MCL 712A.19b, may take into consideration any evidence that had been properly introduced and admitted at the adjudication trial, MCR 3.977(E), along with any additional relevant and material evidence that is received by the court at the termination hearing, MCR 3.977(H)(2).[4]

---

[4] To the extent that the DHHS argues that this Court's opinion in *In re AMAC* supports the trial court's handling of the adjudication and dispositional phases of the case, we disagree. Indeed, *In re AMAC* fully supports our ruling, as reflected in the following passage:

> In this case, there was an adjudicative hearing that concluded with the trial court rendering its written opinion and order terminating respondent's parental rights without a dispositional hearing either immediately following the trial or by proper notice after the trial. We construe the plain and ordinary language of MCR 3.973(A) as requiring a dispositional hearing to be "conducted to determine what measures the court will take with respect to a child properly within its jurisdiction . . . ." Clearly, the dispositional hearing is to be held after the adjudicative phase of the proceeding in which it was determined that the child was properly within the court's jurisdiction. See MCR 3.973(A). And the dispositional hearing must be held either immediately following the adjudicative hearing or after proper notice. See 3.973(B). Therefore, the trial court erred here in not affording respondent

In this case, with respect to the presentation of evidence, the trial court did not separate the adjudication trial from the dispositional hearing, and it then issued rulings in regard to jurisdiction and termination after all the proofs were submitted. The trial court, therefore, failed to proceed as required by the court rules. But on plain-error review, we cannot conclude that respondent's substantial rights were affected or that the integrity, fairness, or public reputation of the proceedings were seriously affected by the court's procedural errors. With regard to respondent's argument that the SANE report and VanAken's testimony touching on LP's assertions should not have been admitted into evidence and that it is impossible to tell whether the court used this evidence for adjudication or disposition, we note the record reflects that to the extent that the court relied on the report and testimony, it was for purposes of *both* adjudication and termination. Moreover, the statements LP made to VanAken were "for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." MRE 803(4). Respondent fails to develop any pertinent argument to the contrary.

With respect to respondent's contention that the trial court made no factual findings, leaving it unclear whether the court properly adjudicated respondent

---

her right to a dispositional hearing. [*In re AMAC*, 269 Mich App at 538 (citations omitted; ellipses in original).]

Although a dispositional hearing can be conducted immediately after an adjudicative trial, the two cannot be converged such that there is no distinction. *In re Thompson*, 318 Mich App 375, 379; 897 NW2d 758 (2016).

with legally admissible evidence, we find that argument lacks merit. The trial court, relying on legally admissible evidence, expressly found that respondent sexually abused LP, that there was penetration, and that there was a substantial risk of harm to the minor children in light of the sexual assault committed by respondent against LP. Moreover, these findings were used to support the exercise of jurisdiction and the termination of parental rights.

In sum, we hold that the trial court committed procedural errors in conducting the adjudicative and dispositional phases of the case; however, respondent has failed to show that the errors affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent argues that his trial attorney was ineffective for failing to object to the trial court's merger of the adjudicatory and dispositional phases of the case.

1. STANDARD OF REVIEW

Whether counsel was ineffective presents a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

2. DISCUSSION

"The principles applicable to claims of ineffective assistance of counsel in the arena of criminal law also apply by analogy in child protective proceedings; therefore, it must be shown that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and that (2) the deficient performance

prejudiced the respondent." *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016). To demonstrate prejudice, a party must show the existence of a reasonable probability that, but for counsel's error, the results of the proceeding would have been different, and a reasonable probability is one that is sufficient to undermine confidence in the outcome. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

In light of our holding regarding the proper procedures under the court rules to be used in conducting an adjudicative trial and an initial dispositional hearing in which termination is sought, we conclude that trial counsel's performance in failing to object to the process used in this case fell below an objective standard of reasonableness. Nevertheless, respondent simply cannot and does not establish the requisite prejudice. We are confident that the results of the adjudication and disposition would have been exactly the same had the court followed the proper procedures. Accordingly, reversal is unwarranted.

C. CHILDREN'S BEST INTERESTS

Finally, respondent argues that the trial court clearly erred by finding that termination of his parental rights was in the children's best interests. Respondent contends that the children's placement with their mother weighed heavily against termination and that the trial court failed to consider that the children were placed with a relative—their mother. He also maintains that the trial court failed to consider that the children had a good relationship and strong bond with their father. Respondent claims that terminating his parental rights was traumatic for the children. Respondent emphasizes that there was no evidence that he harmed, neglected, or abused his

minor children. He notes that there was only one incident of abuse; that two of his children are boys, so there should have been no concern that he would sexually abuse them; and that respondent provided for the basic needs of the children.

1. TERMINATION FRAMEWORK AND STANDARDS OF REVIEW

If a trial court finds that a single statutory ground for termination has been established by clear and convincing evidence and that it has been proved by a preponderance of the evidence that termination of parental rights is in the best interests of a child, the court is mandated to terminate a respondent's parental rights to that child. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).[5] "This Court reviews for clear error the trial court's ruling that a statutory ground for termination has been established and its ruling that termination is in the children's best interests." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011); see also MCR 3.977(K). "A finding . . . is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed . . . ." *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004). When applying the clear-error standard in parental termination cases, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); see also MCR 2.613(C).

[5] Respondent does not argue that the trial court erred by finding that the grounds for termination were established by clear and convincing evidence.

2. DISCUSSION

With respect to a child's best interests, we focus on the child rather than the parent. *In re Moss*, 301 Mich App at 87. In assessing a child's best interests, a trial court may consider such factors as a "child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts Minors*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014). The trial court may also consider how long the child was in foster care or placed with relatives, along with the likelihood that "the child could be returned to [the] parents' home within the foreseeable future, if at all." *In re Frey*, 297 Mich App 242, 249; 824 NW2d 569 (2012).

Furthermore, "[a] child's placement with relatives is a factor that the trial court is required to consider" when making its best-interests determination, *In re Gonzales/Martinez*, 310 Mich App 426, 434; 871 NW2d 868 (2015), and "a child's placement with relatives weighs against termination," *In re Mason*, 486 Mich 142, 164; 782 NW2d 747 (2010). "Relative" is defined in MCL 712A.13a(1)(j) as

> an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling, nephew or niece,

> first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce.

Thus, a child's biological parent is not that child's "relative" for purposes of the statute. This proposition was recognized by this Court in *In re Schadler*, 315 Mich App 406, 412-413; 890 NW2d 676 (2016), wherein the panel observed:

> [R]espondent argues that the trial court entirely failed to give any weight to BS's placement with his biological mother. However, the trial court specifically acknowledged the "week on / week off custodial arrangement between the father and mother" in the process of determining that termination was in BS's best interests. Moreover, MCL 712A.13a(1)(j) defines "relative," and biological mother is not included in the definition. See MCL 712A.13a(1)(j). Therefore, because BS's biological mother was not a "relative" for purposes of MCL 712A.19a, the trial court was not required to consider that relative placement. Respondent's argument is misplaced.

Accordingly, we reject respondent's similar argument in this case.

In finding that termination was in the minor children's best interests, the trial court acknowledged that respondent and the minor children were bonded and that termination would not be an easy transition. But the court also recognized that the children needed stability and permanence, as well as "to grow up in an environment where they are safe and secure[] from . . . potential victimization . . . ." The trial court opined that the children's mother was providing a safe and nurturing environment for the children.

Although there was only evidence of one act of sexual abuse, it was an especially egregious violation of a child who had looked to respondent for care and protection as a father figure. We cannot conclude that

the trial court clearly erred by finding that this single act of sexual abuse that resulted in physical injuries revealed a side of respondent that posed a serious danger to his minor children. With respect to the purported bond between respondent and his children, there was also evidence of a bond between LP and respondent, yet that did not prevent respondent from sexually exploiting and abusing her. The doctrine of anticipatory neglect provides that how a parent treats one child is probative of how that parent may treat other children. *In re LaFrance Minors*, 306 Mich App 713, 730; 858 NW2d 143 (2014). Although the doctrine is not a perfect fit in this case because LP is not respondent's child, respondent had been raising LP for a number of years as if she were his daughter. Furthermore, there is nothing in the record to support respondent's pseudo-psychological argument that he is not a danger to young boys—abuse is abuse. Finally, the fact that respondent provided some limited assistance to his children did not suffice to overcome the danger that respondent poses to his children. In sum, the trial court did not clearly err by finding that termination of respondent's parental rights was in the best interests of the children.

III. CONCLUSION

We hold that the trial court committed procedural errors in conducting the adjudicative and dispositional phases of the case; however, respondent has failed to show that the errors affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. We also conclude that trial counsel's performance in failing to object to the process used in this case fell below an objective standard of reasonableness, but respondent

failed to establish the prejudice required for reversal. Finally, we hold that the trial court did not clearly err by finding that termination of respondent's parental rights was in the children's best interests.

We affirm.

BOONSTRA, P.J., and FORT HOOD, J., concurred with MARKEY, J.

ESTATE OF MILLER v ANGELS' PLACE, INC

Docket No. 348940. Submitted October 7, 2020, at Detroit. Decided October 22, 2020, at 9:10 a.m.

Plaintiff, the estate of Aaron K. Miller, brought an action in the Oakland Circuit Court against Angels' Place, Inc., and its employee, Carol Caramia, alleging ordinary negligence against Angels' Place and Caramia and also alleging breach of contract against Angels' Place. The case arose from the death of Miller, who had mental and physical disabilities and was a resident at a licensed adult foster-care small group home owned and operated by Angels' Place. Miller had the tendency to eat too quickly and put large amounts of food into his mouth; because of this tendency, his access to food was regulated, and he was to be visually monitored when he ate. On December 30, 2017, Miller was at the home, and Caramia was the sole caregiver on duty. Miller began to have difficulty breathing and collapsed. Caramia telephoned 911, and emergency personnel transported Miller to the hospital. He died the next day from asphyxia and airway obstructions as a result of choking on food. Plaintiff initiated this case, and following discovery, defendants moved for summary disposition, asserting that plaintiff's claims did not arise under ordinary-negligence theories but instead were medical malpractice claims. The trial court, Michael Warren, J., granted summary disposition in favor of defendants, holding that Angels' Place was a licensed health facility or agency under MCL 600.5838a(1) because it qualified as an "intermediate care facility" under MCL 333.20108(1) and thus was capable of committing medical malpractice. It further held that Caramia, as an employee and agent of Angels' Place, was also capable of committing medical malpractice. The court found that plaintiff's claims arose out of a contract with defendants to provide Miller with healthcare services and therefore involved a professional relationship entangled with questions of medical judgment. Finally, the court determined that the claims would require the testimony of medical experts. Plaintiff moved for reconsideration, which the trial court denied. Plaintiff appealed.

The Court of Appeals *held*:

The first issue to be determined in any purported medical malpractice case is whether the case is brought against an entity or a person capable of medical malpractice. Under MCL 600.5838a(1), a medical malpractice claim may be brought against a person or entity who is or holds himself or herself out to be a licensed healthcare professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency. A licensed health facility or agency means a health facility or agency licensed under Article 17 of the Public Health Code, MCL 333.1101 *et seq*., and a licensed healthcare professional means an individual licensed or registered under Article 15 of the Public Health Code. Article 17 of the Public Health Code provides its own definition of a health facility or agency in MCL 333.20106(1). In this case, the parties did not dispute that Angels' Place, as an adult foster-care small group home, was not licensed as one of the entities listed under MCL 333.20106(1), nor did they dispute that Angels' Place was not licensed under the Public Health Code. Rather, it was licensed under the Adult Foster Care Facility Licensing Act (the AFCFLA), MCL 400.701 *et seq*. Because Angels' Place was licensed under the AFCFLA and not under Article 17 of the Public Health Code, Angels' Place could not be a licensed health facility or agency within the meaning of MCL 600.5838a(1), regardless of whether it also had certification as a provider of care for the developmentally disabled. As a result, Angels' Place and its employee, Caramia, could not be liable for medical malpractice in that capacity. The trial court improperly held that Angels' Place was an intermediate care facility under MCL 333.20108(1) that became a health facility or agency under MCL 333.20115. MCL 333.20115 refers only to certification, not licensure, and there was no evidence that Angels' Place met the definition of intermediate care facility even for purposes of certification. The record further did not demonstrate that Angels' Place was "a hospital long-term care unit, nursing home, county medical care facility, or other nursing care facility, or distinct part thereof," which was a prerequisite to finding that Angels' Place meets the definition found in MCL 333.20108(1). Because defendants in this case were not entities or persons capable of committing medical malpractice, the claims could not sound in medical malpractice. Rather, the claims alleged in plaintiff's complaint sounded in ordinary negligence. Accordingly, the trial court erred when it granted summary disposition in favor of defendants.

Reversed and remanded for further proceedings.

Giroux Amburn PC (by *Matthew D. Klakulak*) for plaintiff.

Vandeveer Garzia, PC (by *Donald C. Brownell*, *Adam K. Gordon*, and *Christian E. Hildebrandt*) for defendants.

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

GADOLA, P.J. Plaintiff, Joan Miller, as personal representative of the Estate of Aaron Kelly Miller, appeals as of right the trial court order granting defendants, Angels' Place, Inc. (Angels' Place) and Carol Caramia, summary disposition under MCR 2.116(C)(7) on plaintiff's claims of negligence. The trial court concluded that plaintiff's claims sounded in medical malpractice rather than ordinary negligence, and plaintiff challenges that ruling. Because we conclude that defendants are not entities or persons capable of committing medical malpractice, we reverse the trial court's grant of summary disposition and remand for proceedings consistent with this opinion.

I. FACTS

This case arises from the death of Aaron Kelly Miller (Miller). Miller was diagnosed with mental and physical disabilities and required support to live in the community. At the time of his death, Miller was a resident at Joliat Home, a licensed adult foster-care small group home with a special certification for providing services to the developmentally disabled. Joliat Home is owned and operated by defendant Angels' Place.

At Joliat Home, Miller was to be continually monitored for safety. Particularly because Miller had the tendency to eat too quickly and put large amounts of food into his mouth, his access to food was regulated

and he was to be visually monitored when he ate. On December 30, 2017, Miller was at the home, and defendant Carol Caramia, an employee of Angels' Place, was the sole caregiver on duty. Miller began to have difficulty breathing and collapsed. Caramia telephoned 911. Emergency personnel arrived shortly thereafter; they found that Miller did not have a pulse and also discovered food in Miller's mouth. They performed CPR and artificial breathing until Miller regained his pulse and then transported him to the hospital. Miller died the next day from asphyxia and airway obstruction as a result of choking on the food.

Plaintiff initiated this case in the trial court, alleging ordinary negligence against Angels' Place and Caramia and also alleging breach of contract against Angels' Place. After discovery, defendants moved for summary disposition under MCR 2.116(C)(7) and (8), asserting that plaintiff's claims did not arise under ordinary-negligence theories and instead were medical malpractice claims. Defendants argued that Angels' Place was an entity capable of medical malpractice because it is a licensed health facility under MCL 600.5838a(1) and that Caramia was capable of medical malpractice as its agent. Defendants also asserted that plaintiff's claims involved questions of medical judgment and that a lay juror would require testimony from a medical expert to understand whether defendants' actions and decisions had been reasonable or in breach of a duty.

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(7). The trial court found that Angels' Place was properly classified as a licensed health facility or agency because it is an "intermediate care facility," MCL 333.20108(1), and thus is an entity capable of medical malpractice under

MCL 600.5838a, as was Caramia as an employee and agent of Angels' Place. The trial court also found that plaintiff's claims arose out of a contract with defendants to provide Miller with healthcare services and therefore involved a professional relationship entangled with questions of medical judgment. Finally, the trial court determined that the claims would require the testimony of medical experts. Because the claims had not been alleged as medical malpractice claims, the trial court granted defendants summary disposition under MCR 2.116(C)(7) but permitted plaintiff an opportunity to file a motion to amend her complaint under MCR 2.118. The trial court thereafter denied plaintiff's motion for reconsideration. Plaintiff now appeals.

II. DISCUSSION

Plaintiff contends that the trial court erred by granting defendants summary disposition under MCR 2.116(C)(7), holding that her claims sounded in medical malpractice and not ordinary negligence as alleged in her complaint. We agree.

Whether a plaintiff's claim sounds in ordinary negligence or in medical malpractice is a question of law that this Court reviews de novo. *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 517; 918 NW2d 645 (2018). We also review de novo the application of statutes, *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017), and a trial court's decision to grant or deny summary disposition, *Dawoud v State Farm Mut Auto Ins Co*, 317 Mich App 517, 520; 895 NW2d 188 (2016).

The determination whether the nature of a claim is ordinary negligence or medical malpractice is properly made under MCR. 2.116(C)(7). *Bryant v Oakpointe*

Villa Nursing Ctr, Inc, 471 Mich 411, 419; 684 NW2d 864 (2004). In considering a motion under MCR 2.116(C)(7), we accept the contents of the complaint as true unless contradicted by the documentation submitted by the moving party, and we consider any affidavits, depositions, admissions, or other documentary evidence submitted. *McLean v McElhaney*, 289 Mich App 592, 597; 798 NW2d 29 (2010). If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, whether summary disposition is proper is a question of law for the Court. See *id*.

The first issue to be determined in any purported medical malpractice case is whether the case is brought against an entity or a person capable of medical malpractice. *Bryant*, 471 Mich at 420. "A malpractice action cannot accrue against someone who, or something that, is incapable of malpractice." *Adkins v Annapolis Hosp*, 420 Mich 87, 95; 360 NW2d 150 (1984). Recently, this Court discussed who can be sued for malpractice:

> The scope of who can be sued for medical malpractice has expanded over the years. Initially, "[u]nder the common law, only physicians and surgeons were potentially liable for medical malpractice." *Kuznar v Raksha Corp*, 481 Mich 169, 177; 750 NW2d 121 (2008). With MCL 600.5838a, the Legislature expanded the scope of who may be subject to a medical-malpractice action to include other professionals and entities. *Bryant*, 471 Mich at 420, citing *Adkins*, 420 Mich at 94-95. Specifically, the Legislature provided for medical-malpractice claims to be brought against "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency." MCL 600.5838a(1). For these purposes, a "licensed health facility or agency" means "a health facility or agency licensed under article

> 17 of the public health code," and a "licensed health care professional" means "an individual licensed or registered under article 15 of the public health code." MCL 600.5838a(1)(a) and (b). [*LaFave v Alliance Healthcare Servs, Inc*, 331 Mich App 726, 732; 954 NW2d 566 (2020).]

Thus, MCL 600.5838a, though an accrual statute that sets forth when a medical malpractice action accrues, also expands the list of those who are subject to suit for medical malpractice to include a licensed health facility or agency. *Bryant*, 471 Mich at 420. That statute provides, in relevant part:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws. [MCL 600.5838a.]

MCL 600.5838a(1)(a) thus defines licensed health facilities and agencies as "those licensed under article 17 of the Public Health Code," *Kuznar v Raksha Corp*, 481 Mich 169, 177-178; 750 NW2d 121 (2008), specifically, in MCL 333.20101 to MCL 333.22260. Article 17 thereby "provides its own definition of what is a health

facility or agency in the form of a list." *Kuznar*, 481 Mich at 178. That "list," found in MCL 333.20106(1), see *id*. at 178 n 23, specifically defines a "health facility or agency" as follows:

> (1) "Health facility or agency," except as provided in [MCL 333.20115], means:
>
> (a) An ambulance operation, aircraft transport operation, nontransport prehospital life support operation, or medical first response service.
>
> (b) A county medical care facility.
>
> (c) A freestanding surgical outpatient facility.
>
> (d) A health maintenance organization.
>
> (e) A home for the aged.
>
> (f) A hospital.
>
> (g) A nursing home.
>
> (h) A hospice.
>
> (i) A hospice residence.
>
> (j) A facility or agency listed in subdivisions (a) to (g) located in a university, college, or other educational institution.

The list set forth in MCL 333.20106(1) defines "health facility or agency," except as provided in MCL 333.20115. MCL 333.20115 provides for the promulgation of administrative rules to "further define" the list set forth in MCL 333.20106(1). *Kuznar*, 481 Mich at 178. MCL 333.20115 provides, in relevant part:

> (1) The department may promulgate rules to further define the term "health facility or agency" and the definition of a health facility or agency listed in [MCL 333.20106] as required to implement this article. The department may define a specific organization as a health facility or agency for the sole purpose of certification authorized under this section. *For purpose of certification only*, an organization

> defined in [MCL 333.20106(5), *MCL 333.20108(1)*, or MCL 333.20109(4)] *is considered a health facility or agency*. [Emphasis added.]

In this case, the parties do not dispute that Angels' Place is a licensed adult foster-care small group home. The parties also do not dispute that Angels' Place has a certification[1] as a provider of care for the developmentally disabled. However, the parties also do not dispute that Angels' Place, as an adult foster-care small group home, is not *licensed* as one of the entities listed under MCL 333.20106(1), nor is it *licensed* under any administrative expansion of the list under MCL 333.20115. See *Kuznar*, 481 Mich at 178.

Moreover, the parties do not dispute that Angels' Place is not licensed under the Public Health Code. Rather, adult foster-care small group homes are licensed under the Adult Foster Care Facility Licensing Act (the AFCFLA), MCL 400.701 *et seq*. *Life Skills Village, PLLC v Nationwide Mut Fire Ins Co*, 331 Mich App 280, 287; 951 NW2d 724 (2020). Because Angels' Place is licensed under the AFCFLA and not under

[1] Under MCL 333.20131, the Department of Licensing and Regulatory Affairs is charged with the certification process; MCL 333.20131(1) states that the department "shall establish a comprehensive system of licensure and certification for health facilities or agencies . . . ." MCL 333.20131(2) provides that the department "may certify a health facility or agency, or part thereof, defined in [MCL 333.20106] or under [MCL 333.20115] when certification is required by state or federal law, rule, or regulation." "Certification" is defined in MCL 333.20104(1) as "the issuance of a document by the department to a health facility or agency attesting to the fact that the health facility or agency . . . complies with applicable statutory and regulatory requirements and standards [and] . . . is eligible to participate as a provider of care and services in a specific federal or state health program." By contrast, MCL 333.20108(2) defines "license," in pertinent part, as "an authorization, annual or as otherwise specified, granted by the department and evidenced by a certificate of licensure or permit granting permission to a person to establish or maintain and operate, or both, a health facility or agency."

Article 17 of the Public Health Code, Angels' Place cannot be a licensed health facility or agency within the meaning of MCL 600.5838a(1), regardless of whether it also has certification as a provider of care for the developmentally disabled. As a result, Angels' Place and its employee, Caramia, cannot be liable for medical malpractice in that capacity. See *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 337; 941 NW2d 685 (2019).

The trial court, however, held that Angels' Place was an entity capable of medical malpractice because, although Angels' Place was not one of the entities specified in the list provided by MCL 333.20106(1), Angels' Place nonetheless is a licensed health facility or agency within the meaning of MCL 600.5838a(1) given that the trial court found it to be an "intermediate care facility" under MCL 333.20108(1). That section provides:

> (1) "Intermediate care facility" means a hospital long-term care unit, nursing home, county medical care facility, or other nursing care facility, or distinct part thereof, certified by the department to provide intermediate care or basic care that is less than skilled nursing care but more than room and board. [MCL 333.20108(1).]

The trial court concluded that Angels' Place is an intermediate care facility under MCL 333.20108(1) because it is certified to provide care to the developmentally disabled, which the trial court determined was "intermediate care or basic care that is less than skilled nursing care but more than room and board." The trial court reasoned that Angels' Place, as an intermediate care facility under MCL 333.20108(1), becomes a "health facility or agency" under MCL 333.20115. However, MCL 333.20115(1) provides that "[t]he department may define a specific organization as a health facility or

agency *for the sole purpose of certification authorized under this article*. *For purpose of certification only*, an organization defined in [MCL 333.20106(5), *MCL 333.20108(1)*, or MCL 333.20109(4)] is considered a health facility or agency." (Emphasis added.) Additionally, MCL 333.20108(1) refers only to certification, not licensure. Consequently, both statutory sections provide that being an "intermediate care facility" establishes only that it is "certified" under the Public Health Code, not that it is "licensed." The plain language of MCL 600.5838a(1)(a) specifically requires licensure.

Further, there is no demonstration that Angels' Place meets the definition of "intermediate care facility" even for purposes of certification. MCL 333.20108(1) requires that an entity be "a hospital long-term care unit, nursing home, county medical care facility, or other nursing care facility, or distinct part thereof," to be classified as an intermediate care facility "certified by the department to provide intermediate care . . . ." In finding that Angels' Place was a licensed health facility or agency, the trial court principally relied on the second half of MCL 333.20108(1), concluding that Angels' Place is an intermediate care facility because it has been "certified by the department to provide intermediate care or basic care that is less than skilled nursing care but more than room and board." The record, however, does not demonstrate that Angels' Place is "a hospital long-term care unit, nursing home, county medical care facility, or other nursing care facility, or distinct part thereof," which is a prerequisite to finding that Angels' Place meets the definition found in MCL 333.20108(1). Nor does the record support that Angels' Place was, in fact, certified in this manner. Moreover, as discussed earlier, concluding that Angels' Place has been "certified by the department to provide intermediate care or basic care

that is less than skilled nursing care but more than room and board," despite the lack of evidentiary support for this proposition, would not transform Angels' Place into an entity licensed under Article 17 of the Public Health Code when it is instead licensed under the AFCFLA.

Our Legislature expressly identified the category of persons and entities that can be subjected to a medical malpractice lawsuit, and this Court will not expand that category. *LaFave*, 331 Mich App at 732. MCL 600.5838a extends the category of those who are subject to suit for medical malpractice to include a licensed health facility or agency. *Bryant*, 471 Mich at 420-421. MCL 600.5838a(1)(a) defines licensed health facilities and agencies as "those licensed under article 17 of the Public Health Code," *Kuznar*, 481 Mich at 177-178, specifically MCL 333.20101 to MCL 333.22260. Because Angels' Place is not licensed under Article 17 of the Public Health Code, it is not a licensed health facility or agency under MCL 600.5838a. The trial court therefore erred by finding that Angels' Place was a health facility or agency licensed under Article 17 of the Public Health Code, that Angels' Place was an entity capable of medical malpractice, and that Caramia was an agent of Angels' Place similarly capable of medical malpractice.

Plaintiff also contends that the trial court erred when it found that her claims raised questions requiring evidence of medical judgment or knowledge that went beyond a juror's common knowledge and experience and therefore sounded in medical malpractice rather than ordinary negligence. We need not address this additional inquiry, however. Before a claim can be found to be one of medical malpractice, the defendant must be a person or entity capable of committing

malpractice. *LaFave*, 331 Mich App at 731-732. Because defendants in this case are not entities or persons capable of committing medical malpractice, the claims cannot sound in medical malpractice. The claims alleged in plaintiff's complaint therefore sound in ordinary negligence.[2]

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

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

---

[2] Given this conclusion, we decline to address plaintiff's additional challenge that the trial court abused its discretion when it chose to strike the affidavit offered by plaintiff in support of her motion for reconsideration.

PEOPLE v POSEY
PEOPLE v QUINN

Docket Nos. 345491, 351834, and 346039. Submitted October 13, 2020, at Detroit. Decided October 22, 2020, at 9:15 a.m. Leave to appeal sought in Docket No. 345491.

Dametrius B. Posey and Sanchez Quinn were convicted by separate juries at a joint trial in the Wayne Circuit Court in connection with a shooting incident outside a market in Detroit. Posey was convicted of two counts of assault with intent to commit murder (AWIM), MCL 750.83; two counts of assault with intent to do great bodily harm less then murder (AWIGBH), MCL 750.84; carrying a concealed weapon (CCW), MCL 750.227; arming oneself with a weapon with unlawful intent, MCL 750.226; felon in possession of a firearm (felon-in-possession), MCL 750.224f; and six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Quinn was convicted of two counts of AWIGBH, single counts of CCW, arming oneself with a weapon with unlawful intent, and felon-in-possession, and four counts of felony-firearm. While Terrence Byrd and Dwayne Scott were talking together in the parking lot outside a market, two men exited the store and came up behind Byrd and Scott. One, later identified as Posey, pointed a gun at Scott, and the other, later identified as Quinn, pointed a gun at Byrd. Byrd, who had a conceal-carry permit, responded by pulling out his handgun. Byrd fired all 17 rounds in his gun in shooting at defendants; Byrd thought that he struck both defendants, but he did not know whether he or Posey fired first. Although Byrd testified that Quinn did not shoot first and might not have even fired his gun, a gun with a spent casing in it that was linked to Quinn was found at the scene. Byrd failed to identify defendants in photographic lineups soon after the incident, but he identified them during trial. While Scott identified Posey as one of the shooters during a pretrial photographic lineup, he was unable to identify the second assailant. Thereafter, Scott was unable to identify Posey or Quinn at the preliminary examination or at trial. On top of this identification testimony, the prosecution introduced at trial video and photographic evidence related to the shooting. Posey and Quinn were treated for gunshot wounds at area

hospitals after the shooting. Quinn made statements to the police while he was in the hospital; after first denying his presence at the market, he later admitted that he was present during the shooting. The court, Ulysses W. Boykin, J., sentenced Quinn as a third-offense habitual offender to 9 to 20 years' imprisonment for the AWIGBH convictions and 4 to 10 years' imprisonment for the CCW, arming-with-unlawful-intent, and felon-in-possession convictions; those sentences were to be served concurrently with each other but consecutively with concurrent two-year terms of imprisonment for the felony-firearm convictions. The trial court sentenced Posey as a third-offense habitual offender, MCL 769.11, to 22 to 40 years' imprisonment for the AWIM convictions, 9 to 20 years' imprisonment for the AWIGBH convictions, and 4 to 10 years' imprisonment for the CCW, arming-with-unlawful-intent, and felon-in-possession convictions; those sentences were all to be served concurrently with each other but consecutively with concurrent five-year terms of imprisonment for the six felony-firearm convictions. Posey moved in the Court of Appeals to remand for corrections to the jury verdict and for resentencing. On remand, the trial court vacated Posey's AWIGBH convictions and the two associated felony-firearm convictions and resentenced Posey for the remaining convictions to the same terms of imprisonment previously imposed. In Docket No. 345491, Posey appealed his convictions and the original judgment of sentence, and in Docket No. 351834, Posey appealed the amended judgment of sentence entered on resentencing. In Docket No. 346039, Quinn appealed his convictions and judgment of sentence.

The Court of Appeals *held*:

1. The Due Process Clause of the United States Constitution is implicated if an in-court identification was preceded by a suggestive out-of-court identification. To sustain a due-process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. A suggestive identification procedure can arise in the following circumstances: (1) when a witness is called by the police and is told that the police have arrested the right person, (2) when a witness is shown only one person, or (3) when a witness is shown a group of individuals in which one person, the defendant, is singled out in some way, leading the witness to presume that he or she is the perpetrator. Testimony concerning an identification is inadmissible at trial if the trial court finds that the pretrial procedure was impermissibly suggestive. However, an in-court identification may be allowed and admitted despite an impermissibly suggestive procedure if an

in-court identification can be established that is untainted by the improper pretrial identification procedure. A trial court should evaluate the following factors to determine whether a witness has an independent basis for an in-court identification: (1) Prior relationship with or knowledge of the defendant, (2) the opportunity to observe the offense, (3) length of time between the offense and the disputed identification, (4) accuracy or discrepancies in the pre-lineup or showup description and the defendant's actual description, (5) any previous proper identification or failure to identify the defendant, (6) any identification prior to lineup or showup of another person as the defendant, (7) the nature of the alleged offense and the physical and psychological state of the victim, and (8) any idiosyncratic or special features of the defendant. The need to establish an independent basis for an in-court identification only arises when the pretrial identification is tainted by improper procedure or unduly suggestive comments. A witness's failure to identify the defendant in a pretrial lineup does not render the witness's subsequent in-court identification inadmissible; instead, the issue is one of credibility for the fact-finder to determine. Posey admitted that Byrd did not identify him before trial, let alone in an impermissibly suggestive identification, and there was no improper law enforcement activity related to the identification process. Therefore, the independent-basis test was not applicable, and Posey was not denied due process when Byrd identified Posey in court. Further, Posey's trial counsel aggressively challenged Byrd's in-court identification, and it was for the jury to assess Byrd's credibility. With regard to Quinn, there was no suggestive out-of-court identification of Quinn by Scott or Byrd, and it was for the jury to assess Byrd's identification of Quinn in court. Moreover, Quinn admitted to the police that he was present at the crime scene. Accordingly, Quinn was not denied due process of law by a suggestive identification process; moreover, any error related to the unpreserved issue would have been harmless.

2. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that the performance prejudiced the defendant, i.e., that there was a reasonable probability that but for counsel's error, the result of the proceeding would have been different. Posey was not denied effective assistance when his trial counsel failed to object to Byrd's in-court identification testimony; there was no legal basis to challenge that identification, and counsel was not ineffective for failing to raise a meritless argument. Posey's trial counsel was not ineffective for failing to call an eyewitness-identification expert. Hearing testimony from an expert that eyewitness testimony is inherently suspect would not have added much to the

trial given that Byrd's lack of identification of Posey before trial—of which the jury was made aware—illustrated by itself that eyewitness testimony is inherently suspect. Finally, given the other evidence presented (video and photographs showing the shooter and evidence of Posey's treatment for a gunshot wound after the shooting), Posey failed to demonstrate a reasonable likelihood that the outcome of the trial would have been different had he obtained an eyewitness-identification expert. There was no evidence that Quinn's statements to the police while he was in the hospital recovering from gunshot wounds were coerced. Accordingly, trial counsel was not ineffective for failing to pursue a futile motion to suppress. In addition, because there was no evidence to support Quinn's claim that a DNA expert would have exonerated him, trial counsel was not ineffective for failing to obtain that expert.

3. MCL 769.34(10) provides that if a minimum sentence is within the appropriate guidelines minimum sentence range, the Court of Appeals must affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. In *People v Lockridge*, 498 Mich 358 (2015), the Supreme Court determined that Michigan's sentencing guidelines violated the Sixth Amendment right to a jury trial. To remedy the constitutional infringement, the Court declared the guidelines advisory only. In *People v Schrauben*, 314 Mich App 181 (2016), the Court of Appeals concluded that *Lockridge* did not alter or diminish MCL 769.34(10) such that when a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information. The trial court vacated Posey's convictions of AWIGBH on remand and then resentenced defendant to the same minimum prison term of 22 to 40 years for his AWIM convictions. The sentence was within the newly calculated guidelines minimum sentence range, and Posey did not challenge the scoring of the guidelines or the accuracy of the information used by the court in sentencing Posey; thus, under MCL 769.34(10), defendant was not entitled to review of those sentences. To avoid application of MCL 769.34(10), Posey argued that *Schrauben* was wrongly decided and that the panel should declare a conflict and convene a special panel under MCR 7.215(J)(2) and (3) to resolve the issue. Because the panel agreed with the analysis in *Schrauben* related to MCL 769.34(10) and because other panels had also relied on *Schrauben* in published opinions, the Court of Appeals declined to declare a conflict with *Schrauben*. Accordingly, Posey's sentences

were affirmed because (1) MCL 769.34(10) precluded review and (2) Posey failed to raise a viable constitutional challenge to the sentences.

4. Identity is an element of every offense. The elements of AWIGBH are (1) an attempt or threat with force or violence to do corporal harm to another (an assault) and (2) an intent to do great bodily harm less than murder. AWIGBH is a specific-intent crime. The intent to do great bodily harm less than murder is an intent to do serious injury of an aggravated nature. If a defendant has such intent, the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction. Because of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent. Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats. Although actual injury to the victim is not an element of the crime, injuries suffered by the victim may also be indicative of a defendant's intent. Pointing a loaded gun at another person is inherently dangerous. There was sufficient evidence that Quinn was at the scene of the shooting because Quinn's statement to the police placed him there, Quinn went to the hospital with gunshot wounds after the shooting, and Byrd identified Quinn in court. There was also sufficient evidence that Quinn attempted to injure Byrd or Scott and intended to cause great bodily harm because Quinn admitted that he was at the market during that shooting, admitted that he was with someone who intended to rob two individuals outside the market, and admitted that he was holding his gun after exiting the market. Further, the jury could have inferred that Quinn intended to cause serious injury of an aggravated nature because Quinn used a dangerous weapon.

5. Although the trial court plainly erred when it failed to articulate, as required by MCL 769.1k(1)(b)(*iii*), the factual basis for the court costs imposed against Quinn, remand was not necessary because Quinn failed to demonstrate that he was prejudiced by that failure.

In Docket Nos. 345491 and 351834, Posey's convictions and judgment of sentence affirmed. In Docket No. 346039, Quinn's convictions and judgment of sentence affirmed.

CONSTITUTIONAL LAW — DUE PROCESS CLAUSE — IN-COURT IDENTIFICATIONS — NEED FOR INDEPENDENT BASIS.

The Due Process Clause of the United States Constitution is implicated if an in-court identification was preceded by a sugges-

tive out-of-court identification; an in-court identification may be allowed and admitted despite an impermissibly suggestive procedure if the witness has an independent basis for the in-court identification; the need to establish an independent basis for an in-court identification only arises when the pretrial identification is tainted by improper procedure or unduly suggestive comments (US Const, Am IV).

Docket Nos. 345491 and 351834:

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Gabrielle O'Connor*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Adrienne N. Young*) and *Ronald D. Ambrose* for Dametrius B. Posey.

Docket No. 346039:

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Thomas M. Chambers*, Special Assistant Prosecuting Attorney, for the people.

Sanchez Quinn, *in propria persona*, and *Arthur H. Landau* for Sanchez Quinn.

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. In these consolidated appeals, defendants Dametrius Posey and Sanchez Quinn appeal by right their convictions by separate juries at a joint trial. Posey was convicted of two counts of assault with intent to commit murder (AWIM), MCL 750.83; two counts of assault with intent to do great bodily harm

less then murder (AWIGBH), MCL 750.84; carrying a concealed weapon (CCW), MCL 750.227; arming oneself with a weapon with unlawful intent, MCL 750.226; felon in possession of a firearm (felon-in-possession), MCL 750.224f; and six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Posey as a third-offense habitual offender, MCL 769.11, to 22 to 40 years' imprisonment for the AWIM convictions, 9 to 20 years' imprisonment for the AWIGBH convictions, and 4 to 10 years' imprisonment for the CCW, arming-with-unlawful-intent, and felon-in-possession convictions, which are all to be served concurrently but consecutively with concurrent five-year terms of imprisonment for the six felony-firearm convictions. After this Court granted Posey's motion to remand for corrections to the jury verdict and for resentencing,[1] the trial court vacated the AWIGBH convictions and the two associated felony-firearm convictions and resentenced Posey for the remaining convictions to the same terms of imprisonment previously imposed. Quinn was convicted of two counts of AWIGBH, single counts of CCW, arming oneself with a weapon with unlawful intent, and felon-in-possession, and four counts of felony-firearm. The trial court sentenced Quinn as a third-offense habitual offender to 9 to 20 years' imprisonment for the AWIGBH convictions and 4 to 10 years' imprisonment for the CCW, arming-with-unlawful-intent, and felon-in-possession convictions; those sentences are all to be served concurrently with each other but consecutively with concurrent two-year terms of imprisonment for the felony-firearm convictions. Posey appealed his convictions and the original judgment of

[1] *People v Posey*, unpublished order of the Court of Appeals, entered July 5, 2019 (Docket No. 345491).

sentence in Docket No. 345941, and he appeals the amended judgment of sentence entered on resentencing in Docket No. 351834. Quinn appeals his convictions and judgment of sentence in Docket No. 346039. We affirm the convictions and sentences with respect to both defendants.

I. FACTUAL SUMMARY

This case arises from a shooting outside the Super X Market, which is located at the corner of Charles Street and Sparling Street in Detroit. On Sunday, October 8, 2017, Terrence Byrd and his cousin Dwayne Scott were talking together outside the Super X Market near Byrd's Chevrolet Trailblazer. Two men, one described as dark-skinned and the other as being lighter-skinned, approached and entered the store. After a short period, the two men exited the store and flanked Byrd and Scott. The dark-skinned man produced a handgun and pointed it at Scott, while the other man pointed a gun at Byrd. Byrd, who had a permit to carry a concealed weapon, pulled out his firearm in response and gunfire rang out. Byrd discharged all 17 rounds in his gun in shooting at Quinn and Posey. He believed that he struck both assailants. Byrd could not say whether he or Posey shot first. Byrd testified that Quinn did not shoot first and that he did not even see Quinn fire his gun. A spent casing, however, was found stuck in a gun that was dropped at the scene and linked to Quinn. Although Byrd was not injured during the episode, Scott was shot in his hip and left arm.

Although Byrd failed to identify Posey or Quinn in photo lineups shortly after the incident and, in fact, selected other individuals in the arrays, he identified both of them at trial as the culprits, with Posey being

the dark-skinned person and Quinn being the lighter-skinned person. In a pretrial photo lineup, Scott identified Posey as one of the shooters, but he was unable to identify the other shooter. Scott could not identify either defendant at the preliminary examination or trial. A surveillance video and photos of the events as they transpired outside the market were admitted into evidence. They showed clear pictures of the dark-skinned man, but the lighter-skinned man was wearing a hoodie and was more difficult to see.

Posey and Quinn were both treated for gunshot wounds at area hospitals after the shooting. Quinn made statements at the hospital to the police in which, after first lying, he admitted being present during the shooting at the Super X Market. A video of that interview was admitted into evidence.[2] When police spoke to Posey at the hospital, he initially provided officers with a false name. Following defendants' convictions, these appeals ensued.

II. DOCKET NOS. 345491 & 351834—DEFENDANT POSEY

A. DUE PROCESS AND IN-COURT IDENTIFICATION

Posey argues that he was denied his right to due process of law when Byrd was allowed to identify him at trial. We disagree. Because Posey did not object to Byrd's identification testimony at trial, this issue is unpreserved. We review unpreserved constitutional issues for plain error affecting substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). Thus, to succeed, Posey must show that there was an error, that the error was clear or obvious, and that the error affected his substantial rights. *People v Carines*,

[2] Quinn's interview was presented only to his jury.

460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights when it impacts the outcome of the lower-court proceedings. *Id*. Additionally, reversal is only warranted when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the integrity, fairness, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id*.

A defendant's right to due process is implicated if an in-court identification was preceded by a suggestive out-of-court identification. *Neil v Biggers*, 409 US 188, 196-198; 93 S Ct 375; 34 L Ed 2d 401 (1972). "In order to sustain a due process challenge, a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993) (opinion by GRIFFIN, J.). A suggestive identification procedure can arise when a witness is called by the police and is told that the police have arrested the right person, when a witness is shown only one person, or when a witness is shown a group of individuals wherein one person, the defendant, is uniquely singled out in some way, leading the witness to presume that he or she is the perpetrator. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). "If the trial court finds that the pretrial procedure was impermissibly suggestive, testimony concerning that identification is inadmissible at trial." *Kurylczyk*, 443 Mich at 303.[3] But an in-court identification may be allowed and admitted despite an impermissibly suggestive procedure if an independent basis for the in-court

[3] "Due process protects criminal defendants against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained

identification can be established that is untainted by the improper pretrial identification procedure. *Id*. "[R]eliability is the linchpin in determining the admissibility" of possibly tainted identification testimony. *Manson v Brathwaite*, 432 US 98, 114; 97 S Ct 2243; 53 L Ed 2d 140 (1977).

To determine if a witness has an independent basis for an in-court identification, the Michigan Supreme Court has identified eights factors a court should evaluate:

> 1. Prior relationship with or knowledge of the defendant.
>
> 2. The opportunity to observe the offense. This includes such factors as length of time of the observation, lighting, noise or other factor affecting sensory perception and proximity to the alleged criminal act.
>
> 3. Length of time between the offense and the disputed identification. . . .
>
> 4. Accuracy or discrepancies in the pre-lineup or showup description and defendant's actual description.
>
> 5. Any previous proper identification or failure to identify the defendant.
>
> 6. Any identification prior to lineup or showup of another person as defendant.
>
> 7. . . . [T]he nature of the alleged offense and the physical and psychological state of the victim. . . .
>
> 8. Any idiosyncratic or special features of defendant. [*People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977).]

While Scott identified Posey in a pretrial photo lineup, Scott could not identify Posey at trial. Scott's

---

through unnecessarily suggestive procedures." *People v Sammons*, 505 Mich 31, 41; 949 NW2d 36 (2020) (quotation marks and citation omitted).

pretrial identification of Posey is not at issue. Byrd did not identify Posey in a photo lineup before trial; he selected another individual. He did, however, identify Posey at trial. Byrd indicated that he realized he had identified the wrong person in the photo array after he saw Posey in a subsequent news broadcast. On appeal, Posey acknowledges that Byrd made no pretrial identification of Posey, let alone an improperly suggestive identification. Nonetheless, Posey maintains that we should apply the factors governing the independent-basis test to assess the admissibility of Byrd's in-court identification of Posey.

"The need to establish an independent basis for an in-court identification *only arises* where the pretrial identification is tainted by improper procedure or unduly suggestive comments." *People v Laidlaw*, 169 Mich App 84, 92; 425 NW2d 738 (1988) (emphasis added). In *People v Barclay*, 208 Mich App 670, 675-676; 528 NW2d 842 (1995), this Court observed:

> The need to establish an independent basis for an in-court identification arises where the pretrial identification is tainted by improper procedure or is unduly suggestive. At no point has defendant argued that the lineup procedure was improper or unduly suggestive. Rather, defendant's argument is premised on the fact that [the witness] did not identify defendant at a pretrial corporeal lineup, but identified him in court (at the preliminary examination) as the man who poured the gasoline in the store. The fact that [the witness] did not identify defendant at the lineup did not render his subsequent in-court identification inadmissible. Rather, this was a credibility issue that was properly before the jury to determine. The trial court did not commit clear error in allowing the in-court identification testimony. [Citations omitted.]

Moreover, in *Perry v New Hampshire*, 565 US 228, 231-233; 132 S Ct 716; 181 L Ed 2d 694 (2012), the United States Supreme Court stated and held:

> In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.
>
> An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.
>
> We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of

> evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt. [Quotation marks and citation omitted.]

Here, there was no improper law enforcement activity and no pretrial identification by Byrd. Posey's reliance on *United States v Hill*, 967 F2d 226 (CA 6, 1992)—which reached a conclusion compatible with Posey's argument—is misplaced because *Hill* is inconsistent with Michigan precedent, see *Barclay*, 208 Mich App at 675-676, and was issued before the United States Supreme Court decided *Perry*. Posey's counsel aggressively challenged Byrd's testimony by highlighting how Byrd, while not under stress and with the incident still fresh in his mind, identified someone other than Posey in the photo array and only changed his mind after viewing the news broadcast of the incident.[4] Byrd also acknowledged on cross-examination that when he made the identification during the police photo lineup, he did not know what the assailants looked like. It was for the jury to assess the reliability and credibility of Byrd's in-court identification of Posey as one of the shooters. We also note that Posey was treated for gunshot wounds at a hospital shortly after the shooting occurred, that he lied to police about his identity, and that Byrd believed that he hit both Posey and Quinn with gunfire. This evidence leads to an almost inescapable conclusion that Posey was present at the scene of the shooting.

Posey also argues that he was denied the effective assistance of counsel when trial counsel failed to object to Byrd's in-court identification testimony and when

[4] We note that Posey does not make any argument that Byrd's viewing of the broadcast impermissibly tainted his in-court identification such that the identification was inadmissible.

counsel failed to retain an expert witness on eyewitness identification. Whether counsel was ineffective presents a mixed question of fact, which is reviewed for clear error, and constitutional law, which is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Our Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), articulated the principles governing a claim of ineffective assistance of counsel, stating as follows:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Quotation marks and citations omitted.]

An attorney's performance is deficient if the representation falls below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding

matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); see also *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (explaining that the same presumption applies regarding a trial counsel's decision to call or not to call expert witnesses). We cannot, however, "insulate the review of counsel's performance by simply calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Initially, this Court must determine whether strategic choices were made after less than complete investigation, with any choice being reasonable only to the extent that reasonable professional judgment supported the limitations on investigation. *Id.*; see also *People v Ackley*, 497 Mich 381, 389; 870 NW2d 858 (2015).

Because, for the reasons discussed earlier, there was no valid legal basis to challenge Byrd's in-court identification of Posey, trial counsel was not ineffective for failing to object to the identification. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (noting that counsel is not ineffective for failing to raise a meritless argument or futile objection).

Posey also argues that trial counsel was ineffective for failing to call an eyewitness-identification expert at trial. While the identification of Posey as one of the shooters was an important issue at his trial, it was reasonable for trial counsel to attack the credibility and reliability of Byrd's in-court identification solely through cross-examination. Although it is possible an expert *may* have helped, one was not required. See *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994) (explaining that the law requires a trial that is fair, not perfect). Trial counsel effectively challenged Byrd's identification testimony. In fact, without the use of an expert, the jury was made aware that Byrd

admitted identifying someone other than Posey in a photo lineup the day after the shooting when his memory was fresh. Again, Byrd even admitted that at the time of the array, he actually could not identify the shooters. Instead, Byrd indicated that he relied on his subsequent viewing of the surveillance videos on a television news broadcast—not his personal recollection of the shooters—to identify defendants. Further, the jury was informed that at the preliminary examination Byrd could only identify Quinn as one of the perpetrators. Thus, hearing testimony from an expert that eyewitness testimony is inherently suspect would not have added much, considering that the jurors were made fully aware of Byrd's dubious history of identifying the shooters. Put another way, Byrd's failure to identify defendants as the shooters immediately after the shooting and his subsequent in-court identification of defendants illustrated firsthand that eyewitness testimony can be inherently suspect. No expert was needed to convey this point.

For the same reason, Posey fails to demonstrate a reasonable likelihood that the outcome of the proceedings would have been different had he obtained an expert witness for trial. Additionally, the prosecution presented surveillance video evidence and still frames showing the assailants. As a result, the jury may have completely disregarded Byrd's questionable identification testimony and instead relied on both the video and photographic evidence showing the shooters and the circumstantial evidence that Posey appeared at a hospital with gunshot wounds after the incident to determine that Posey was one of the gunmen. In sum, we hold that Posey's claims of ineffective assistance of counsel do not warrant reversal.

B. SENTENCING AND PROPORTIONALITY

Posey argues that the trial court abused its discretion when it sentenced him to serve 22 to 40 years' imprisonment for his AWIM convictions. We disagree. "[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). We review de novo constitutional challenges to sentencing decisions. See *People v Skinner*, 502 Mich 89, 99; 917 NW2d 292 (2018).

At his initial sentencing, Posey's guidelines range for his AWIM convictions was 225 to 562 months (or 18 years and 9 months to 46 years and 10 months), and the court sentenced him within that range to a minimum prison term of 22 years. After filing his claim of appeal in Docket No. 345491, Posey successfully moved to remand for resentencing. On remand, the trial court vacated Posey's convictions of AWIGBH and recalculated his guidelines range at 171 to 427 months (or 14 years and 3 months to 35 years and 7 months). The court, however, resentenced Posey to the same minimum prison term of 22 years, which was still well within the new guidelines minimum sentence range—more than 13 years below the top end of the range.

Posey argues that the minimum sentence is not proportionate because the court failed to take into consideration his rehabilitative potential and because the sentence was not decreased at resentencing despite the decrease in and lowering of the guidelines range. "If a minimum sentence is within the appropriate guide-

lines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). In this case, Posey's minimum sentence of 22 years falls within the applicable guidelines range, and he does not challenge the scoring of the guidelines or the accuracy of the information used by the court in sentencing Posey.

Posey argues that MCL 769.34(10) is no longer good law in light of our Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). In *Lockridge*, the Supreme Court held that Michigan's sentencing guidelines violated the Sixth Amendment right to a jury trial, and it remedied the constitutional infringement by declaring the guidelines advisory only. *Id*. at 364-365. In *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016), this Court held that the decision in "*Lockridge* did not alter or diminish MCL 769.34(10)[.]" Therefore, "[w]hen a trial court does not depart from the recommended minimum sentencing range, the minimum sentence must be affirmed unless there was an error in scoring or the trial court relied on inaccurate information." *Schrauben*, 314 Mich App at 196. Posey acknowledges *Schrauben*, argues that it was wrongly decided in violation of *Lockridge* and the Sixth Amendment, and asks us to declare a conflict and request the convening of a special panel under MCR 7.215(J)(2) and (3).

In *People v Ames*, 501 Mich 1026 (2018), our Supreme Court entered an order directing oral argument on the application for leave to appeal and asking the parties to address "whether MCL 769.34(10) has been rendered invalid by this Court's decision in *People v Lockridge*, 498 Mich 358 (2015), to the extent that the statute

requires the Court of Appeals to affirm sentences that fall within the applicable guidelines range 'absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.' See *People v Schrauben* . . . ." The Supreme Court heard oral arguments on January 24, 2019, and then later unanimously denied the application for leave to appeal because the Court was "not persuaded that the questions presented should be reviewed . . . ." *People v Ames*, 504 Mich 899 (2019). While not binding precedent,[5] the order in *Ames* appears to signal the Supreme Court's acceptance of *Schrauben*. Moreover, this Court has been relying on the construction of MCL 769.34(10) set forth in *Schrauben*, including in binding published opinions. See *People v Anderson*, 322 Mich App 622, 636 & n 1; 912 NW2d 607 (2018) (citing *Schrauben* in support of its ruling that "[b]ecause the trial court sentenced Anderson within the applicable sentencing guidelines range, this Court need not evaluate Anderson's sentences for reasonableness and must affirm his sentences . . . ."). Under these circumstances, and because we believe that the *Schrauben* panel was correct in its analysis, we decline to declare a conflict with *Schrauben* under MCR 7.215(J)(2) and (3).

Additionally, defendant is simply mistaken that a sentence within the guidelines is unassailable absent a scoring error or inaccurate information. MCL 769.34(10) does not and cannot preclude *constitutional* appellate challenges to a sentence, e.g., an argument that a sentence constitutes cruel and unusual punish-

[5] See *Tebo v Havlik*, 418 Mich 350, 363 n 2; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.) ("A denial of leave to appeal has no precedential value."). See also MCR 7.301(E) ("The reasons for denying leave to appeal . . . are not to be regarded as precedent.").

ment. See *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008) (stating that MCL 769.34(10)'s limitation on review does not apply to claims of constitutional error); see also *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006) ("It is axiomatic that a statutory provision, such as MCL 769.34(10), cannot authorize action in violation of the federal or state constitutions.").

We note that grossly disproportionate sentences may constitute cruel and unusual punishment. *People v Bullock*, 440 Mich 15, 32; 485 NW2d 866 (1992). However, there is a distinction between "proportionality" as it relates to the constitutional protection against cruel and unusual punishment, and "proportionality" as it relates to reasonableness review of a sentence, which is not constitutional in nature. *Id*. at 34 n 17 ("Because the similarity in terminology may create confusion, we note that the *constitutional* concept of 'proportionality' under Const 1963, art 1, § 16 [cruel or unusual punishment prohibition] is distinct from the nonconstitutional 'principle of proportionality' discussed in . . . *Milbourn* . . . , although the concepts share common roots."). A sentence within the guidelines range is presumptively proportionate, and a proportionate sentence is not cruel or unusual punishment. *Powell*, 278 Mich App at 323. A defendant can only overcome that presumption by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate. *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). No unusual circumstances were presented here, and the AWIM sentences were not disproportionate. Indeed, we conclude that the 22-year minimum sentence was proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Steanhouse*, 500 Mich at 459-460. In this case, defendant does not argue that his AWIM sentences constitute

cruel or unusual punishment, and we conclude, in any event, that because the sentences were presumptively proportionate, devoid of unusual circumstances, proportionate under *Milbourn*, and certainly not grossly disproportionate, they did not constitute cruel or unusual punishment.

Because MCL 769.34(10) precludes appellate review of Posey's AWIM sentences and he does not raise a viable constitutional challenge to the sentences, we affirm those sentences.

III. DOCKET NO. 346039—DEFENDANT QUINN

A. DUE PROCESS AND IN-COURT IDENTIFICATION

Quinn argues that he was denied due process of law by a suggestive identification process. But as with the argument presented by Posey, there was no pretrial identification of Quinn by Scott or Byrd and thus no suggestive out-of-court identification. Byrd's identification of Quinn in court was properly left for the jury to assess. Accordingly, Quinn's argument fails. See *Perry*, 565 US at 231-233; *Barclay*, 208 Mich App at 675-676. Moreover, Quinn made a statement to the police in which he admitted being present at the crime scene, and his attorney conceded that point in counsel's arguments to the jury. Any error arising from this unpreserved issue would have been completely harmless and nonprejudicial. *Carines*, 460 Mich at 763.

B. SUFFICIENCY OF THE EVIDENCE

Quinn next argues that there was insufficient evidence to support his AWIGBH convictions. The argument is cursory, vague, and disjointed. In *People v Kenny*, 332 Mich App 394, 404; 956 NW2d 562 (2020), this Court observed:

> This Court reviews de novo the issue regarding whether there was sufficient evidence to support a conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence—whether direct or circumstantial—in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses. Circumstantial evidence and any reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. The prosecution need not negate every reasonable theory of innocence, it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. All conflicts in the evidence must be resolved in favor of the prosecution. [Quotation marks and citations omitted.]

Quinn first appears to argue that the evidence was insufficient to establish his presence at the crime scene. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Quinn's statement to police placed him at the crime scene. Also, defense counsel conceded that Quinn was present at the shooting. And Byrd's in-court identification indicated that Quinn was at the crime scene. Also, Quinn went to the hospital after the shooting suffering from gunshot wounds. There was not only sufficient evidence that Quinn was present at the shooting, there was overwhelming evidence.

Next, Quinn essentially contends that there was insufficient evidence to show that he instigated or started the shooting or that he even discharged his weapon before Byrd, who was not injured, opened fire.

Thus, according to Quinn, there was no attempt to injure Byrd or Scott and no intent to cause great bodily harm.

In *People v Stevens*, 306 Mich App 620, 628-629; 858 NW2d 98 (2014), this Court addressed the offense of AWIGBH, stating:

> The elements of AWIGBH are (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. AWIGBH is a specific intent crime. The intent to do great bodily harm less than murder is an intent to do serious injury of an aggravated nature. If a defendant has such intent, the fact that he was provoked or that he acted in the heat of passion is irrelevant to a conviction. Because of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent. Intent to cause serious harm can be inferred from the defendant's actions, including the use of a dangerous weapon or the making of threats. Although actual injury to the victim is not an element of the crime, injuries suffered by the victim may also be indicative of a defendant's intent[.] [Quotation marks and citations omitted.]

In Quinn's interview with the police, after initially lying about whether he was present at the Super X Market, Quinn admitted to being at the market, admitted that he was with someone who intended to rob two individuals near the Trailblazer outside the market, and admitted that he produced his gun after exiting the market. There was also evidence showing, contrary to Quinn's assertions in his statement to the police, that Quinn had his firearm drawn and pointed at Byrd *before* Byrd responded by pulling out his own firearm. To the extent that Quinn is suggesting that if Byrd fired first, it would make Quinn's subsequent

discharge of his weapon justifiable, i.e., self-defense, we find that argument to be without merit. Quinn did not raise any issue of self-defense, and the jury was not instructed on self-defense. Moreover, in light of the evidence that Quinn was the aggressor, any claim of self-defense would not have been sustainable. See *People v Guajardo*, 300 Mich App 26, 35; 832 NW2d 409 (2013) ("In general, a defendant does not act in justifiable self-defense when he or she uses excessive force or when the defendant is the initial aggressor.").

Furthermore, the jury could reasonably infer that Quinn had the intent to cause serious injury of an aggravated nature in light of his use of a dangerous weapon. *Stevens*, 306 Mich App at 629. As this Court has explained, "[m]erely pointing a loaded gun at another person is inherently dangerous; the notion that actually shooting a gun in the direction of another person, no matter how inaccurately, could reflect anything but an intent to cause serious harm is beyond comprehension." *People v Blevins*, 314 Mich App 339, 358; 886 NW2d 456 (2016) (emphasis omitted). Additionally, Quinn cannot rely on the fact that Byrd testified that he never saw Quinn fire his weapon. The person Byrd identified as Quinn left his gun behind at the scene. The retrieved gun had a spent casing that apparently had become jammed or stuck inside the weapon. From this evidence, the jury could have reasonably inferred that Quinn fired his gun. Moreover, the jury was instructed on aiding and abetting, and there was evidence that Posey and Quinn were working together to commit a robbery and that Posey fired his gun multiple times in the gunfight melee that erupted at the market. See MCL 767.39 ("Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or

abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense."); *People v Robinson*, 475 Mich 1, 6; 715 NW2d 44 (2006) (noting that aiding and abetting is a theory of prosecution that allows the imposition of vicarious liability for accomplices). Although vacated presumably on double-jeopardy grounds, Posey was convicted of two counts of AWIGBH by the jury. Thus, the jury certainly could have determined that Quinn—Posey's accomplice—was guilty of two counts of AWIGBH on an aiding and abetting theory even if Quinn did not have a chance to discharge his weapon before being shot.

In sum, we hold that Quinn's argument that there was insufficient evidence to support his AWIGBH convictions fails. Reversal is unwarranted.

C. IMPOSITION OF COURT COSTS

Quinn argues that remand is necessary because the trial court did not explain the factual basis for its imposition of $1,300 in court costs as required under MCL 769.1k(1)(b)(*iii*) (providing that a court may impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case") and under this Court's decision in *People v Konopka (On Remand)*, 309 Mich App 345, 360; 869 NW2d 651 (2015) ("We . . . remand to the trial court for it to establish a factual basis for the $500 in costs imposed under MCL 769.1k(1)(b)(*iii*), or to alter that figure, if appropriate."). The trial court imposed the $1,300 in court costs without explanation. But Quinn did not preserve this issue with an objection; therefore, our

review is for plain error affecting Quinn's substantial rights. *Carines*, 460 Mich at 763.

The prosecutor has supplied us with a document from the State Court Administrative Office (SCAO) reflecting that the average cost per criminal case in the Wayne Circuit Court is $1,302.[6] Furthermore, during Posey's resentencing, he was assessed $1,300 in court costs as well. And at that time, the trial court explained that the $1,300 figure "has been arrived at as an average cost of processing cases through the Wayne County Circuit Court by the [SCAO]." Although this remark pertained to Posey and not to Quinn, it reveals the trial court's reliance on the SCAO calculation for the imposition of $1,300 in court costs. While *Konopka* would ordinarily call for a remand, we decline to do so under the present circumstances. *Konopka*, 309 Mich App at 360. Quinn does not even present an argument under the prejudice prong of the plain-error test. Accordingly, although the trial court plainly erred by failing to articulate the factual basis for the court costs imposed against Quinn, Quinn has not demonstrated any of the requisite "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Carines*, 460 Mich at 763.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Quinn argues that he was denied the effective assistance of counsel during trial in two particular instances. Quinn first asserts that counsel was ineffective for failing to move to suppress his statements to the police. On the day of the shooting, Quinn was taken to Henry Ford Hospital after he was shot, and he had

[6] We exercise our power under MCR 7.216(A)(4) to "permit . . . additions to the . . . record" and will consider the SCAO document.

surgery that same day. The following day, the police interviewed Quinn at the hospital. The interview was recorded and admitted into evidence. Quinn maintains that as a result of his postsurgery condition, his statements were not voluntary and thus inadmissible. Quinn primarily relies on the fact that he was physically injured and on pain medication at the time of the interview.

It is well established that voluntary statements are admissible, while involuntary statements are not. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972). In *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), the Michigan Supreme Court set forth the analysis governing whether a defendant's statements or confession was voluntary:

> The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . . ." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."
>
> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether

> the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Citations omitted.]

Again, Quinn focuses solely on his injuries and the medication he was taking to support his claim of involuntariness. All of the other factors discussed in *Cipriano* appear to support a conclusion that Quinn's statements to the police were voluntary. Quinn was 29 years old at the time; he had a GED, and he could read and write. Quinn's status as a third-offense habitual offender indicates that he had prior experience with the police. The questioning lasted less than 25 minutes, of which, more than six minutes were dedicated to discussing Quinn's personal information and obtaining a *Miranda*[7] waiver. There is no suggestion that Quinn had been deprived of food, sleep, or medical attention, and there is no evidence that Quinn was abused or threatened with any abuse.

Furthermore, assuming that Quinn was experiencing some pain from his injuries and was affected by his pain medication, we still have no indication that his condition was so debilitating as to make him lose his free will. In our review of the interview, Quinn appears alert and articulate the entire time, with no sign that he was impaired by any medication during the interview. Consequently, Quinn's reliance on *Mincey v Arizona*, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978), is misplaced. In *Mincey*, the defendant had been seriously wounded; he was severely depressed; he was still

---

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

in the intensive care unit when interviewed, he described leg pain that was unbearable; he was quite confused; some of his written answers were incoherent; he was using a breathing apparatus reserved for more critical patients; he had made several ignored requests for the questioning to cease; and the interrogating officer only stopped the interview at points when the defendant lost consciousness or received medical treatment. *Id*. at 398-401.

The video of Quinn's interview shows a markedly different situation. Quinn never asked to stop the questioning; he was alert and conscious the whole time; and his physical condition was nowhere near as severe as the defendant's condition in *Mincey*. In sum, there is no evidence that Quinn's mental condition was significantly compromised or diminished. Indeed, he was alert, responsive, and articulate during the interview.

It is also important to recall that Quinn initially lied to the police. When a detective asked him about the circumstances surrounding his getting shot, Quinn first stated that he had been shot by someone named "John Boy" at a tire store, possibly near Dequindre Road. Quinn claimed that he was trying to buy some rims for his tires. The detective then asked Quinn if he was sure about that story, and Quinn replied, "I'm positive." When the detective said that he had seen a video showing Quinn at the Super X Market, Quinn changed his story and admitted to being at the market. Quinn also admitted to being present with "D" at the market and that "D" wanted to rob two individuals who were outside standing next to a Trailblazer. Although Quinn initially denied having a gun that day, he later admitted to having a firearm and wielding it after leaving the market. Quinn explained that the "gunplay started" right after he walked out of the Super X Market. Quinn

maintained that he only pulled out his gun after seeing other weapons being displayed, and Quinn continued to deny having ever fired his gun. Quinn's initial fabrications belie his claim that his statements were involuntary. If the circumstances in the interview were such that Quinn had lost his free will, he would not have been able to fabricate a story in an attempt to clear himself of any criminal wrongdoing. See *DeJesus v Delaware*, 655 A2d 1180, 1198 (Del, 1995) (stating that the defendant's "exculpatory statements at the hospital serve to undermine his claim of coercion" and involuntariness). The video shows that Quinn finally relented with his falsehoods, for the most part, when he was informed that the detective had clearly seen him in the video.

Furthermore, in *Colorado v Connelly*, 479 US 157, 163-164; 107 S Ct 515; 93 L Ed 2d 473 (1986), the United States Supreme Court spoke to the issue of voluntariness as part of due-process analysis, explaining:

> [T]he cases considered by this Court over the 50 years since *Brown v Mississippi*[, 297 US 278; 56 S Ct 461; 80 L Ed 682 (1936),] have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the "voluntariness" calculus. But this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional "voluntariness." [Citation omitted.]

In this case, there is simply no evidence to indicate or suggest that there was any police coercion in obtaining Quinn's statements. Therefore, there was no due-process violation.

For these reasons, any motion to suppress Quinn's statements on the basis that they were involuntary would not have been successful. The totality of the circumstances established that Quinn's statements were voluntary. Accordingly, defense counsel was not ineffective for failing to pursue a meritless or futile motion to suppress. See *Ericksen*, 288 Mich App at 201.

Quinn also argues that counsel was ineffective for failing to obtain a DNA expert. This claim lacks merit. There is nothing in the lower-court record suggesting that a DNA expert could have discovered anything of relevance. With nothing in the record to support Quinn's position that DNA testing would have been helpful, he cannot prevail on this issue. See *Carbin*, 463 Mich at 600 (stating that a defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel). There simply is no basis for concluding that DNA testing would have exonerated Quinn.

IV. CONCLUSION

In Docket Nos. 345491 and 351834, we affirm Posey's convictions and judgment of sentence. In Docket No. 346039, we likewise affirm Quinn's convictions and judgment of sentence.

BOONSTRA, P.J., and FORT HOOD, J., concurred with MARKEY, J.

NYKORIAK v NAPOLEON

Docket No. 354410. Submitted October 9, 2020, at Grand Rapids. Decided October 22, 2020, at 9:20 a.m. Leave to appeal denied 507 Mich 883 (2021).

T. P. Nykoriak filed an action in the Wayne Circuit Court against the Wayne County Clerk and the Wayne County Board of Election Commissioners, seeking the disqualification of the third defendant, Benny Napoleon, as a candidate in the election for Wayne County Sheriff. Nykoriak alleged that Napoleon's affidavit of identity (AOI) had not been properly notarized. The court, Timothy M. Kenny, J., denied plaintiff's mandamus complaint and related motions. The Court of Appeals granted plaintiff's motion for immediate consideration of his appeal.

The Court of Appeals *held*:

1. Mandamus is an extraordinary remedy that is only proper if (1) the party seeking the writ 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 legal or equitable remedy exists that might achieve the same result. Nykoriak argued that Napoleon's AOI failed to comply with MCL 168.558 of the Michigan Election Law, MCL 168.1 *et seq*., which requires, *inter alia*, candidates for elected office to file a notarized AOI with the city clerk that contains the candidate's name, address, and other information useful to establishing the candidate's identity. Nykoriak argued that Napoleon's AOI was facially defective because it did not include a notary signature or date of notarization as required under MCL 55.287 of the Michigan Law on Notarial Acts, MCL 55.261 *et seq*. However, a review of the AOI showed that although the notary did not sign and date the form in the spaces designated for notary use, the notary did sign and date the form in the section of the form labeled "for office use only." There was no dispute that the signature on the form belonged to the notary. The notary also stamped the form with the date of expiration of her commission and the county in which she was acting. Because there is no statutory requirement regarding the location of the notary's signature on the AOI, the notary's signature in the "for

office use only" section of the form was sufficient to satisfy MCL 55.287(1). Similarly, the AOI also contained the date that the notarial act was performed, although it did not appear on the line designated for the date of notarization. The date "4/15/2020" was written on the form in the "for office use only" section. Napoleon signed the form on April 15, 2020, the same date that the AOI was filed. Thus, the date of filing was the same date as the notarial act, which is reflected on the form. Because the date that the notarial act was performed was stated on the AOI, the AOI facially complied with MCL 55.287(2)(e). Therefore, the Wayne County defendants did not have a clear legal duty to remove Napoleon's name from the ballot, and the circuit court correctly concluded that Nykoriak was not entitled to mandamus.

2. Under MCL 691.1031, there is a rebuttable presumption of laches in election cases if the action is commenced less than 28 days before the date of the affected election. Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time. Nykoriak filed his action more than 28 days before the primary election at issue, so the rebuttable presumption of laches did not apply as a matter of law. However, after Napoleon filed his AOI on April 15, 2020, Nykoriak filed objections on April 24, 2020. When no action was taken by the Wayne County defendants, Nykoriak waited 24 days to bring suit in the circuit court. During this time, the ballots were printed and delivered to the local clerks. Nykoriak's claim that he used this time to hire counsel, who then had to investigate the claim and research the issue, was not persuasive because there was only one issue in dispute. Napoleon and the Wayne County defendants also sufficiently established that a change in position, i.e., the printing and delivery of the ballots, had resulted in prejudice. Therefore, the circuit court did not err by ruling that the doctrine of laches barred Nykoriak's challenge.

Affirmed.

ELECTION LAW — AFFIDAVIT OF IDENTITY — NOTARIZATION — FACIAL DEFECTS.

MCL 168.558 of the Michigan Election Law, MCL 168.1 *et seq*., requires that a candidate for elected office file an affidavit of identity (AOI) containing the candidate's name, address, and other information useful to establishing their identity; the AOI must be notarized in accordance with MCL 55.287 of the Michigan Law on Notarial Acts, MCL 55.261 *et seq*., which requires, *inter alia*, that the notary's signature and the date of notarization appear on the AOI; an AOI that contains the notary's signature

> and date of notarization in a location on the form other than the one designated for notarial acts complies with MCL 168.558 and MCL 55.287 and is not facially defective so long as the notary's signature, the date of notarization, and other required information in MCL 55.287(e) appear on the form.

Alexander V. Lyzohub for T. P. Nykoriak.

Perkins Law Group, PLLC (by *Todd Russell Perkins*) for Benny Napoleon.

Janet Anderson Davis, Assistant Corporation Counsel, for the Wayne County Clerk and the Wayne County Board of Election Commissioners.

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

PER CURIAM. Plaintiff appeals as of right the circuit court order denying his complaint and motion for a writ of mandamus seeking to compel defendants the Wayne County Clerk (the Clerk) and the Wayne County Board of Election Commissioners (the Board) (collectively, the Wayne County defendants), to reject a facially defective election form and disqualify defendant Benny Napoleon (Napoleon) as a competing candidate in the election for the office of Wayne County Sheriff. We affirm.

I. BACKGROUND

Plaintiff, a candidate for the Democratic primary election, filed a complaint seeking a writ of mandamus to compel the Wayne County defendants to disqualify the incumbent candidate, Napoleon, based on an allegedly facially defective affidavit of identity (AOI). Specifically, plaintiff alleged that Napoleon's AOI was defective because it was not properly notarized. Defendants re-

sponded that the AOI was not defective and that plaintiff's claim was barred by the doctrine of laches.

Following a hearing, the circuit court agreed with defendants and denied plaintiff's complaint and related motions. This appeal followed and we granted immediate consideration. *Nykoriak v Napoleon*, unpublished order of the Court of Appeals, entered August 14, 2020 (Docket No. 354410).[1]

II. MANDAMUS

Plaintiff argues that the circuit court erred by failing to issue a writ of mandamus directing the Wayne County defendants to disqualify Napoleon as a candidate in the election for Wayne County Sheriff on the basis of his facially defective AOI. We disagree.

"This Court reviews for an abuse of discretion a trial court's grant or denial of a writ of mandamus. An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Southfield Ed Ass'n v Bd of Ed of the Southfield Pub Sch*, 320 Mich App 353, 378; 909 NW2d 1 (2017) (quotation marks and citations omitted). "We review de novo, as questions of law, whether defendants have a clear legal duty to perform and whether plaintiff has a clear legal right to performance of any such duty." *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). We also review de novo the interpretation of statutes. *Protecting Mich Taxpayers v Bd of State Canvassers*, 324 Mich App 240, 244; 919 NW2d 677 (2018).

---

[1] Plaintiff subsequently filed a bypass application for leave to appeal in our Supreme Court along with a motion for immediate consideration. The Court granted the motion for immediate consideration, but denied bypass. *Nykoriak v Napoleon*, 506 Mich 915 (2020).

As we explained in *O'Connell v Dir of Elections*, 317 Mich App 82, 90-91; 894 NW2d 113 (2016):

> Mandamus is an extraordinary remedy . . . . Thus, issuance of this writ is proper only if (1) the party seeking the writ 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, legal or equitable, that might achieve the same result. Within the meaning of the rule of mandamus, a clear, legal right is one 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. [Quotation marks and citations 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*, 316 Mich App at 42 (quotation marks omitted).

Plaintiff argues that Napoleon's AOI did not comply with MCL 168.558. Accordingly, this issue involves the interpretation of that statute.

> This Court's primary task in interpreting and applying a statute is to discern and give effect to the intent of the Legislature. The words of the statute are the most reliable evidence of the Legislature's intent, and this Court must give each word its plain and ordinary meaning. In interpreting the statute at issue, [this Court] consider[s] both the plain meaning of the critical words or phrase as well as its placement and purpose in the statutory scheme. When a statute's language is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. [*Stumbo v Roe*, 332 Mich App 479, 484-485; 957 NW2d 830 (2020) (quotation marks and citations omitted; alterations in original).]

MCL 168.558 relates to the filing of petitions, fees, and affidavits for primary elections and provides:

> (1) When filing a nominating petition, qualifying petition, filing fee, or affidavit of candidacy for a federal, county, state, city, township, village, metropolitan district, or school district office in any election, a candidate shall file with the officer with whom the petitions, fee, or affidavit is filed 2 copies of an affidavit of identity. A candidate nominated for a federal, state, county, city, township, or village office at a political party convention or caucus shall file an affidavit of identity within 1 business day after being nominated with the secretary of state. The affidavit of identity filing requirement does not apply to a candidate nominated for the office of President of the United States or Vice President of the United States.
>
> (2) An affidavit of identity must contain the candidate's name and residential address; a statement that the candidate is a citizen of the United States; the title of the office sought; a statement that the candidate meets the constitutional and statutory qualifications for the office sought; other information that may be required to satisfy the officer as to the identity of the candidate; and the manner in which the candidate wishes to have his or her name appear on the ballot. If a candidate is using a name that is not a name that he or she was given at birth, the candidate shall include on the affidavit of identity the candidate's full former name.
>
> (3) The requirement to indicate a name change on the affidavit of identity does not apply if the name in question is 1 of the following:
>
> (a) A name that was formally changed at least 10 years before filing as a candidate.
>
> (b) A name that was changed in a certificate of naturalization issued by a federal district court at the time the individual became a naturalized citizen at least 10 years before filing as a candidate.
>
> (c) A name that was changed because of marriage.

(d) A name that was changed because of divorce, but only if to a legal name by which the individual was previously known.

(e) A name that constitutes a common law name as provided in section 560b.

(4) An affidavit of identity must include a statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid; and a statement that the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both. If a candidate files the affidavit of identity with an officer other than the county clerk or secretary of state, the officer shall immediately forward to the county clerk 1 copy of the affidavit of identity by first-class mail. The county clerk shall immediately forward 1 copy of the affidavit of identity for state and federal candidates to the secretary of state by first-class mail. An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section.

(5) If petitions or filing fees are filed by or on behalf of a candidate for more than 1 office, either federal, state, county, city, village, township, metropolitan district, or school district, the terms of which run concurrently or overlap, the candidate so filing, or on behalf of whom petitions or fees were so filed, shall select the 1 office to which his or her candidacy is restricted within 3 days after the last day for the filing of petitions or filing fees unless the petitions or filing fees are filed for 2 offices that are combined or for offices that are not incompatible. Failure to make the selection disqualifies a candidate with respect to each office for which petitions or fees were so filed and the name of the candidate must not be printed upon the

> ballot for those offices. A vote cast for that candidate at the ensuing primary or general election must not be counted and is void.
>
> (6) A violation of this section for perjury is distinct and separate from any violation of the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282.

As we explained in *Stumbo*, 332 Mich App at 483,

> [u]nder MCL 168.558(1) and (2), a candidate filing a nominating petition or a filing fee in lieu of nominating petition must also file an AOI containing the candidate's name, address, and other information useful to establishing the candidate's identity. The Secretary of State provides a form AOI for use by candidates. This form AOI includes a space designated for the candidate's signature. To the immediate right of the signature space is a space designated for the candidate to record the date he or she signed the AOI. The form AOI also provides space for a notary to attest to the identity of the affiant signing the AOI.

The parties do not dispute that strict compliance with MCL 168.558 is required. See *id*. at 481 ("Our Supreme Court has instructed that a candidate for elected office must strictly comply with the preelection form and content requirements identified in the Michigan Election Law, MCL 168.1 *et seq*., in the absence of any statutory language expressly indicating that substantial compliance with the statute's requirements suffices."). Nor do the parties dispute that this statute requires notarization, as defined by the Michigan Law on Notarial Acts, MCL 55.261 *et seq*.[2] MCL 55.287, relating to the signature and statement requirements, provides:

---

[2] We are cognizant that on April 8, 2020, in response to the COVID-19 pandemic, the Governor signed Executive Order 2020-41, temporarily suspending strict compliance with MCL 55.261 *et seq*. "to the extent it requires a notary to be in the physical presence of an individual seeking

(1) A notary public shall place his or her signature on every record upon which he or she performs a notarial act. The notary public shall sign his or her name exactly as his or her name appears on his or her application for commission as a notary public.

(2) On each record that a notary public performs a notarial act and immediately near the notary public's signature, as is practical, the notary public shall print, type, stamp, or otherwise imprint mechanically or electronically sufficiently clear and legible to be read by the secretary and in a manner capable of photographic reproduction all of the following in this format or in a similar format that conveys all of the same information:

(a) The name of the notary public exactly as it appears on his or her application for commission as a notary public.

(b) The statement: "Notary public, State of Michigan, County of _____.".

(c) The statement: "My commission expires _____.".

(d) If performing a notarial act in a county other than the county of commission, the statement: "Acting in the County of _____.".

(e) The date the notarial act was performed.

(f) If applicable, whether the notarial act was performed using an electronic notarization system under section 26a or performed using a remote electronic notarization platform under section 26b.

(3) A notary public may use a stamp, seal, or electronic process that contains all of the information required under subsection (2). However, the notary public shall not use the stamp, seal, or electronic process in a manner that renders anything illegible on the record being notarized. A notary public shall not use an embosser alone or use any other method that cannot be reproduced.

---

the notary's services" and, in lieu thereof, authorizing a two-way real-time audiovisual process for the performance of a notarial act.

> (4) The illegibility of the statements required under subsection (2) does not affect the validity of the transaction or record that was notarized.

In *Berry*, 316 Mich App at 40, the plaintiff, a registered voter, filed a complaint seeking a writ of mandamus to compel the defendants, the Plymouth Township Clerk, Plymouth Township Election Commission (the Plymouth Township defendants) and the Wayne County Election Commission (the Wayne County defendants), not to place the names of two candidates, the intervening defendants, on the ballot for the August 2, 2016 primary election. It was undisputed that the affidavits filed by the intervening defendants did not provide a precinct number as required by MCL 168.558(2). *Id*. We concluded that because the intervening defendants failed to comply with MCL 168.558(2), the Wayne County defendants had a clear legal duty not to certify their names under MCL 168.558(4). *Id*. at 44. We also concluded that completing a facial review of the affidavits was a ministerial task because they were facially defective. *Id*. at 45. We further concluded that the plaintiff lacked an adequate legal or equitable remedy that might achieve the same result as mandamus. *Id*. Finally, we concluded that the plaintiff had "a clear legal right to performance of the Wayne County defendants' statutory duties." *Id*. at 45, 51.

In *Stumbo*, 332 Mich App at 481, we recognized that "[t]he failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot." In that case, the parties agreed that the defendant's AOI contained "a facially obvious defect" in that "[t]he date that accompanies her signature differ[ed] from the date of the notarization." *Id*. at 486. We concluded,

however, that the AOI was "strictly compliant with the requirements of MCL 168.558." *Id*. We explained:

> There is no question that [the defendant] signed her AOI. There is also no question that the notarization on the AOI is facially compliant with MCL 55.285(1)(b), (4), and (6)(c), which require a notary to witness and attest to a signature made in the presence of the notary. A review of the AOI shows that notary Brent W. Royal attests in that notarization that [the defendant] signed her AOI before him on April 21, 2020. Therefore, we conclude that [the defendant] strictly complied with the attestation requirement implicit in MCL 168.558. [*Id*. at 488.]

We held "that as long as the AOI has been signed by the candidate and notarized in a manner allowed under MCL 55.285, the AOI strictly complies with the attestation requirements implicit in MCL 168.558 and the clerk has a legal duty to certify the affiant to the board of election commissioners for placement on the ballot." *Id*. at 482-483.

In this case, plaintiff argues that Napoleon's AOI is facially defective because it does not include a notary signature and date of notarization as required under MCL 55.285. A review of the AOI shows that the notary did not sign and date the AOI in the specific locations designated for the notary signature and date. Rather, the notary's signature appears in the "for office use only" section on the line indicating "received by." The date of "4/15/2020" appears on the line designated as the "date of filing." The AOI was also stamped by the notary. The stamp included the date on which the notary's commission expires and the county in which she was acting.

With regard to the signature, plaintiff does not dispute that the signature on the "received by" line was that of the notary. That is, there is no dispute that the

notary actually signed the AOI. We agree with defendants that there is no statutory requirement regarding the location of the notary's signature; therefore, the notary's signature in the "for office use only" section is sufficient to satisfy the requirement of MCL 55.287(1).

Likewise, we conclude that the AOI states the date that the notarial act was performed, and, therefore, is facially compliant with MCL 55.287(2)(e). Again, the line designated for the date of notarization was left blank. However, in the "for office use only" section, the date of "4/15/2020" was written on the line designated for the "date of filing." Napoleon signed the AOI on April 15, 2020, the same date that the AOI was filed. The notary named on the AOI is the deputy director of the elections division in the Wayne County Clerk's Office. That being so, Napoleon either presented in-person to the Wayne County Clerk's Office[3] or complied with the process described in Executive Order 2020-41 on April 15, 2020. Stated otherwise, the date of the filing was the same date of the notarial act. Accordingly, the date written on the "date of filing" line next to the clerk/notary's signature, "4/15/2020," is the same date that the clerk notarized the AOI. Because the date that the notarial act was performed is reflected on the AOI, the AOI facially complied with MCL 55.287(2)(e).

To summarize, the AOI was facially compliant with the requirements under MCL 55.287 because it contained: (1) the notary's signature; (2) the notary's name; (3) the county of the notary's commission; (4) the expiration date of the notary's commission; (5) the county the notary acted in; and (6) the date the notarial act was performed. Although certain of these

[3] Plaintiff's pleadings reflect that plaintiff arranged for an in-person meeting by making an appointment with the Wayne County Clerk's Office.

requirements were not completed in the box provided, they were nonetheless on the form, rendering it facially compliant. To conclude otherwise would elevate form over substance. Because the AOI complied with the requirements of MCL 168.558, we conclude that the Wayne County defendants did not have a clear legal duty to remove Napoleon's name from the ballot, and the circuit court correctly concluded that plaintiff was not entitled to a writ of mandamus.

III. LACHES

Because plaintiff is not entitled to a writ of mandamus on the merits, we need not address the parties' arguments regarding laches. However, even if we accepted plaintiff's challenge to Napoleon's AOI, we would nevertheless affirm because the circuit court did not err by determining that plaintiff's claim was barred by the doctrine of laches.

As explained in *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 589; 939 NW2d 705 (2019):

> Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time. To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay. Typically, [l]aches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert. A party guilty of laches is estopped from asserting a right it could have and should have asserted earlier. [Quotation marks and citations omitted; alteration in original.]

"This doctrine applies to cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Wayne Co v*

Wayne Co Retirement Comm, 267 Mich App 230, 252; 704 NW2d 117 (2005) (quotation marks and citation omitted). The doctrine of laches applies in actions in which equitable relief is sought. MCL 600.5815. Moreover, in election cases, MCL 691.1031 creates a rebuttable presumption of laches:

> In all civil actions brought in any circuit court of this state affecting elections, dates of elections, candidates, qualifications of candidates, ballots or questions on ballots, there shall be a rebuttable presumption of laches if the action is commenced less than 28 days prior to the date of the election affected. This section shall not apply to actions brought after the date of the affected election.

Plaintiff filed this action on June 29, 2020, more than 28 days before the date of the August 4, 2020 primary election. Therefore, a rebuttable presumption of laches does not apply in this case. But contrary to plaintiff's assertion, this does not mean that laches does not apply as a matter of law. Although there is no rebuttable presumption of laches in this case, the doctrine may still apply.

In this case, Napoleon's AOI was filed on April 15, 2020. Plaintiff filed objections to the AOI with the Clerk on April 24, 2020, and with the Board on June 5, 2020, but no action was taken by the Wayne County defendants. Plaintiff then waited another 24 days before bringing suit in the circuit court. Plaintiff alleged that, during this time, he considered his options and hired counsel, who investigated his claim, conducted research, and drafted and filed his pleadings. By this time, the printing of the ballots was completed and the ballots had been delivered to the local clerks.

The circuit court did not err by finding unexcused or unexplained delay, particularly in light of plaintiff's prior experience with elections. At the hearing on

plaintiff's motion, the circuit court questioned the assertion made by plaintiff's attorney that it took time to research the issue, asking "what amount o[f] research needed to be done in this particular matter other than what the notary statute requires?" Although the circuit court did not make any specific findings regarding the reason for plaintiff's delay, it is apparent that the court did not find plaintiff's argument persuasive. We agree that the explanation for the delay provided by plaintiff's attorney was not particularly compelling given the single issue in dispute and its nature as an election matter. In addition, defendants sufficiently established a corresponding change in position that had resulted in prejudice in light of the printing and delivery of ballots to local clerks. Therefore, the circuit court did not err by ruling that the doctrine of laches applied to bar plaintiff's "11th hour" challenge.[4]

Affirmed. No costs, a significant question of public interest being involved.

LETICA, P.J., and K. F. KELLY and REDFORD, JJ., concurred.

---

[4] We reject the Wayne County defendants' argument that this appeal is moot, as we believe that this issue is "publicly significant, likely to recur, and yet likely to evade judicial review." *Barrow v Detroit Election Comm*, 305 Mich App 649, 659-660; 854 NW2d 489 (2014) (quotation marks omitted) (reviewing a similar issue under this doctrine more than six months after the winning candidates took office).

BAYBERRY GROUP, INC v CRYSTAL BEACH CONDOMINIUM ASSOCIATION

Docket No. 349378. Submitted October 7, 2020, at Grand Rapids. Decided October 22, 2020, at 9:25 a.m.

Bayberry Group, Inc., a real estate developer and successor to the developer of The Homestead, filed an action in the Leelanau Circuit Court against Crystal Beach Condominium Association and three other condominium associations, seeking damages for maintenance costs and a court order requiring that defendants to pay a proportionate share of ongoing costs to maintain the South Homestead Road easement. Defendants were condominium projects located at The Homestead, a recreational resort located near Lake Michigan. South Homestead Road connected defendants' properties and other properties in The Homestead to M-22. In 2013, plaintiff sought an agreement with the other condominium associations to share the costs of maintaining roadways and other areas within The Homestead. The resulting "Common Area Maintenance" agreement was signed by a majority of the condominium associations that were serviced by South Homestead Road and provided for the maintenance of all of the roadway areas within The Homestead, including lawns and other landscaping. Defendants did not sign the agreement. Plaintiff filed suit alleging that the South Homestead Road easement was a general common element of each condominium project and that defendants were responsible for its maintenance and upkeep under their master deeds and bylaws. Plaintiff asked for damages for the maintenance costs from 2011 through 2017, less the amount incurred by the other associations. Following a bench trial, the trial court, Kevin A. Elsenheimer, J., found that the South Homestead Road easement was not a common element of defendants' master deeds and condominium documents and therefore that defendants had no contractual obligation to pay for costs associated with the easement. The court also concluded that even if defendants had such a contractual obligation, plaintiff's claim for damages for previous maintenance costs would have been waived and barred by the doctrine of laches. Nevertheless, the court concluded that plaintiff was entitled under the common law to future expenses for the maintenance of the South Home-

stead Road easement that were necessary for safe ingress and egress. The trial court created a formula to calculate each parties' cost for maintaining the easement, according to their approximate use. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff argued that defendants and the other co-owners were responsible for the maintenance, repair, upkeep, decoration, and replacement of the South Homestead Road easement under their master deeds and other condominium documents. MCL 559.135 of the Condominium Act, MCL 559.101 *et seq*., addresses easements and provides that when easements are necessary under the act, they are to be created in the condominium documents or other appropriate instruments and must describe the permitted use, the relevant restrictions on the use of the easement, and the rights and financial obligations of those entitled to use the easement. In this case, exhibit B of each of defendants' master deeds provided that access is provided to the condominium project via a 66-foot wide easement for ingress and egress, and there is no dispute that this referred to the South Homestead Road easement. Article 10 of the master deeds also referred to the South Homestead Road easement, but did not provide that the easement is a common element of the condominium project or set forth any maintenance, repair, decoration, or replacement obligations. Plaintiff further argued that the South Homestead Road easement was a common element under Article 7(a)(7), which provided that "common elements" included elements of the condominium project not categorized in the master deed as common elements but that were intended for common use or were necessary to the existence, upkeep, and safety of the project. However, the examples of common elements provided in Article 7(a)(7) included "stairways, laundry rooms and storage areas." A road is not in the same category as these examples, so it reasonably followed that the South Homestead Road easement is not included in the definition of common elements in Article 7(a)(7). Article 7(a)(1) of the master deeds specifically addressed roads that are "general common elements" of the condominium projects, but it did not describe the South Homestead Road easement either explicitly or by reference. Therefore, the South Homestead Road easement did not fall within the category of "general common elements" described in Article 7(a)(1). Given that roads were specifically addressed in Article 7(a)(1), it follows that the drafters would have included the South Homestead Road easement in that provision if they had intended for it to be a common element of the condominium

project. The trial court did not clearly err when it concluded that plaintiff did not establish that defendants had breached their contracts, i.e., the master deeds and other condominium documents, by failing to pay for the maintenance, repair, decoration, and upkeep of the South Homestead Road easement. Plaintiff also failed to establish that the South Homestead Road easement was a common element by operation of law.

2. The use of an easement must be strictly confined to the purposes for which it was granted or reserved. Defendants were granted a 66-foot wide easement for "ingress and egress." An "ingress-and-egress easement" is defined as an easement that grants the right to use land to enter and leave another's property; thus, defendants had the right to enter and leave their properties using the South Homestead Road easement. According to plaintiff, defendants were obligated under common law to pay not only for costs related to the maintenance and repair of the paved roadway, but for the cost of maintaining the full 66-foot wide easement, including landscaping, lighting, and signage. It is well settled that making repairs and improvements necessary to the effective enjoyment of an easement is incidental to and part of the easement. Therefore, defendants were only required to make repairs to the easement that were necessary to their ability to safely enter and leave their respective properties. By attempting to impose obligations on defendants beyond maintenance of the easement for ingress and egress, plaintiff essentially attempted to unilaterally expand the scope of the easement, which was not permissible.

3. When an easement is used jointly by both the dominant and servient estate, the maintenance costs of the easement are to be paid by the owners of the estates in proportion to each party's use. In this case, the trial court determined that maintenance costs for the South Homestead Road easement should be paid by plaintiff and defendants, and the court devised a formula based on its findings regarding each party's approximate use of the easement. The court made findings as to the portion of the South Homestead Road easement that defendants used, as well as findings regarding the total number of users of the easement. In formulating the number of users, the court took into account use of the easement by plaintiff, defendants, and "other guests/homeowners," which the court attributed to plaintiff. According to the court, defendants had 84 total condominium units, plaintiff had 127 rental units, and the court attributed to plaintiff 100 "other assumed units" for other condominium associations and homeowners. The trial court did not make specific findings of

fact concerning why it assigned 100 units to plaintiff, but instead referred generally to testimony regarding the use of the easement by plaintiff and its invitees and guests. Upon review of the record, the court seemed to have improperly relied on speculation in making this finding. Remand was therefore appropriate so that the court could make specific findings of fact concerning the use of the easement. Additionally, plaintiff argued that defendants were obligated to pay for another easement, the National Lakeshore Area, and that the trial court erred by failing to address this issue. The evidence offered at trial did not support that defendants had an easement to the National Lakeshore Area, so plaintiffs did not show that defendants were financially obligated to maintain it.

4. The trial court concluded that the doctrine of laches was applicable to plaintiff's breach-of-contract claim. Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff. But laches is not triggered by the passage of time alone; rather, application of the doctrine is justified by the prejudice to the defendant that results from the delay. Defendants asserted laches as an affirmative defense, arguing that plaintiff's claims were barred because plaintiff and its predecessors in interest had failed to request any cost-sharing payments for more than 35 years following the creation and recording of the condominium documents. Although the trial court concluded that laches barred plaintiff's claim based on plaintiff's 30-plus year delay in bringing the litigation, the court did not make findings of fact as to how defendants were prejudiced by the delay. Because such a finding was necessary before the court could conclude that laches applied, the trial court erred by applying laches.

Decision affirmed in part, vacated in part, and case remanded for further proceedings.

Varnum LLP (by *Jon M. Bylsma*) for Bayberry Group, Inc.

Olson, Bzdok & Howard, PC (by *Ross A. Hammersley*) for Crystal Beach Condominium Association and Gentle Winds Condominium Association.

Alward Fisher Rice Rowe & Graf, PLC (by *Nicole R. Graf*) for Tall Timber Condominium Association and Great Lakes Condominium Association.

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

CAMERON, J. Plaintiff, Bayberry Group, Inc., a successor to the developer of The Homestead, appeals a May 24, 2019 opinion and order, which was entered following a bench trial. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This matter arises from a dispute involving the interpretation of condominium documents and Michigan common law as it relates to the obligations of defendants, Crystal Beach Condominium Association, Gentle Winds Condominium Association, Great Lakes Condominium Association, and Tall Timber Condominium Association, to pay for the maintenance, repair, and upkeep of a roadway easement called the South Homestead Road easement. South Homestead Road connects defendants' respective properties and other properties in The Homestead to M-22. Portions of South Homestead Road traverse Gentle Winds' property, Great Lakes' property, and Tall Timber's property.

The Homestead is a recreational resort located on the shores of Lake Michigan. Defendants were four of the five earliest condominium projects at The Homestead, and defendants' master deeds were recorded in the 1970s. Thereafter, the number of condominium associations at The Homestead increased. In 2013, Bayberry began engaging with representatives of the various condominium associations. Bayberry sought an agreement to share the costs of maintaining the roadways and other areas within The Homestead. As a result of these efforts, the Common Area Maintenance Agreement ("CAM agreement") was created. The CAM

agreement provided for maintenance of all of the "Roadway Areas" within The Homestead, which included the South Homestead Road easement. "Roadway Areas" included not only the paved or graveled roadways, but also "lawns and the entirety of any planting bed or any other landscaping lying wholly or partially within the width of the roadway easement." A majority of the condominium associations serviced by South Homestead Road executed the CAM agreement, but defendants did not. The CAM agreement became effective on January 1, 2015.

After defendants refused to pay a share of fees under the CAM agreement, Bayberry filed suit against defendants on July 13, 2017. In relevant part, Bayberry alleged that the South Homestead Road easement is a general common element of each condominium project and that, under defendants' master deeds and bylaws, defendants were responsible for its maintenance, repair, and upkeep. Bayberry requested that it be awarded damages for maintenance costs from 2011 through 2017 and that the trial court order defendants to "pay an amount equal to the total cost of maintenance, repair and upkeep of the Easement less the usage costs incurred by all other associations and Co-owners. . . . " Defendants denied that the South Homestead Road easement was listed as a common element in their condominium documents. In their affirmative defenses, defendants asserted that the doctrine of waiver and the defense of laches barred Bayberry's claims for damages because Bayberry (and its predecessors in interest) had failed to request any cost-sharing payments for more than 35 years following the creation and recording of the condominium documents.

Following a three-day bench trial, the trial court found that "the ingress/egress Easement of South

Homestead Road, from M-22 to the Condominium Projects, is not a common element of" defendants' master deeds and condominium documents. The trial court held that because defendants had "no contractual obligation" for the South Homestead Road easement's "maintenance, repair, decoration and replacement," Bayberry was "not entitled to any past damages." The trial court also concluded that even if defendants had been contractually obligated under their condominium documents to pay for costs associated with the easement, Bayberry's claim for past damages would have been waived and barred by the defense of laches. The trial court held that Bayberry was entitled to "future expenses" for the maintenance of the South Homestead Road easement under common law. Specifically, the trial court held as follows:

> [G]oing forward, [d]efendants are obligated [under common law] to contribute their proportionate share of the cost for maintenance, repair and upkeep of the portion of South Homestead Road necessary for their safe ingress and egress, based on their use, and likewise, [Bayberry] is obligated to contribute its proportionate share of the cost for maintenance, repair and upkeep, based on use, for the portion of South Homestead Road that crosses Defendants' real property.
>
> * * *
>
> Defendants' responsibility for repair, maintenance and upkeep of the ingress/egress Easement shall be limited to costs associated with salting and sanding, snow-plowing, keeping the road clear of debris and repair/replacement/repaving of the road and road drains. Landscaping, mowing, irrigation, electrical/lighting and signage [are] not essential to maintain safe ingress and egress and thus, shall not be included costs associated with "repair, maintenance and upkeep."

The trial court held that "the cost of *future* repair and maintenance should be distributed among all users in proportions that closely approximate the usage of the respective parties." The trial court created a formula in an attempt to accomplish this. This appeal followed.

II. STANDARDS OF REVIEW

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003) (citations omitted). "The construction and interpretation of an unambiguous contract is a question of law that we review de novo." See *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002). "The extent of a party's rights under an easement is a question of fact, and a trial court's determination of those facts is reviewed for clear error. A trial court's dispositional ruling on equitable matters, however, is subject to review de novo." *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005).

III. ANALYSIS

A. BREACH OF CONTRACT

Bayberry first argues that the trial court erred by holding that the "roadway easement was not a common element" of each condominium project. According to Bayberry, because the master deeds and bylaws provide that South Homestead Road is a common element, defendants (along with the other co-owners) were

solely responsible for the road's maintenance, repair, upkeep, decoration, and replacement. We disagree.

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). In this case, defendants' master deeds and the relevant accompanying condominium documents constitute the contracts. In interpreting these documents, this Court applies the rules governing construction of a contract. See *Rossow*, 251 Mich App at 658-659.

The goal of contract interpretation "is to determine and enforce the parties' intent on the basis of the plain language of the contract itself." *AFSCME v Detroit*, 267 Mich App 255, 261-262; 704 NW2d 712 (2005). The words of a contract "are interpreted according to their plain and ordinary meaning," and this Court "gives effect to every word, phrase, and clause" while avoiding "interpretations that would render any part of the document surplusage or nugatory." *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015). If a contract incorporates another document by reference, the two writings should be read together. *Forge v Smith*, 458 Mich 198, 207 & n 21; 580 NW2d 876 (1998). Ultimately, this Court enforces clear and unambiguous language as written. *Tuscany Grove Ass'n*, 311 Mich App at 393.

A "master deed" is "the condominium document recording the condominium project to which are attached as exhibits and incorporated by reference the bylaws for the project and the condominium subdivision plan for the project." MCL 559.108. A "condominium project," which is defined as "a plan or project

consisting of not less than 2 condominium units established in conformance with [the Condominium Act]," MCL 559.104(1), is established upon the recording of a master deed, MCL 559.172(1). Importantly, the master deed must include an accurate legal description of the land involved in the project. MCL 559.108(a). The Condominium Act, MCL 559.101 *et seq*., specifically addresses easements in MCL 559.135, which states the following:

> Where fulfillment of the purposes of sections 31, 32, 33 or any other sections of this act reasonably requires the creation of easements, then the easements shall be created in the condominium documents or in other appropriate instruments and shall be reasonably described in the condominium documents. The easements shall contain the following:
>
> (a) A description of the permitted use.
>
> (b) If less than all co-owners are entitled to utilize the easement, a statement of the relevant restrictions on the utilization of the easement.
>
> (c) If any persons other than those entitled to the use of the condominium units may utilize an easement, a statement of the rights of others to utilization of the same and a statement of the obligations, if any, of all persons required to contribute to the financial support of the easement.

In this case, all of defendants' master deeds were recorded in the 1970s. As required by MCL 559.108(a), Article 3 of each master deed identifies and includes a legal description of the land involved in the condominium project. Incorporated into each master deed by reference, and attached thereto as Exhibit B, is a series of drawings and survey maps known as the "Condominium Subdivision Plan," which depicted the proposed project. The plan shows the dimensions and locations of the condominium units and everything else

within the boundaries of the condominium project, including utility easements and common elements. Exhibit B of each master deed provides that "[a]ccess is provided by a 66 ft. wide easement for ingress and egress." There is no dispute that this easement is the South Homestead Road easement.

The South Homestead Road easement is referred to again in Article 10 of each master deed. Article 10 of each master deed, entitled "Easements for Benefit of the Condominium," provides, in relevant part:

> In addition to the easement for ingress and egress to the Condominium from M-22, and the utility easements, all as are described in the Condominium Subdivision Plan which are granted for the benefit of the Condominium, the Co-owners, their heirs, successors and assigns by the incorporation by reference of the Condominium Subdivision Plan into this Master Deed, the following easements are granted:
>
> (a) Each Co-owner shall have the right, privilege and power in common with the other Co-owners to use and enjoy the Common Elements in accordance with this Master Deed.

Thus, although Article 10 refers to the South Homestead Road easement, Article 10 does not indicate that the easement is a common element of the condominium project, and it does not include any reference to maintenance, repair, decoration, and/or replacement obligations. Article 10 then goes on to refer to additional easements and provides that "[e]ach Co-owner shall have the right, privilege and power in common with the other Co-owners to use and enjoy the Common Elements in accordance with this Master Deed." Article 4(k) of defendants' master deeds defines common elements, "where used without modification, [to] mean both the general and limited common elements described in Article 7."

None of the subsections of Article 7 specifically refers to the South Homestead Road easement for ingress and egress. Nonetheless, Bayberry argues that the South Homestead Road easement can be considered a common element under Article 7(a)(7). Article 7(a)(7) provides the following concerning common elements:

> Such other elements of the project not here designated as general or limited common elements which are not enclosed within the boundaries of an apartment, and which are intended for common use, or are necessary to the existence, upkeep and safety of the project, including but not limited to stairways, laundry rooms and storage areas.

Thus, under Article 7(a)(7), "common elements" include "other elements of the project . . . which are not enclosed within the boundaries of an apartment" and are either "intended for common use, or are necessary to the existence, upkeep and safety of the project . . . ."

Bayberry argues that the South Homestead Road easement is necessary "to the existence, upkeep and safety of the project" because without the easement, defendants would not have access to their respective properties. To determine the meaning of a word or phrase, we must consider the context or setting in which the term appears. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 215; 737 NW2d 670 (2007). Contracts must be read "as a whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). "[W]hen several words are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." *Atlantic Casualty Ins Co v Gustafson*, 315 Mich App 533, 541; 891 NW2d 499 (2016) (quotation marks and citation omitted). Spe-

cifically, "words grouped in a list should be given related meanings." *Id*. (quotation marks and citation omitted).

In this case, Article 7(a)(7) provides examples of "common elements" that are intended to be included in the provision. The examples include "stairways, laundry rooms and storage areas." Roads are not included in the list, but the provision's use of the phrase "including but not limited to" establishes that the list is not exhaustive. Nonetheless, we conclude that a road is not in the same category as the examples provided in Article 7(a)(7). The South Homestead Road easement undoubtedly exists so that an individual can travel (often by a motor vehicle) on a paved surface within and outside of the condominium project. In contrast, "stairways, laundry rooms and storage areas" are located within the four walls of a building within the condominium project. Therefore, we conclude that the plain language establishes that the South Homestead Road easement is not included in the definition of common element provided in Article 7(a)(7).

Importantly, Article 7(a)(1) addresses roads. Specifically, Article 7(a)(1) includes "[t]he land described in Article 3," such as "driveways, roads, sidewalks and parking spaces," as "general common elements" of each respective condominium project. The South Homestead Road easement is not described in Article 3 of the master deeds of Gentle Winds, Great Lakes or Tall Timber. Article 3 of Crystal Beach's master deed states that the property is "[s]ubject to and together with an easement for ingress and egress over an existing road which runs Northeasterly to a 66 ft. road and easement which connects with State Highway M-22." Thus, although the Crystal Beach master deed refers to the South Homestead Road easement, it does so only to describe a different easement for ingress and egress,

which "runs Northeasterly" to the South Homestead Road easement. Nancy Keepelman, who owns a unit at Crystal Beach, testified that the road described in Article 3 of Crystal Beach's master deed is River Edge Road. According to Keepelman, River Edge Road is the "segment between Homestead Road . . . and [Crystal Beach's] parking lot."

Consequently, because the South Homestead Road easement is not described in Article 3 of any of defendants' master deeds, the easement does not fall within the category of "general common elements" outlined in Article 7(a)(1). Given that roads are specifically addressed in Article 7(a)(1), it reasonably follows that the drafters would have included the South Homestead Road easement in Article 7(a)(1) if they had intended for the South Homestead Road easement to be a common element of the condominium project. Therefore, we conclude that the trial court did not clearly err by concluding that Bayberry failed to establish that defendants had breached their respective contracts by failing to pay for the maintenance, repair, decoration, and upkeep of the South Homestead Road easement. Given that the language of the contracts is unambiguous, we decline Bayberry's invitation to consider the conduct of the parties following the recording of the master deeds.

Bayberry next argues that the roadway easement is a common element by operation of law. Specifically, Bayberry argues that condominium associations can only hold property as a general common element or a limited common element and that there are no other types of ownership within a condominium project. To support this argument, Bayberry cites *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 146; 783 NW2d 133 (2010). However, *Paris Meadows* involved

taxation issues, which are not at issue in this appeal. Furthermore, Bayberry's argument ignores the fact that the South Homestead Road easement is not listed as a common element in the master deeds and the other relevant condominium documents. Consequently, the trial court did not err by concluding that the easement is not a common element of defendants' condominium projects by operation of law.

B. COMMON-LAW OBLIGATION TO SHARE MAINTENANCE AND COSTS OF EASEMENT

1. SCOPE OF EASEMENT

Bayberry argues that even if the trial court properly determined that defendants were obligated under common law to pay for a portion of the South Homestead Road easement's repair, maintenance, and upkeep, the trial court erred by limiting each defendant's "obligation to costs related to only the actual paved roadway and not the full 66-foot wide easement." We disagree.

"An easement is the right to use the land of another for a specified purpose," *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997), and an easement may be created "by express grant, by reservation or exception, or by covenant or agreement," *Rossow*, 251 Mich App at 661 (quotation marks and citation omitted). The "use of an easement must be confined strictly to the purposes for which it was granted or reserved," *Blackhawk Dev Corp*, 473 Mich at 41 (quotation marks and citation omitted), and "[t]he owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights," *Morrow v Boldt*, 203 Mich App 324, 329; 512 NW2d 83 (1994). The language of the instrument that granted the easement determines the scope of the

easement holder's rights. *Blackhawk Dev Corp*, 473 Mich at 42. "Once granted, an easement cannot be modified by either party unilaterally." *Schadewald*, 225 Mich App at 36. When determining an easement's purpose,

> [t]he language of an express easement is interpreted according to rules similar to those used for the interpretation of contracts. Accordingly, in ascertaining the scope and extent of an easement, it is necessary to determine the true intent of the parties at the time the easement was created. Courts should begin by examining the plain language of the easement, itself. If the language of the easement is clear, it is to be enforced as written and no further inquiry is permitted. [*Wiggins v City of Burton*, 291 Mich App 532, 551; 805 NW2d 517 (2011) (citations omitted).]

In this case, defendants were granted a 66-foot-wide easement for "ingress and egress." The relevant documents do not define ingress and egress, so this Court must consult a dictionary to determine what these terms commonly mean. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). "Ingress" is defined as "the power or liberty of entrance or access," and "egress" is defined as "the action or right of going or coming out." *Merriam-Webster's Collegiate Dictionary* (11th ed). An "ingress-and-egress easement" is an easement that grants "[t]he right to use land to enter and leave another's property." *Black's Law Dictionary* (10th ed). Thus, defendants were granted the right to enter and leave their respective properties. Because the language of the easement is clear, it must be "enforced as written and no further inquiry is permitted." See *Wiggins*, 291 Mich App at 551 (quotation marks and citation omitted).

With respect to the repairs and improvements that defendants were required to make, it is well settled that "[t]he making of repairs and improvements nec-

essary to the effective enjoyment of an easement . . . is incidental to and part of the easement." *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976). Therefore, defendants are only required to make repairs and improvements to the easement that are incidental to and part of their ability to safely enter and leave their respective properties. See *id*.

Bayberry does not dispute the trial court's conclusion that defendants are required to pay for "salting and sanding, snowplowing, keeping the road clear of debris and repair/replacement/repaving of the road and road drains." Rather, Bayberry argues on appeal that the trial court erred by limiting defendants' duties to the paved portion of South Homestead Road. According to Bayberry, defendants have an obligation to maintain the entire 66-foot-wide easement, including not only the paved portion of the easement used for ingress and egress, but also the portion outside the paved area that includes "grass, irrigation, flowerbeds, bushes, trees, lighting, street signs, traffic signs and curbs." However, we fail to see how maintaining grass, irrigation systems, flowerbeds, bushes, and trees would assist defendants with safely entering and leaving their respective properties. Furthermore, testimony at trial supported that the expenses that Bayberry was trying to recover for the area outside of the paved roadway were not necessary for safe ingress and egress. The trial court clearly found this testimony to be credible. By attempting to impose obligations on defendants beyond the maintenance of the easement for ingress and egress, Bayberry is essentially unilaterally attempting to expand the scope of the express easement. Because this is impermissible, we conclude that Bayberry's argument lacks merit. See *Schadewald*, 225 Mich App at 36.

2. ALLOCATION OF COSTS

Next, Bayberry argues that the trial court clearly erred or made an error of law in fashioning the formula for calculating maintenance costs in proportion to Bayberry's use and defendants' use of the South Homestead Road easement and Bayberry's easements over defendants' properties. According to Bayberry, the formula used by the trial court to allocate costs is based on speculation and does not allocate cost by use. We agree.

"[I]t is the owner of an easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." *Morrow*, 203 Mich App at 329-330. However, "[t]he maintenance costs of an easement used jointly by both the dominant and servient owners are to be paid in proportion to each party's use." *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 194; 550 NW2d 850 (1996).

In relevant part, the trial court ruled that

> because South Homestead Road is used in common by both [Bayberry], its guests and invitees, and the Defendants, the cost of *future* repair and maintenance should be distributed among all users in proportions that closely approximate the usage of the respective parties. This applies to both the ingress/egress Easement from M-22 to the Defendants' properties and the Developer-retained easement across the Defendants' properties.

The trial court found that Crystal Beach has 16 units, that Gentle Winds has 14 units, that Great Lakes has 30 units, and that Tall Timbers has 24 units. The trial court then found as follows:

> The total length of South Homestead Road is 4,819 feet. This length has been broken down into eight segments, A1

> through A8. The portion of the ingress/egress Easement from M-22 to Defendants' property, segments A1 through A5, is approximately 3,840 feet. Segment A6 is 368 feet and owned by Defendant Gentle Winds. Segment A7 is 392 feet and owned by Defendant Great Lakes. Segment A8 is 219 feet and owned by Defendant Tall Timber. Thus, [Bayberry's] 979 foot easement over Defendants' property consists of segments A6 through A8.

The trial court found that defendants have an easement over segments A1 through A5 and further found as follows:

> The total repair, maintenance and upkeep costs . . . for segments A1 through A5, divided by 3,840 feet determines the repair/maintenance/upkeep cost per foot.
>
> Beach Club Membership, or "Units" that utilize the entire length of South Homestead Road, has been approximated at 331 units. Therefore, in order to ascertain each Defendants' proportional amount, the formula shall be as follows: the Units per association divided by 331 "Beach Club" Units, multiplied by the repair/maintenance/upkeep cost per foot, multiplied by 3,840 feet. Similarly, the formula to ascertain [Bayberry's] proportional amount to Defendants' [sic] is 247 divided by 331 "Beach Club" Units, multiplied by the repair/maintenance/upkeep cost per foot, multiplied by 368 feet (for Gentle Winds) or 392 feet (for Great Lakes) or 219 feet (for Tall Timber).

On appeal, Bayberry argues that the trial court's allocation of costs is not founded in law because the trial court failed to account for the other users of the South Homestead Road easement. However, it is clear that the trial court accounted for other users when calculating the proportional use of the easement. Specifically, the trial court noted that, along with defendants, "South Homestead Road is also used by other condominium associations, home owners, visitors to and employees and vendors of The Homestead resort." The trial court found that "Beach Club Membership, or

'Units' that utilize the entire length of South Homestead Road, has been approximated at 331 units."[1] In a footnote, the trial court clarified as follows:

> This "Unit" number consists of Defendants' 84 units, plus [Bayberry's] 127 rentals, *plus 100 assumed units for other condominium associations/homeowners*. At trial, there was testimony as to the various use of Defendants' easement by [Bayberry] and [Bayberry's] invitees and guests, including construction vehicles, the resort shuttle, BATA [Bay Area Transportation Authority], food delivery and wedding vendors, American Waste trucks and laundry services for the Homestead. *Given this testimony, the Court believes that 100 additional units is a fair approximation, if not an underestimation, of actual use by* [*Bayberry*]. [Emphasis added.]

Thus, when fashioning a formula for allocation of use, the trial court took into account Bayberry's use of the easement, defendants' use of the easement, and "other guests/homeowners[']" use of the easement. The trial court then attributed the nonparties' use of the easement to Bayberry.

On appeal, Bayberry argues that the trial court's "assumption of 100 other guests/homeowners is a guess not based in fact or testimony." According to Bayberry, "[t]here are over 350 other property owners besides [Bayberry's] guests and the Defendant Associations." According to Bayberry, this is supported by facts in evidence.

Testimony at trial supported that the CAM agreement divided South Homestead Road into segments. A1 through A5 totaled 3,840 feet, A6 totaled 368 feet,

---

[1] The parties note that the "331 units" referred to by the trial court appear to be the result of a mathematical error in adding Bayberry's 127 units, 100 "assumed" units for the other condominium associations, and defendants' 84 units; the sum of 127, 100, and 84 is 311.

A7 totaled 392 feet, and A8 totaled 219 feet. A1 through A5 is the segment of South Homestead Road from M-22 through another condominium association, Sundance.[2] A6 traverses Gentle Winds' property, A7 traverses Great Lakes' property, and A8 traverses Tall Timber's property. It was undisputed at trial that Crystal Beach has 16 units, that Gentle Winds has 14 units, that Great Lakes has 30 units, and that Tall Timbers has 24 units.

Adriene Kokowicz, an employee of The Homestead who handled accommodations and other matters, testified that there are 127 "hotel units" at The Homestead. Additionally, there was testimony at trial concerning the number of condominiums and "single units" within The Homestead and how many of those units were available to be rented, either through The Homestead's rental program or through third parties, such as Airbnb. James Musial, an owner in Gentle Winds and the treasurer of the Gentle Winds Condominium Association's board, testified that there were a total of 599 "units" that could potentially use South Homestead Road from M-22 to the Beach Club. This number included defendants' 84 units, and Musial agreed that the remaining 515 units were not all owned by The Homestead. The parties all presented evidence concerning the amount of traffic on the South Homestead Road easement, and extensive testimony was presented concerning how much of that traffic could be attributed to the Beach Club, which was characterized as the "premier attraction" for The Homestead. However, none of the parties presented specific numbers concerning the amount of traffic that traversed the easement. Indeed, Robert Kuras, the

[2] Sundance is a condominium association that is located between Crystal Beach and Gentle Winds.

manager and operator of The Homestead, acknowledged that he had never hired someone to conduct a "digital count of traffic" and had never hired a "traffic engineer" to perform a "traffic count within the resort."

When allocating use, the trial court found that 331 units used the entire length of South Homestead Road. This number consisted of defendants' 84 units, Bayberry's 127 "rentals," and "100 assumed units for other condominium associations/homeowners." The trial court did not make specific findings of fact concerning why it assigned "100 assumed units" to Bayberry. Rather, the trial court generally referred to testimony concerning the use of defendants' easement by Bayberry and Bayberry's "invitees and guests." The trial court provided examples of vehicles that traversed the easement, and the trial court's examples were supported by the testimony of several witnesses at trial. On this basis, the trial court stated that it "believe[d] that 100 additional units [was] a fair approximation, if not an underestimation, of actual use by [Bayberry]." Upon review of the record, however, it appears that the trial court relied on speculation when making this finding.

Specifically, Musial testified that he had created an alternative way of allocating the costs of maintaining the South Homestead Road easement. In explaining his calculations, Musial testified that he had assigned 331 units to Beach Club members, which included an allocation of 153 units "for the hotels and buildings owned by the Homestead." When asked why he did so, Musial testified that testimony at trial established that Beach Club members, "hotel units," people who "rent[ed] through the Homestead[,] and people who rent[ed] their units through the Homestead" all had access to the Beach Club. The following line of questioning then occurred:

> [*Counsel for Gentle Winds*]: You made this additional calculation based on what you heard at trial about the importance of the beach club and whose [sic] limited to actually access the beach club and that sort of thing, is that correct?
>
> [*Mr. Musial*]: Right. With the exception that, you know, through the testimony I did [not] know how many Homestead or how many properties were rented through the Homestead, I knew how many hotels because we discussed that. But, afterwards I went—I went to the resort realties web page, the Homestead's web page, and tallied up that there were 127 rentals currently listed. What's not included in this note is there are 104 hotel units. And, then I made an assumption that there are 100 other beach club members because [Bayberry's] witnesses were asked how many there were, and, you know, wasn't [sic] aware because he said that he's not part of the membership committee for that, so I made an assumption of 100.[3] So, I came up with 331 beach club members . . . .

During cross-examination, Musial again agreed that his assessment that there were 100 "other beach club members" was an "assumption." Musial noted that "the president of the group couldn't tell me what that number was" during his testimony so Musial "just assumed it based on what [he] thought might be reasonable, a reasonable estimate, of how many people might be down there." When asked if Musial was able to indicate whether the actual number of other beach club members was "higher or lower," he responded "I really couldn't."

Because it appears that the trial court inappropriately relied on speculation instead of evidence in determining the allocation of use of the easement, we must vacate that portion of the opinion and order and

---

[3] Although Musial referenced Bayberry's "witnesses," it appears that he was only referring to Kuras.

remand the matter to the trial court. On remand, the trial court must make specific findings of fact concerning the use of the easement and must comply with *Bowen*.

Bayberry also argues that the trial court erred by failing to address "the [e]asement that is the National Lakeshore Area." According to Bayberry, "*Bowen* likewise requires payment" for maintenance, upkeep, and repair in that area. Bayberry notes that "[t]he National Lakeshore Area is th[e] area from M-22 almost to the Welcome Center but outside the Roadway Easement that is maintained by The Homestead. It is essentially a large grass lawn with some trees, two flower beds, a water feature, signs, and three flagpoles."

In its discussion of the history of The Homestead, the trial court noted that a portion of the property in the immediate vicinity of the entrance to The Homestead from M-22 to South Homestead Road was the subject of litigation in federal court. Specifically, the United States acquired 32.4 acres of land from The Homestead by utilizing its power of eminent domain through a declaration of taking. The trial court summarized the litigation as follows:

> In 1978, a Judgment of Declaration of Taking and Order for Possession was issued, which permitted the United States of America to take, by eminent domain, a portion of the Developer's real property which included Homestead Road. On February 16, 1984, an Amended Judgment on Declaration of Taking and Order for Possession was executed. This Amended Judgment provided a perpetual access easement for ingress and easement to The Homestead property and a perpetual easement for a Maintenance Area "to facilitate the visibility of the intersection of Homestead Road and State Highway M-22." The Maintenance Area easement (also referred to as the "National Lakeshore Easement") gave the Developer the

> rights and responsibilities for clearing, grading, seeding, planting, installing signage, installing lighting, sprinkling, and improving, replacing, repairing and maintaining the easement property. Moreover, while the Amended Judgment gave the Developer the exclusive right and responsibility to maintain the easements, it indicated that apportioning the cost of such maintenance to the beneficiaries of the easements was permissible.

At trial, it was acknowledged that defendants' condominium projects were established long before the federal court judgment was entered. Importantly, Kuras testified that *he* held "[s]everal" easements to the National Lakeshore Area. Kuras acknowledged that he had "allowed everyone who owns property or is a guest at The Homestead to use that easement to access the[] property." However, because Kuras was unaware of an easement being granted to defendants, we fail to see how *Bowen* would obligate defendants to pay for maintenance of the National Lakeshore Area. Indeed, *Bowen* requires that "[t]he maintenance costs of *an easement* used jointly by both the dominant and servient owners are to be paid in proportion to each party's use." *Bowen*, 217 Mich App at 194 (emphasis added). Because the evidence establishes that only Kuras holds easements to the National Lakeshore Area, we conclude that Bayberry's argument that defendants are obligated under *Bowen* to pay for maintenance with respect to the National Lakeshore Area is without merit.

3. DAMAGES AWARD

Finally, Bayberry argues that the trial court erred by failing to award past damages based on its erroneous conclusion that the doctrine of waiver and defense of laches applied. However, our review of the trial court's opinion and order supports that the trial court only hypothetically applied the doctrine of waiver to

Bayberry's breach-of-contract claim and then concluded that "the doctrine of laches is applicable in this case based on the 30-plus year delay in bringing this litigation." Thereafter, the trial court concluded that Bayberry was only entitled to "future expenses" for the maintenance of the South Homestead Road easement. Thus, the trial court applied the doctrine of laches to Bayberry's common-law claim.

"Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff." *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). The doctrine of laches arose from the requirement that a complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence. *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Id*. Although timing is important, laches is not triggered by the passage of time alone; rather, it is the prejudice occasioned by the delay that justifies application of the doctrine to bar a claim. *Id*. at 114-115. The defendant bears the burden of proving that the plaintiff's lack of diligence prejudiced the defendant sufficiently to warrant application of the doctrine of laches. See *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004).

In their affirmative defenses, defendants asserted that the doctrine of laches barred Bayberry's claims because Bayberry (and its predecessors in interest) failed to request any cost-sharing payments for more than 35 years following the creation and recording of

the condominium documents. In its opinion and order, the trial court concluded as follows:

> The Court additionally finds that the doctrine of laches is applicable in this case based on the 30-plus year delay in bringing this litigation. The doctrine of laches is a tool of equity that may remedy the general inconvenience resulting from delay in the assertion of a legal right which is practicable to assert. It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party. When laches appears, the court merely leaves the parties where it finds them because equity will not lend aid to those who are not diligent in protecting their own rights. [Citations omitted.]

Thus, the trial court's analysis, which is contained in a footnote in its opinion and order, does not make findings of fact as to how defendants were prejudiced by "the 30-plus year delay in bringing th[e] litigation." We have explained:

> The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. . . . The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created. The defendant bears the burden of proving this resultant prejudice. [*PowerPick Player's Club*, 287 Mich App at 51 (quotation marks and citations omitted).]

Because the trial court failed to make "a finding that the delay caused some prejudice to [defendants] . . . and that it would be inequitable to ignore the prejudice so created" and because such a finding was necessary before the trial court could conclude that the defense of laches applied, the trial court erred by applying laches. We therefore vacate the portion of the trial court's

opinion and order concerning its conclusion that the defense of laches applies and remand to the trial court so that it may make factual findings concerning prejudice.

Bayberry also argues that the trial court failed to explain why "the remedy in this case is not effective as of the date of the filing of this action." Given that we must vacate the trial court's decision with respect to allocations of costs and the defense of laches for the reasons already discussed, the parties may address this issue in the trial court on remand.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and CAVANAGH, J., concurred with CAMERON, J.

TT v KL

Docket No. 351531. Submitted October 13, 2020, at Detroit. Decided October 29, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 952 (2021).

TT petitioned the St. Clair Circuit Court for an ex parte nondomestic personal protection order (PPO) against respondent, KL, requesting that the court issue the PPO under MCL 600.2950a because respondent had allegedly stalked her as defined in MCL 750.411h and MCL 750.411i and had allegedly posted false statements about her on social media in violation of MCL 750.411s. Respondent and his former girlfriend were the parents of OLG; petitioner was the child's maternal great aunt. During a custody dispute with the child's mother, respondent posted information on the Internet about the child's mother and her family, asserting that they were putting the child at risk by allowing her to be in the presence of, or have contact with, LW, a convicted sex offender. After the child's mother obtained a PPO against him, respondent posted online attacks on petitioner through social media, prompting petitioner to also seek a PPO against respondent. Petitioner asserted that many people had contacted her in response to respondent's posts and that she was worried that the posts would affect her employment as a sign-language interpreter for school children. The court, Cynthia A. Lane, J., granted an ex parte PPO, prohibiting, under MCL 750.411h and MCL 750.411i, respondent from stalking petitioner. The ex parte PPO also prohibited respondent from posting comments about petitioner on social media. Respondent allegedly violated the PPO over a span of a few months in 2019, resulting at various times in respondent being arrested, jailed, arraigned on the warrants, and then posting bond. In March 2019, respondent moved to terminate the PPO, asserting that petitioner had made false statements in her petition, that the information in his posts was accurate, and that his actions were protected by the First Amendment of the United States Constitution. The trial court held an evidentiary hearing on the motion, which was adjourned during respondent's cross-examination of petitioner. The continuation of the hearing was rescheduled many times because respondent's counsel was allowed to withdraw. In June 2019, respondent filed a federal lawsuit against the trial court judge in her individual

capacity, asserting that the nondomestic PPO statute violated the First Amendment; respondent later amended that complaint to add a due-process claim under the Fourteenth Amendment of the United States Constitution. Thereafter, in September 2019, respondent filed a notice of withdrawal of his motion to terminate the PPO, purportedly reserving the right to refile the motion; the trial court rejected defendant's notice of withdrawal. Respondent filed an objection to that decision and also moved for disclosure of communications and/or to disqualify the trial court judge. Respondent's request for disclosure was based on the assumption that the trial court judge had discussed the instant PPO litigation with her trial counsel in the federal litigation. Respondent asserted that the trial court had thus violated the Code of Judicial Conduct, Canon 3(A)(4), by having those assumed conversations and that the trial court judge was required to recuse herself because of the conflict of interest or bias given the federal action. According to respondent, he requested to withdraw his motion to terminate the PPO because of the conflict or bias. When the hearing on that motion was continued, the trial court first denied respondent's motion to disqualify, determining that the motion was untimely and that the federal action was effectively against the office of the circuit court, not against her personally. With respect to the alleged ex parte communications with trial counsel in the federal action, the trial court stated than any communications were expressly authorized by law and did not have to be disclosed in light of the disclosure exception in Canon 3(A)(4)(e). After concluding the hearing on the motion to terminate the PPO, the trial court denied respondent's attempt to withdraw the motion to terminate the PPO, reasoning that the original PPO termination hearing had already started, that the court had the right to control its own docket by deciding to continue on the motion, that respondent had a right to hear his constitutional claims resolved, and that there was no legal authority granting respondent the absolute right to withdraw the motion. The trial court took the motion to terminate the PPO under advisement. Subsequently, respondent moved for the chief judge to review the trial court's denial of his motion to disqualify; the chief judge affirmed that decision. After the chief judge affirmed that decision, the trial court issued a written opinion and order with respect to the motion to terminate the PPO. The court made findings of fact and concluded that petitioner had failed to demonstrate that respondent's conduct constituted stalking behavior as prohibited by MCL 750.411h and MCL 750.411i. With regard to MCL 750.411s, the trial court found that respondent had knowingly made false statements about petitioner on social media and that he had posted those false statements to harass her and to

cause others to harass her. The court amended the original PPO by removing the provisions based on MCL 750.411h and MCL 750.411i and by prohibiting respondent from posting defamatory statements about petitioner on social media and/or from publishing such statements elsewhere. Respondent appealed.

The Court of Appeals *held*:

1. The Due Process Clause of the United States Constitution requires that an unbiased and impartial decision-maker hear and decide a case. A trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming that presumption. Under MCR 2.003(D)(1)(a), all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification. A judge will not be disqualified solely because a litigant in a case pending before the judge has filed a lawsuit against that judge. Further, suing a judge does not create legitimate grounds for disqualification when the judge has been sued as a result of their rulings in the case. To hold otherwise would allow any litigant an easy method of judge-shopping, eliminating disfavored judges until the desired judge has been obtained. A trial judge's refusal to disqualify him or herself does not violate a defendant's due-process rights in the absence of any evidence that the trial judge conducted the trial in a biased manner or that the state proceedings were in any way affected by the federal action brought by the defendant against the trial judge. In this case, respondent was not entitled to relief from the trial court order denying his motion for disqualification because he did not address on appeal one of the trial court's reasons for denying the disqualification motion—i.e., that the motion was untimely because it was filed more than three months after he commenced the federal litigation. Regardless, there was no evidence that the trial court acted in a biased or less than impartial manner because the court had already started the motion-to-terminate hearing, allowed a number of adjournments of that hearing as requested by respondent, and ultimately terminated portions of the PPO that were not supported by the evidence. While the trial court did not allow respondent to withdraw his motion, the court had inherent authority to exercise its discretion in controlling its docket. Canon 3(A)(4) did not compel the trial court to recuse itself or require a disclosure of communications. Respondent's argument was rejected because (1) he failed to address the trial court's ruling relying on Canon 3(A)(4)(e), which allows ex parte communication that are expressly authorized by law, and (2) there was no evidence that there were ex parte communications between the trial court and the court's counsel in the federal action regarding the state PPO action, particularly

given that the federal action concerned the constitutionality of the PPO statute. Accordingly, the trial court and the chief judge did not err by rejecting respondent's motion seeking disclosure of ex parte communications or to disqualify the court.

2. MCL 600.2950a(1) provides that in nondomestic matters, an individual may petition for a PPO to enjoin a person from posting a message contrary to MCL 750.411s and from stalking as defined in MCL 750.411h and MCL 750.411i; a PPO must be specifically limited to the adjudicated speech. A court may not grant relief under MCL 750.411s(1) unless the petition alleges facts that constitute stalking as defined in MCL 750.411h or MCL 750.411i, or conduct that is prohibited under MCL 750.411s. Conduct implicated by MCL 750.411h and MCL 750.411i was not at issue in this appeal because the trial court omitted the provisions based on those statutes from the amended PPO. MCL 750.411s(1) provides that a person shall not post a message through the use of any medium of communication, including the Internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply (1) the person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim; (2) posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested; (3) conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested; and (4) conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested. To prohibit postings under MCL 750.411s, a court must determine that the postings in question violate the elements in the statute. The statute is designed to prohibit cyberstalking by proxy and cyberharassment by proxy, and the focus of the statute is on the unconsented contacts that occur because of the posts—resulting in the harassment of the victim—not the actual posts themselves; a stalker uses other persons to harass the victim when the stalker posts a message that leads to unconsented contact. Under MCL 750.411s(8)(i), the truthfulness of a posted message is not relevant when determining whether the message was posted in violation of MCL 750.411s(1).

3. MCL 750.411s(6) provides, however, that MCL 750.411s does not prohibit constitutionally protected speech or activity.

Defamation only serves as a possible argument by a PPO petitioner when the respondent raises a claim that the requested PPO would violate their First Amendment rights. In that regard, the First Amendment states that Congress shall make no law abridging the freedom of speech. The First Amendment protects speech over the Internet to the same extent as speech over other media, but the right to speak freely is not absolute. In particular, the First Amendment does not protect defamatory words. Thus, defamatory speech—communication that tends to harm the reputation of a person so as to lower them in the estimation of the community or deter others from associating or dealing with them—is not constitutionally protected. Statements that are not protected by the First Amendment include false statements of fact, which are those that state actual facts but are objectively provable as false, along with direct accusations or inferences of criminal conduct. Although MCL 600.2911 provides a cause of action for money damages for defamation, the statute does not preclude enjoining defamatory communications that satisfy the elements of MCL 750.411s. Further, under MCL 600.2950a, a trial court may enjoin a defendant from making defamatory statements after there has been a determination that the speech was, in fact, false. Thus, if the elements of MCL 750.411s have been satisfied for purposes of obtaining a PPO under MCL 600.2950a, and if the respondent has asserted that his or her posted messages constituted constitutionally protected speech, a petitioner does not have to prove economic injury when the petitioner can otherwise establish that the posts were false and defamatory. In other words, when a respondent challenges a request for a PPO on the basis that the PPO would prohibit constitutionally protected speech and the petitioner counters that the posted messages are defamatory, the petitioner need not show economic injury to enjoin that speech.

4. In this case, although the amended PPO expired during the pendency of the appeal, the appeal was not moot because identifying an improperly issued PPO is a live controversy. Respondent did not dispute the trial court's conclusion that petitioner had demonstrated reasonable cause to continue the PPO because she established the elements of MCL 750.411s; therefore, that conclusion stood. Respondent's posts on social media in effect asserted that petitioner allowed a known sex offender to have ongoing access to the child; the assertions, which respondent made either negligently or intentionally, were proved false. Accordingly, the trial court did not err by concluding that respondent made defamatory statements about petitioner on various Facebook pages. However, the PPO was too broad and not confined to the boundaries set

forth in MCL 750.411s. Remand was necessary for the court to amend the PPO to provide that, absent petitioner's consent, respondent was prohibited from posting online messages that assert that petitioner is allowing LW to have access to, or contact with, the child and that otherwise violate MCL 750.411s.

Affirmed in part, reversed in part, and case remanded for modification of the amended PPO.

PERSONAL PROTECTION ORDERS — SOCIAL MEDIA POSTS — FALSE AND DEFAMATORY POSTS — ASSERTION OF CONSTITUTIONALLY PROTECTED SPEECH — PROOF OF ECONOMIC INJURIES NOT REQUIRED.

MCL 600.2950a(1) provides, in part, that in nondomestic matters, an individual may petition for a personal protection order (PPO) to enjoin a person from posting a message contrary to MCL 750.411s; although MCL 600.2911 provides a cause of action for money damages for defamation, the statute does not preclude enjoining defamatory communications that satisfy the elements of MCL 750.411s; if the elements of MCL 750.411s have been satisfied for purposes of obtaining a PPO under MCL 600.2950a and the respondent has asserted that his or her posted messages constituted constitutionally protected speech, a petitioner does not have to prove economic injury when the petitioner can otherwise establish that the posts were false and defamatory.

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

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

MARKEY, J. Respondent, KL, appeals by right a modified nondomestic personal protection order (PPO) issued by the trial court under MCL 600.2950a following an evidentiary hearing on KL's motion to terminate the PPO. The original PPO had been entered upon request by petitioner, TT. The amended PPO prohibits respondent "from posting defamatory statements about Petitioner on social media and/or from publishing such statements elsewhere." Respondent also appeals the trial court's order denying his motion to disqualify the trial court judge, along with the chief judge's order affirming the denial, after respondent

filed suit against the trial court judge in a federal action that challenged the constitutional validity of MCL 600.2950a. We affirm the rejection of respondent's effort to disqualify the trial court judge, but we reverse with respect to the modified PPO and remand for further amendment of the PPO.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

OGL is the daughter of respondent-father KL. At the time of the events giving rise to the PPO litigation, it appears that OGL was around four years old. Respondent was in a bitter custody dispute with OGL's mother, who was respondent's former girlfriend. Petitioner TT is OGL's maternal great aunt. Respondent believed that OGL was regularly taken to the maternal grandparents' farm for visits, that a man, LW, was permitted by the grandparents to live in a shack on the property, and that LW is a twice-convicted sex offender.[1] Respondent went on a personal Internet crusade against OGL's mother and her family regarding his view that they were placing OGL in harm's way by allowing her to be in the presence of, or have contact with, LW. Respondent's actions included the use of social media to highlight the situation and, ostensibly, to protect and obtain justice for OGL. Respondent also complained that local governmental agencies and the courts had been of little help to his cause and had actually thwarted his efforts to safeguard his daughter.

It was within this context that petitioner filed a petition for a nondomestic PPO against respondent on March 4, 2019. In the petition, petitioner indicated

[1] A document was submitted indicating that LW had a 1985 conviction for assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g, and a 2004 conviction for fourth-degree criminal sexual conduct, MCL 750.520e.

that OGL's mother had a PPO against respondent, that, apparently, OGL's mother had inadvertently left petitioner's name on some paperwork submitted to another court to show that respondent had violated that particular PPO, and that respondent thereafter began focusing his online attacks on petitioner. Petitioner alleged that respondent sent her multiple messages through Facebook Messenger and began attacking her on social media. She claimed that respondent posted her picture on public Facebook pages with a caption stating that she was helping a violent sexual predator. Petitioner further asserted that respondent accused her numerous times on social media of allowing a pedophile, LW, to have access to OGL. Petitioner attached the Facebook messages and posts to her petition, including a post on a Facebook page for a group started by respondent called "Justice for [OGL]," which stated:

> Pictured below is [petitioner]. As you can read, it seems as if [OGL's] maternal family is actively trying to protect the twice convicted violent sexual predator while simultaneously allowing him ongoing access to [OGL].
>
> [Petitioner] has also been putting in great efforts to help the twice convicted violent sexual predator attempt to have [respondent] thrown in jail again due to alleged "violations" of the frivolous PPO the twice convicted violent sexual predator has against [respondent].[2]

Petitioner contended that none of respondent's claims was true. She further maintained that she had never even met or talked to LW.

In the myriad computer screen shots showing communications between the parties and respondent's

---

[2] Aside from the PPO at issue in this case, it appears that respondent has been the subject of several other PPOs and has been accused of violating those PPOs.

public posts, which were later admitted into evidence, there were snippets of a transcript from a child custody hearing regarding OGL. LW testified at the hearing, stating that he could not remember ever having any physical contact with OGL, that a couple of times he went to the grandparents' house to do some work and OGL happened to be present, that he politely responded to her when she spoke to him, and that he was told by a woman from Children's Protective Services not to be around OGL unsupervised. At one point in his testimony, LW indicated that he "was informed by [T] about what was being talked about." "T" is petitioner's first name. LW also testified that his "nephew's wife [T] was on the Facebook and she seen . . . a conversation going on between this guy [respondent] and somebody else."[3] LW additionally noted that "T" was not in court because she had just undergone surgery. It is evident that LW was not referring to petitioner when mentioning the name "T" at the hearing. And petitioner sent a message to respondent directly informing him that she did not personally know LW, that she had never spoken to him, and that she was not the person LW was referring to at the hearing. The trial court was not presented with any child custody transcript references to petitioner's full name. We also note that the transcript references to "T" do not say anything about "T" engaging in acts or conduct that gave LW access to OGL.

In the PPO petition, petitioner noted that many people had messaged her about respondent's posts and asked her what was going on. She stated that she worked as an interpreter in a school and that she was very concerned that the false social-media posts would

[3] LW spoke of a PPO that he had obtained against respondent.

affect her employment.[4] Petitioner was worried that parents and future prospective clients would not want her to be their interpreter. She implored the trial court to order the removal of the posts and to bar respondent from continuing to lie about her on social media.

On March 5, 2019, the trial court entered an ex parte PPO, which prohibited respondent from stalking petitioner, as "stalking" is defined in MCL 750.411h and MCL 750.411i. The PPO forbid respondent from following petitioner, appearing at her residence or workplace, approaching or confronting her, entering onto her property, sending her mail, contacting her by phone, placing an object on or delivering an object to petitioner's property, threatening to kill or injure petitioner, and purchasing or possessing a firearm. Significantly, the PPO also prohibited respondent from "posting a message through the use of any medium of communication, including the internet or a computer or any electronic medium, pursuant to MCL 750.411s." More specifically, the ex parte PPO provided that respondent was not permitted to "post[] comments about Petitioner on social media."

During March 2019, three orders to show cause for violating the PPO were entered, along with three accompanying bench warrants for respondent's arrest. Another alleged violation occurred in May 2019, resulting in a show-cause order and a bench warrant. The alleged violations concerned respondent's continued computer usage and social-media posts touching on prohibited subjects. At different times, respondent was arrested, jailed, arraigned on the warrants, and posted bond.

---

[4] The record indicated that petitioner was employed as a sign-language interpreter.

On March 13, 2019, respondent moved to terminate the PPO, claiming that petitioner made false statements in the PPO application, that he was not posting anything that was inaccurate, and that his actions were protected by the First Amendment.[5] On March 21, 2019, an evidentiary hearing was conducted on respondent's motion to terminate the PPO. The trial court examined petitioner, who was unrepresented at the time, and counsel retained by respondent began cross-examination of petitioner before the hearing was adjourned and scheduled to continue at a later date.[6] On June 20, 2019, an evidentiary hearing was conducted on all four of the alleged PPO violations and that hearing was also continued. There were several adjournments with respect to the continuation of the hearing on the motion to terminate the PPO because respondent's attorney was allowed to withdraw. Respondent obtained new counsel, and respondent was sent to jail for 10 days for being held in contempt by a different judge conducting a child custody hearing regarding OGL.

On June 27, 2019, respondent, under 42 USC 1983, filed a federal lawsuit against the trial court, naming the judge in her official capacity as the defendant and challenging the nondomestic PPO statute as violative of the First Amendment. On August 16, 2019, respondent amended the federal complaint, adding a due-process claim under the Fourteenth Amendment, US Const, Am XIV.[7] Before the hearing on the motion to

---

[5] US Const, Am I.

[6] We shall discuss the evidence presented at the hearing in the analysis section of this opinion to the extent necessary to resolve the appeal. The evidence did include materials that had been attached to petitioner's PPO application.

[7] In the amended federal complaint, respondent alleged:

terminate the PPO was continued, respondent filed a notice of withdrawal of his motion to terminate the PPO on September 13, 2019, reserving "the right to refile said motion . . . ." On September 16, 2019, the trial court's judicial secretary e-mailed respondent's attorney and informed him that the court "is not granting your request to withdraw your [m]otion . . . ." On September 17, 2019, respondent filed an objection to the court's rejection of the notice of withdrawal; he also moved for disclosure of communications and/or to disqualify the trial court. On the basis of assumed communications from the trial court's counsel in the federal lawsuit to the court that pertained to the instant PPO litigation, respondent argued that the court was in violation of Michigan's Code of Judicial Conduct, Canon 3(A)(4), for considering these so-called ex parte communications outside the presence of the parties in the case at bar.[8] Respondent contended that Canon 3(A)(4) required the trial court to disclose to the parties the substance of those assumed ex parte communications between the court and the court's attor-

> [Respondent] is not attacking or challenging the Social Media injunction [PPO] itself but instead seeks declaratory and/or injunction relief by targeting as unconstitutional the Michigan non-domestic PPO statute as it has been authoritatively construed and may be attacked as explained and authorized by *Skinner v Switzer*, 131 S. Ct. 1289 (2011).
>
> * * *
>
> [T]he procedural safeguards employed under the Michigan non-domestic PPO statute are insufficient to pass constitutional muster required by procedural due process under the Fourteenth Amendment to the United States Constitution.

[8] Canon 3(A)(4) provides, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows . . . ."

ney. Respondent further maintained that the trial court judge was required to recuse herself because of the appearance of potential bias in light of the federal lawsuit brought against her. Respondent explained that this conflict or bias was why respondent had sought to withdraw the motion to terminate the PPO, which would have eliminated the problem. But because the trial court judge did not allow withdrawal of the motion, respondent felt it necessary that she disqualify or recuse herself.

On September 19, 2019, the hearing on the motion to terminate the PPO was continued. At the start of the hearing, the court and the parties discussed the issues concerning respondent's efforts to withdraw the motion to terminate the PPO and the motion to disqualify the trial court. The trial court judge denied the motion to disqualify herself, again rejected respondent's attempt to withdraw the motion to terminate the PPO, and resumed and concluded the hearing on respondent's motion to terminate the PPO. With respect to the attempt to withdraw the motion to terminate the PPO, the trial court observed that respondent's requested hearing on the motion was already in progress, that the court had the right to control its docket and decide to continue with the motion, that respondent deserved to have his important constitutional claims resolved, and that there was no legal authority that gave respondent the absolute right to withdraw the motion.[9]

The trial court next ruled that recusal or disqualification was unnecessary. The court first found that respondent's motion was untimely under MCR 2.003(D)(1)(a) because it was filed almost three months

[9] The trial court entered an order denying withdrawal of the motion to terminate the PPO. The court acknowledged that respondent filed a notice of withdrawal and not a request or motion to withdraw, but the court viewed the matter as one requiring judicial permission.

after the federal lawsuit was commenced absent explanation why the motion was not filed soon after the federal case was initiated. The trial court also determined that the federal action was effectively against the office of the circuit court and not the judge personally, regardless of her being named as defendant in that case. With respect to ex parte communications and Canon 3(A)(4), the trial court opined that any communications that may have occurred between the court's counsel in the federal case and the court were expressly authorized by law and did not have to be disclosed in light of the exception in Canon 3(A)(4)(e) ("A judge may initiate or consider any ex parte communications when expressly authorized by law to do so."). Immediately after the ruling on disqualification, respondent's attorney asked the court, for purposes of a planned appeal, to confirm whether there were any communications between the court and the court's attorney in the federal lawsuit regarding respondent's PPO litigation with petitioner. The trial court declined to answer the question, stating that it had no obligation to disclose that information.

The parties offered no further testimony or evidence in regard to the motion to terminate the PPO, and the court simply entertained the parties' extensive arguments. The trial court took the motion to terminate the PPO under advisement.

Respondent moved for the chief judge to review the trial judge's decision not to recuse or disqualify herself. On October 24, 2019, before the trial court issued its ruling on the motion to terminate the PPO, the chief judge issued a written opinion and order denying respondent's challenge. The chief judge indicated that the federal lawsuit was clearly not grounds for disqualification. The chief judge claimed that the premise

of the federal action was that respondent disagreed with the trial court's rulings in the instant action, and that is not a proper ground to disqualify a judge. The chief judge further ruled that the trial court did not have to recuse itself merely because respondent sued the court. The chief judge explained, "If that were the case, any party unhappy with the judge assigned to their case could remove the judge by suing them . . . ." With respect to the alleged ex parte communications from the trial court's federal counsel to the court in supposed violation of Canon 3(A)(4), the chief judge found that while respondent had indicated his belief that these communications must have occurred, "there [was] no evidence suggesting such communications actually took place." Finally, the chief judge noted that contrary to respondent's assertion, the trial court's refusal to comment on the alleged ex parte communications did not suggest or imply that respondent's beliefs were accurate.

On October 28, 2019, the trial court issued a written opinion and order with respect to the motion to terminate the PPO. The court first summarized the evidence presented at the evidentiary hearing. The trial court observed that the evidence showed that respondent had contacted petitioner several times in January and February 2019, that petitioner on occasion replied to respondent's messages, that respondent did not stop contacting petitioner despite her requests for him to do so, that petitioner blocked some of respondent's messages, that respondent never threatened petitioner with physical violence, and that the parties never met face-to-face after the messages began. The court noted the reference in the child custody transcript to a person with the same first name as petitioner and who had purportedly allowed contact between OGL and LW. The court stated that respondent had information in

his possession that it was not petitioner who was being referred to in the transcript, yet he "apparently chose to ignore it and chose instead to continue to publish similar untrue allegations about the Petitioner." The trial court found that respondent posted false information about petitioner on the "Justice for [OGL]" page, on an "attorney review" Facebook page, on a Port Huron Facebook page, and on a Facebook page created by respondent using a false last name. The court concluded that the evidence established that petitioner did not personally know LW and had never made any contact with him although she knew of him because his name had been mentioned in the child custody litigation. The court further stated:

> [Petitioner] described the effect Respondent's postings have had on her. Petitioner is a sign language interpreter who works for an agency that contracts with various school districts to provide services for their hearing impaired students. She works directly with children. Respondent's Facebook postings have caused her anxiety, humiliation, and a fear of losing her job. Her employer has counseled her about Respondent's postings. She has had discussions about the postings with her boss, with the principal of the school where she primarily works, and with the superintendent of that school system. Acquaintances have sent her private Facebook messages and text messages asking her why she is exposing her niece to a convicted sex offender. She is on constant alert, wondering what Respondent will be posting about her next.

The trial court proceeded to review the relevant legal authorities. The court next ruled that petitioner had not demonstrated that respondent's conduct amounted to stalking behavior prohibited by MCL 750.411h and MCL 750.411i.[10] With respect to MCL 750.411s, which

---

[10] As indicated earlier and under the authority of MCL 750.411h and MCL 750.411i, the PPO forbid respondent from following petitioner,

prohibits posting certain messages on the Internet or a computer without the victim's consent, the court acknowledged that it could not bar constitutionally protected speech or activity. See MCL 750.411s(6) ("This section does not prohibit constitutionally protected speech or activity."). But the trial court also indicated that defamatory statements are not constitutionally protected. The court found that respondent knowingly made false statements about petitioner on social media, which would have caused a reasonable person to feel terrorized, frightened, intimidated, threatened, or harassed, and which did, in fact, cause petitioner to experience those feelings. The trial court also concluded that respondent made those false postings to harass petitioner and to cause others to harass her. The court therefore ruled that petitioner had demonstrated reasonable cause to believe that respondent committed acts prohibited by MCL 750.411s. The trial court amended the original PPO, removing the provisions based on MCL 750.411h and MCL 750.411i, and prohibiting respondent "from posting defamatory statements about Petitioner on social media and/or from publishing such statements elsewhere."[11]

Respondent now appeals by right. We note that the amended PPO provided that it remained in effect until March 4, 2020, which date has now passed. We do not know whether the PPO was continued or expired without renewal. Nevertheless, the appeal is not moot

---

appearing at her residence or workplace, approaching or confronting her, entering onto her property, sending her mail, contacting her by phone, placing an object on or delivering an object to petitioner's property, threatening to kill or injure petitioner, and purchasing or possessing a firearm.

[11] By order dated November 7, 2019, the trial court dismissed all four of the alleged PPO violations. The record on appeal does not provide any insight regarding why the court dismissed the charges.

even if the modified PPO is no longer in effect. In *TM v MZ*, 501 Mich 312, 319-320; 916 NW2d 473 (2018), our Supreme Court held:

> We conclude that identifying an improperly issued PPO as rescinded is a live controversy and thus not moot. A judgment here *can* have a "practical legal effect" . . . because if the Court concludes that the trial court should never have issued the PPO, respondent would be entitled to have LEIN [Law Enforcement Information Network] reflect that fact. Thus, an appeal challenging a PPO, with an eye toward determining whether a PPO should be updated in LEIN as rescinded, need not fall within an exception to the mootness doctrine to warrant appellate review; instead, such a dispute is simply not moot. Consequently, and contrary to the decision of the Court of Appeals, the mere fact that the instant PPO expired during the pendency of this appeal does not render this appeal moot.

II. ANALYSIS

A. EX PARTE COMMUNICATIONS AND DISQUALIFICATION OF THE TRIAL COURT

1. RESPONDENT'S ARGUMENTS

Respondent argues that the protection afforded by the attorney-client privilege made it impossible for the trial court to both comply with Canon 3(A)(4) "and be a federal defendant with non-waived attorney-client privilege." Respondent asserts that the trial court judge was required to recuse herself because of her alleged inability to comply with Canon 3(A)(4). Respondent essentially contends that the trial court judge must have had communications with her attorney in the federal action about the instant PPO case, "namely in the form of discussions via attorney-client privilege to defend the federal lawsuit." Minimally, according to respondent, the trial court had to give the parties and

their counsel notice of the ex parte communications and disclose to them the substance of the communications. Respondent then shifts gears, maintaining that there was an appearance of impropriety because of the federal lawsuit against the court. Respondent posits that "[r]easonable minds would and could question whether the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired when adjudging the legal actions of a party who has sued the judge in her official capacity in another court." And thus, there was an appearance of impropriety in the form of a conflict of interest. Respondent requests a decision reversing the denial of disqualification, vacating the trial court's ruling on the PPO, and remanding the case to "a non-conflicted judicial officer."

2. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's factual findings regarding a motion for disqualification while its application of the facts to the law is reviewed de novo. *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. (quotation marks and citation omitted).

3. DISCUSSION

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012). But "[a] trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Id*.; see also *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210

(1996). Various nonexclusive grounds for disqualification are set forth in MCR 2.003(C), which provides, in relevant part:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [Alteration in original.[12]]

Disqualification is also warranted when a judge has more than a "de minimis interest that could be substantially affected by the proceeding[.]" MCR 2.003(C)(1)(g)(iii). "[J]udicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality.' " *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), quoting *Cain*, 451 Mich at 496. In fact, "a trial judge's remarks made during trial, which are critical of or hostile to counsel, the parties, or their cases, ordinarily do not establish disqualifying

---

[12] Canon 2(A) provides:

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

bias." *In re MKK*, 286 Mich App at 567. An appearance of impropriety may arise when the conduct of a judge "would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *Caperton*, 556 US at 888 (quotation marks and citation omitted).[13]

In this case, one of the reasons the trial court gave for denying the motion for disqualification was that respondent's motion was untimely. MCR 2.003(D)(1)(a) provides, in part, that "[t]o avoid delaying trial and inconveniencing the witnesses, all motions for disqualification *must* be filed within 14 days of the discovery of the grounds for disqualification." (Emphasis added.) Indeed, respondent's motion was filed nearly three months after the federal litigation was commenced. And at the latest, the grounds for disqualification would have been discovered immediately upon filing the suit. On appeal, respondent fails entirely to address this basis for the trial court's 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). For this reason alone, respondent's de-

[13] The *Caperton* Court noted:

> The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today. Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. [*Caperton*, 556 US at 889-890 (quotation marks and citation omitted).]

Due-process rights are implicated when the probability of actual bias by the judge is too high to be constitutionally tolerable. *Id*. at 872.

mand for disqualification fails. But we nonetheless continue with the analysis.

The chief judge's observations below were consistent with the following remarks of our Supreme Court in *Grievance Administrator v Fieger*, 476 Mich 231, 274; 719 NW2d 123 (2006) (separate opinion by TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ.):

> Indeed, if anyone can force a judge's disqualification merely by suing that judge, then any litigant would have an easy method of judge-shopping, eliminating disfavored judges until the desired judge has been obtained. The destructive effect of such a rule is too obvious to require further elaboration.

The Supreme Court of our sister state Ohio likewise stated as follows in *In re Disqualification of Saffold*, 155 Ohio St 3d 1272, 1272-1273; 2018-Ohio-5258; 121 NE3d 387 (2018):

> It is well established that a judge will not be disqualified solely because a litigant in a case pending before the judge has filed a lawsuit against that judge. To hold otherwise would invite parties to file lawsuits solely to obtain a judge's disqualification, which would severely hamper the orderly administration of judicial proceedings. . . .
>
> . . . [I]n general, suing a judge does not create legitimate grounds for disqualification when the judge has been sued as a result of her rulings in the case. [Quotation marks and citations omitted.[14]]

And in *Olsen v Wainwright*, 565 F2d 906, 907 (CA 5, 1978), the Fifth Circuit for the United States Court of Appeals ruled:

---

[14] See also *Tennant v Marion Health Care Foundation, Inc*, 194 W Va 97, 109 n 10; 459 SE2d 374 (1995) ("If the disqualification of every judge who is sued in his or her official capacity was required, it would have a substantial impact on available judicial resources.").

> Petitioner next alleges that where the trial judge had been named as a defendant in a federal civil suit filed by petitioner, the judge's refusal to disqualify himself violated petitioner's due process rights. No evidence is presented that the judge conducted the trial in a biased manner, or that the proceedings were in any way affected by the civil suit. The failure of the judge to disqualify himself under these circumstances was not error.

In this case, there was no indication that the trial court acted in a biased or less than impartial manner. The court began the evidentiary hearing on respondent's motion to terminate the PPO, allowed respondent a number of his requested adjournments, and ultimately terminated those aspects of the PPO related to stalking under MCL 750.411h and MCL 750.411i for lack of evidence. The trial court did not prevent respondent from presenting his side of the matter, and respondent chose not to testify. It is true that the court refused to allow respondent to withdraw his motion to terminate the PPO. A trial court, however, has the inherent authority to exercise its discretion in controlling its docket. *Baynesan v Wayne State Univ*, 316 Mich App 643, 645; 894 NW2d 102 (2016). Respondent couched the notice of withdrawal in terms that attempted to reserve a right to refile the motion to terminate the PPO in the future, which was not a "right" that respondent could dictate to the court.[15] Considering this problematic characteristic of the notice of withdrawal, along with the facts that the hearing was already underway and several adjournments had been granted, we cannot conclude that the trial court's decision to disallow withdrawal of the motion reflected actual bias against respondent. The trial

[15] A motion to terminate a PPO must be filed within 14 days of service of the PPO or upon a showing of good cause for a later filing. MCR 3.707(A)(1)(b).

court's ruling on the matter did not evidence deep-seated favoritism or antagonism that would make fair judgment impossible—it was simply a judicial ruling. *Armstrong*, 248 Mich App at 597.

With respect to Canon 3(A)(4), which, again, provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows . . . ," we note the canon did not compel recusal or require a disclosure of communications in this case.[16] We initially note that respondent fails to address the trial court's ruling relying on the exception to Canon 3(A)(4) found in Subpart (A)(4)(e) of Canon 3 regarding ex parte communications that are expressly authorized by law. As stated earlier, that briefing failure alone provides a reason to reject respondent's argument on appeal. *Denhof*, 311 Mich App at 521. Furthermore, were we to accept respondent's argument, it would effectively vitiate the principle that a person cannot force a judge's disqualification merely by suing that judge.

Additionally, as the chief judge observed, there was no evidence that there were ex parte communications between the trial court and the court's counsel in the federal action concerning the pending PPO litigation involving petitioner and respondent. The federal lawsuit regards the constitutionality of the PPO statute,

[16] Respondent's argument about the court's having to give notice to the parties and disclose ex parte communications is based on the language in Canon 3(A)(4)(a)(ii). Although the language in this provision does demand notification and disclosure of ex parte communications, it is only implicated when a judge "allow[s] ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits[.]" Canon 3(A)(4)(a). There is no evidence or claim of such communications. Accordingly, the legal premise of respondent's position completely evaporates.

which would not necessarily require a discussion by the court and its counsel about the particular aspects of the instant PPO case.[17]

In sum, respondent fails to persuade us that the trial court or the chief judge committed error requiring reversal with respect to respondent's motion seeking disclosure of ex parte communications or to disqualify the court.

B. PPO ENJOINING DEFAMATORY SPEECH ON SOCIAL MEDIA

1. RESPONDENT'S ARGUMENTS

Respondent argues that the nondomestic PPO statute, MCL 600.2950a, does not bar or provide a remedy for defamation. Respondent contends that he believed that LW's testimony in the child custody proceeding referred to petitioner and not to another individual with the same first name, that respondent did not direct publication to third parties, and that he did not republish LW's testimony on social media negligently. Therefore, according to respondent, he did not commit a written defamation through any of his posts and his speech was thus constitutionally protected under the First Amendment. Respondent further maintains that the amended PPO constituted an unconstitutional prior restraint. Additionally, respondent asserts that if he defamed petitioner, MCL 600.2911 would be implicated, giving petitioner a cause of action for money damages but not the right to petition for a PPO.[18] Respondent

[17] To the extent that respondent claims a conflict of interest independent from his assertion of an appearance of impropriety, he has failed to show an interest by the court in the petitioner and respondent's PPO litigation that would be substantially affected by the federal lawsuit.

[18] MCL 600.2911 provides for money damages in a suit for libel or slander and sets forth various parameters depending on the type of

finally claims that equity will not enjoin a defamation absent economic injury, which did not occur here.

2. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's decision regarding whether to issue a PPO. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. A court necessarily abuses its discretion when it makes an error of law. *TM v MZ (On Remand)*, 326 Mich App 227, 235-236; 926 NW2d 900 (2018). Factual findings underlying a PPO ruling are reviewed for clear error. *Hayford*, 279 Mich App at 325. This Court reviews de novo constitutional issues. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). Matters of statutory construction are also subject to de novo review. *TM*, 326 Mich App at 236.

3. RULES OF STATUTORY CONSTRUCTION

In *Whitman v City of Burton*, 493 Mich 303, 311-312; 831 NW2d 223 (2013), the Michigan Supreme Court articulated the principles governing the interpretation of a statute:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the

---

defamation involved. MCL 600.2911(7) states, "An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently."

> statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent. [Citations omitted.]

4. DISCUSSION

MCL 600.2950 concerns PPOs involving current or former spouses, individuals in dating relationships, and housemates, while MCL 600.2950a, the nondomestic PPO statute pertinent here, addresses stalking behavior or conduct that is not limited to certain existing relationships. Except as otherwise provided in MCL 600.2950 and MCL 600.2950a, an action for a PPO is governed by the Michigan Court Rules, with MCR 3.701 *et seq*., applying to PPOs against adults. MCR 3.701(A). "The petitioner bears the burden of establishing reasonable cause for issuance of a PPO . . . ." *Hayford*, 279 Mich App at 326. A respondent may file a motion to terminate or modify a PPO. MCR 3.707(A)(1)(b); MCL 600.2950a(13). The burden of proof remains with a petitioner who seeks to establish "a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO . . . ." *Hayford*, 279 Mich App at 326.

MCL 600.2950a(1) provides:

> [A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h, 750.411i, and 750.411s. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalk-

> ing as defined in section 411h or 411i, or conduct that is prohibited under section 411s . . . . Relief may be sought and granted under this subsection whether or not the individual to be restrained or enjoined has been charged or convicted under section 411h, 411i, or 411s of the Michigan penal code . . . .

MCL 750.411h concerns stalking and MCL 750.411i pertains to aggravated stalking. MCL 750.411h and MCL 750.411i are no longer pertinent in this case because the trial court discarded the parts of the PPO connected to those two statutory provisions. On the other hand, MCL 750.411s is relevant and provides, in pertinent part, as follows:

> (1) A person shall not post a message through the use of any medium of communication, including the internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent, if all of the following apply:
>
> (a) The person knows or has reason to know that posting the message could cause 2 or more separate noncontinuous acts of unconsented contact with the victim.
>
> (b) Posting the message is intended to cause conduct that would make the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (c) Conduct arising from posting the message would cause a reasonable person to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.
>
> (d) Conduct arising from posting the message causes the victim to suffer emotional distress and to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

As defined in MCL 750.411s(8)(i), to "post a message" means "transferring, sending, posting, publish-

ing, disseminating, or otherwise communicating or attempting to transfer, send, post, publish, disseminate, or otherwise communicate information, *whether truthful or untruthful*, about the victim." (Emphasis added.) And as indicated earlier, MCL 750.411s "does not prohibit constitutionally protected speech or activity." MCL 750.411s(6).

When MCL 600.2950a is considered in conjunction with MCL 750.411s, it becomes clear that to be entitled to a PPO, a petitioner must establish that the respondent engaged in conduct that involved posting a message on the Internet or a computer without the petitioner's consent and that the four elements found in Subdivisions (a) through (d) of MCL 750.411s(1) are all satisfied. "[T]o prohibit postings under MCL 750.411s, there must be a determination that the postings in questions violate the elements set forth in the statute." *Buchanan v Crisler*, 323 Mich App 163, 181; 922 NW2d 886 (2018). The *Buchanan* panel, discussing MCL 750.411s, explained:

> [I]t appears that the statute is designed to prohibit what some legal scholars have referred to as "cyberstalking by proxy" or "cyberharassing by proxy." In other words, as made plain by the statute, it is not the postings themselves that are harassing to the victim; rather, it is the unconsented contacts arising from the postings that harass the victim. In particular, the statute envisions a scenario in which a stalker posts a message about the victim, without the victim's consent, and as a result of the posting, others initiate unconsented contacts with the victim. These unconsented contacts, arising from the stalker's postings, result in the harassment of the victim. In this manner, by posting a message that leads to unconsented contact, the stalker is able to use other persons to harass the victim.
>
> For example, there have been cases of cyberstalking by proxy in which a stalker posts messages with sexual

> content about the victim and suggests that the victim is interested in sexual contact. In that situation, third parties read the message and contact the victim, expecting sex. In a somewhat more benign example, in a Massachusetts case, harassers posted false advertisements online, suggesting that the victims had something for sale or to give away for free; as a result of these advertisements, the victims received numerous phone calls and visits at their home about the items. In each of these cases, the victim was harassed by the unconsented contacts that arose from the online postings. As written, MCL 750.411s is designed to address situations in which the victim is harassed by conduct arising from the posts. [*Id*. at 179-181 (citations omitted).]

Once the elements of MCL 750.411s are established, the PPO issued by a trial court under MCL 600.2950a must indicate that it restrains or enjoins the respondent from engaging in further conduct prohibited by MCL 750.411s. MCL 600.2950a(1).

With respect to the elements listed in MCL 750.411s, the trial court ruled that petitioner had demonstrated reasonable cause to continue the PPO because the requirements of the statute had been satisfied. On appeal, respondent does not challenge the court's determination that the elements in MCL 750.411s had been established by petitioner. Again, taking MCL 750.411h and MCL 750.411i out of the equation, engagement in conduct prohibited by MCL 750.411s had to be shown to justify the issuance of a PPO under MCL 600.2950a. Because respondent fails to take issue with the trial court's ruling on the elements of MCL 750.411s, we will not explore the issue, and the court's decision stands. Respondent's position is that the amended PPO violates the First Amendment and that there was no defamation that would remove the case from the protection of the First Amendment.

According to the language of MCL 750.411s(8)(i), posted messages can be prohibited even if they are

truthful, but by the same token MCL 750.411s cannot be read to prohibit constitutionally protected speech, MCL 750.411s(6). In *TM*, 326 Mich App at 237-238, this Court addressed the constitutional implications of a PPO issued under MCL 750.411s, stating:

> The First Amendment, applicable to the States through the Fourteenth Amendment, provides that Congress shall make no law abridging the freedom of speech. The United States Supreme Court has held that the federal constitution protects speech over the Internet to the same extent as speech over other media. However, the right to speak freely is not absolute. For example, libelous utterances are not within the area of constitutionally protected speech, and a state may therefore enact laws punishing them.
>
> Prohibitions relating to content, however, are few, because of the First Amendment's "bedrock principle" that an idea cannot be prohibited simply because society finds the idea itself offensive or disagreeable. The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed. The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Thus, the First Amendment does not protect obscenity or defamation, within certain limits. A State may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace, including "fighting words," "inciting or producing imminent lawless action," and "true threats." [Quotation marks, citations, brackets, and ellipsis omitted.]

Again, the United States Constitution does not protect defamatory speech. *Id*. at 240. A defamatory communication is a communication that tends to harm a person's reputation, thereby lowering the person in the estimation of the community or deterring others from dealing or associating with them. *Id*. at 240-241. A defamatory statement is a statement asserting facts

that are and can be proven false. *Id*. at 241. Statements that are not protected by the First Amendment include false statements of fact, which are those that state actual facts but are objectively provable as false, along with direct accusations or inferences of criminal conduct. *Buchanan*, 323 Mich App at 182. Accusations of criminal activity are considered defamation per se under the law without the need to prove damages to a plaintiff's reputation. *TM*, 326 Mich App at 241.

At the evidentiary hearing on the motion to terminate the PPO, petitioner testified that respondent posted—on multiple public Facebook pages—petitioner's photograph, her name, and factual assertions that petitioner was helping a sexual predator, LW, by allowing him to have contact with, and access to, OGL. Petitioner stated that these assertions were false and that she had never even met or communicated with LW, let alone provide him assistance in any form or fashion. Petitioner testified that the offending Facebook pages included "Justice for [OGL]," which was created by respondent and had over 1,000 members, an attorney-review page, a Port Huron page, and a Facebook page respondent created by using a false name. Petitioner explained that LW had testified in a child custody hearing and referred to a person with the same first name as petitioner, that the transcript of the hearing revealed that this person was the wife of LW's nephew and not petitioner, and that respondent knew full well that in his testimony, LW was not referring to petitioner. Petitioner testified that the social-media postings placed her employment as a sign-language interpreter in jeopardy.

The trial court did not err by concluding that respondent made defamatory statements concerning petitioner on the various Facebook pages. Respondent's

posts on social media effectively asserted that petitioner was allowing LW, a convicted sex offender, to have ongoing access to OGL. This statement constituted a factual assertion that could be and was proved false. Respondent's claim that he believed LW's testimony in the child custody proceeding concerned petitioner is disingenuous. The transcript itself revealed that "T" was the wife of LW's nephew, petitioner informed respondent multiple times that she had never met or communicated with LW, and even the transcript references to "T" did not show that "T" was facilitating access to OGL by LW. There was simply no truth whatsoever in respondent's Facebook posts regarding the actions and conduct of petitioner. Furthermore, contrary to respondent's arguments, the Facebook posts were published to third parties because the page "Justice for [OGL]" alone had over 1,000 members. And the factually inaccurate Facebook posts were, minimally, the result of respondent's negligence, if not his intentional misconduct, in light of the evidence that the child custody transcripts did not refer to petitioner and did not even indicate that "T" allowed LW access to OGL.

Moreover, although MCL 600.2911 provides for money damages for defamation, this does not mean, as claimed by respondent, that it precludes enjoining defamatory communications that satisfy the elements of MCL 750.411s. Nothing in the plain and unambiguous language of MCL 600.2911 allows for that construction. With respect to respondent's argument that MCL 600.2950a does not bar or provide a remedy for defamation, we conclude that it reflects a fundamental misunderstanding of MCL 600.2950a and its incorporation of MCL 750.411s. As discussed earlier, under MCL 600.2950a(1), a court may enjoin a person from engaging in conduct that violates MCL 750.411s, but

this relief can only be granted if it is alleged and shown that the respondent violated MCL 750.411s. The issue of defamation only serves as a possible argument by a PPO petitioner when the respondent raises a claim that the requested PPO would violate his or her First Amendment rights.

We also note that truthful communications or posts can rise to the level of a violation of MCL 750.411s, and in turn be prohibited by a PPO under MCL 600.2950a, without infringing a respondent's constitutional rights. In *Buchanan*, 323 Mich App at 183, this Court explained:

> Although statements that are defamatory are not protected under the First Amendment, it does not follow that truth is a defense to a PPO prohibiting postings that violate MCL 750.411s. Quite simply, [the respondent's] defamation arguments lack merit for the simple reason that defamation is not the only type of speech exempted from First Amendment protections. And in this case, the trial court did not prohibit [the respondent's] speech because it had concluded that [he] defamed [the petitioner]. Rather, the trial court entered a PPO to prevent [the respondent] from posting a message in violation of MCL 750.411s. Under MCL 750.411s(8)(i), the truthfulness of the messages is irrelevant to whether [the respondent] violated the statute.

The *Buchanan* panel discussed the speech-integral-to-criminal-conduct exception to the First Amendment, which has been recognized in relation to criminal stalking statutes. *Id*. at 185. The Court observed that it is not deemed an abridgment of freedom of speech to make a course of conduct unlawful merely because the conduct entails the use of the written, printed, or spoken word, as is involved in stalking provisions. *Id*. This Court recognized the conundrum created by the speech-integral-to-criminal-conduct exception, consid-

ering that MCL 750.411s, a stalking statute, contains a provision that it does not prohibit constitutionally protected speech, MCL 750.411s(6), which would be rendered meaningless if all violations of MCL 750.411s triggered the speech-integral-to-criminal-conduct exception. *Id*. at 185-187. The *Buchanan* panel, after reviewing decisions from various jurisdictions, came to the following resolution:

> When these various cases are read together, it becomes clear that while messages posted to harass a private individual may be enjoined, cyberstalking laws may not be used to restrict speech that relates to a public figure or matters of public concern. We find these cases persuasive, and we hold that when the argument is raised that MCL 750.411s is being used to prohibit constitutionally protected speech relating to a matter of public concern, it must be determined whether the postings are intended solely to cause conduct that will harass a private victim in connection with a private matter or whether the publication of the information relates to a public figure and an important public concern. [*Id*. at 188-189 (citations omitted).]

Here, petitioner is a private victim and, perhaps arguably, respondent's postings regarded a private matter and not a matter of public concern. Under these circumstances, the speech-integral-to-criminal-conduct exception to the First Amendment would apply, rendering the truthfulness of respondent's posts irrelevant. Nevertheless, unlike the circumstances in *Buchanan*, petitioner raised defamation in response to respondent's assertion that his First Amendment rights were being violated, not the speech-integral-to-criminal-conduct exception. Therefore, our ruling is restricted to defamation and not to the speech-integral-to-criminal-conduct exception to the First Amendment, which was not addressed by the trial court. And, again, the trial court did not err by ruling that petitioner established that respon-

dent's posts were defamatory. But we must still examine respondent's argument concerning prior restraints.

The *TM* panel addressed enjoining future defamatory statements and the doctrine of prior restraints, stating:

> The term "prior restraint" is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur. Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints. Such restrictions are distinguishable from punishment arising from past speech that has been adjudicated as criminal. Because injunctions carry greater risks of censorship and discriminatory application than do general ordinances, they require a somewhat more stringent application of general First Amendment principles. Any prior restraint of expression bears a heavy presumption against its constitutional validity.
>
> . . . Whether and under what circumstances a court in Michigan is permitted to enjoin defamation has not been considered by this Court in a published decision since 1966, in *McFadden v Detroit Bar Ass'n*, 4 Mich App 554; 145 NW2d 285 (1966). In that case, a panel of this Court held that "it is a familiar and well-settled rule of American jurisprudence that equity will not enjoin a defamation, absent a showing of economic injury . . . ." *Id*. at 558. The *McFadden* Court stated that the primary reason for refusing to do so was "an abhorrence of previous restraints on freedom of speech," but acknowledged other reasons, including that there is "an adequate remedy at law, *i.e.*, an action for damages, and that the defendant in a defamation action has the right to a jury trial which would be precluded by granting of an injunction." *Id*.
>
> Contrary to *McFadden*, there is a modern trend toward allowing injunctions of defamatory speech. That modern trend, though, first requires a determination by a factfinder that the statements were definitively false and then

> specifically limits any injunction to the adjudicated speech. As discussed, the trial court failed to make such a determination in this case. Therefore, regardless of whether the modern trend or the rule announced in *McFadden*, 4 Mich App at 558, is adopted, the issuance of the PPO here, because of the trial court's failure to determine that the speech actually was false, fails to overcome the heavy presumption against its constitutional validity. [*TM*, 326 Mich App at 244-246 (some quotation marks and citations omitted).]

"Numerous courts, both federal and state, have held that a trial court may enjoin a defendant from making defamatory speech after there has been a determination that the speech was, in fact, false." *Id*. at 246 n 6 (citing numerous supporting opinions from other jurisdictions).

In this case, while petitioner was worried about the possibility of economic injury, there was no evidence that she actually suffered that injury. That said, *McFadden* was issued in 1967 by this Court, and it is not binding precedent. MCR 7.215(J)(1). Moreover, *McFadden* concerned a straightforward equitable request for injunctive relief and was not couched within the context of a stalking statute that required the establishment of several culpability elements. If the elements of MCL 750.411s have been satisfied for purposes of obtaining a PPO under MCL 600.2950a, and if the respondent has asserted that his or her posted messages constituted constitutionally protected speech, we see no valid reason for demanding proof of economic injury when the petitioner can otherwise establish that the posts were false and defamatory. Ultimately, MCL 750.411s, as applied through MCL 600.2950a, concerns the enjoinment of cyberstalking, not defamation. We thus choose to apply the modern trend and conclude that when a respondent challenges

a request for a PPO on the basis that the PPO would prohibit constitutionally protected speech and the petitioner counters that the posted messages are defamatory, the petitioner need not show economic injury.

Consistently with the modern trend, the trier of fact must determine that the statements or posts were definitively false. The trial court here did so, and its ruling was supported by the evidence. But to also be consistent with the modern trend, the PPO needs to be specifically limited to the adjudicated speech. In this case, the amended PPO prohibited respondent "from posting defamatory statements about Petitioner on social media and/or from publishing such statements elsewhere." This language is much too broad and unconfined to the boundaries set in MCL 750.411s. The trial court should have amended the PPO to provide that, absent petitioner's consent, respondent is prohibited from posting online messages that assert that petitioner is allowing LW to have access to, or contact, with OGL and that otherwise violate MCL 750.411s.

III. CONCLUSION

We hold that the trial court did not err by denying respondent's motion that sought disclosure of alleged ex parte communications between the trial court and the court's counsel in the federal suit and that sought recusal or disqualification of the trial court. We further hold that the amended PPO was inconsistent with the law and must be further modified as outlined above.[19]

[19] Of course, if no PPO is currently in place, a modified active or operative PPO cannot be issued unless petitioner seeks to reestablish a PPO. We are unsure whether further amendment of the PPO for purposes of changing the prior LEIN entry is feasible, as compared to the act of rescinding a PPO, and we shall leave it to the trial court on

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Neither party having fully prevailed on appeal, we decline to tax costs under MCR 7.219.

BOONSTRA, P.J., and FORT HOOD, J., concurred with MARKEY, J.

---

remand to explore that matter. If the amended PPO was continued or remains in effect, it shall be modified consistent with our holding.

CITY OF GRAND RAPIDS v BROOKSTONE CAPITAL LLC

Docket No. 350746. Submitted October 8, 2020, at Grand Rapids. Decided October 29, 2020, at 9:05 a.m.

The city of Grand Rapids sued Brookstone Capital LLC and its subsidiary affordable housing projects, 240 Ionia Avenue Limited Dividend Housing Association Limited Partnership (240 Ionia) and 345 State Street Limited Dividend Housing Association Limited Partnership (345 State Street), in the Kent Circuit Court for breach of agreement and unjust enrichment. Portions of 240 Ionia and 345 State Street were exempt from ad valorem property taxation under MCL 125.1415a of the Michigan State Housing Development Authority Act (the MSHDA Act), MCL 125.1401 *et seq*., but both properties were obligated to pay plaintiff an annual service charge for public services, or payment in lieu of taxes (PILOT), under the statute; the relevant provisions of plaintiff's city code, Grand Rapids Code, §§ 1.410 to 1.413 (the PILOT Ordinance); and plaintiff's resolutions approving the projects. Plaintiff sued defendants for failing to pay the full amount of PILOT charges billed by plaintiff during its 2015, 2016, and 2017 billing cycles. Brookstone filed a counterclaim seeking a declaratory judgment that plaintiff had to calculate PILOT amounts based on 4% of annual shelter rents for all occupants of 240 Ionia and 345 State Street and that plaintiff could not charge PILOT amounts based on the ad valorem tax rate for market-rate units. The parties filed opposing motions for summary disposition, and the trial court, Christopher P. Yates, J., ruled in favor of plaintiff. Defendants appealed.

The Court of Appeals *held*:

1. Under MCL 125.1415a(2), a municipality may determine the amount of PILOT applicable to any class of housing project, so long as the service charge does not exceed the amount of ad valorem tax that would otherwise apply. Additionally, MCL 125.1415a(6) stipulates that the PILOT-calculation method must differentiate between occupants who are lower-income persons or families and those who are not. For the portion of the building occupied by persons "other than low income persons or families," the annual PILOT amount must be equal to the full amount of the

taxes that would have been paid on that portion of the development if the project were not tax-exempt. MCL 125.1415a(7) defines low-income persons and families for purposes of MCL 125.1415a as persons and families who are eligible to move into tax-exempt housing projects. Defendants argued that the Legislature intended for this definition to encompass all persons who live in a low-income housing project, regardless of their income level or the portion of the project they occupy. However, this interpretation of Subsection (7) required an unnatural interpretation of Subsection (6). The Legislature plainly required the owners of low-income housing projects to be charged an amount equal to the amount of the full ad valorem tax on the portion of the project occupied by tenants "other than low income persons or families," as well as an annual PILOT charge for units occupied by low-income persons or families, either pursuant to the default amounts set by Subsection (2) or the amount a plaintiff established by ordinance as permitted under Subsection (2). In this case, the trial court correctly determined that the statute did not permit the imposition of a uniform PILOT charge based on annual shelter rent for the total number of units in the project.

2. Under Const 1963, art 7, § 22, a municipality's power to adopt an ordinance is subject to the state Constitution and state law. State law may preempt a regulation by an inferior level of government when the inferior level of government attempts to regulate the same subject matter as a higher level of government. The PILOT Ordinance failed to comply fully with the MSHDA Act in that the ordinance did not incorporate the directive in MCL 125.1415a(6) to charge fees in lieu of taxes equal to the ad valorem tax for any portion of the project occupied by "other than low income persons or families." Additionally, the statute does not permit municipalities to impose uniform PILOT charges for low-income housing projects irrespective of the financial statuses of the occupants. To the extent that the PILOT Ordinance conflicted with state law, it was preempted and that portion of it was unenforceable. Therefore, enforcement of the ordinance in the manner desired by defendants to evade plaintiff's charges of the equivalent of ad valorem tax for the portions of the housing projects occupied by other than low-income persons or families would violate state law. The Michigan State Housing Development Authority (MSHDA) argued in its amicus brief that it had always interpreted MCL 125.1415a in the manner urged by defendants and that the PILOT Ordinance applied the statute correctly, but MSHDA's interpretation of the statute conflicted with the Legislature's intent as expressed in the plain language of MCL 125.1415a and was not binding.

3. Plaintiff had argued in the trial court that although the language of the PILOT Ordinance is unambiguous, the trial court should determine that the absent directive of MCL 125.1415a(6) was either inherent in the ordinance or should be engrafted into it through the doctrine of *in pari materia*. The trial court chose the latter method and used the *in pari materia* statutory-construction doctrine to justify its ruling and to harmonize MCL 125.1415a and the PILOT Ordinance. However, the *in pari materia* doctrine was not applicable because the statute and the ordinance were both clear and unambiguous, and the doctrine did not permit a condition or restriction of a previously enacted statute to be added to a later-enacted statute. Nevertheless, the trial court's decision did not need to be disturbed. The court did not have to reconcile the statute with the defective ordinance because MCL 125.1415a was not ambiguous, so Michigan law required it to be enforced as written. Further, because the PILOT Ordinance directly conflicted with MCL 125.1415a(6), the trial court could not enforce the ordinance as written because it would have required plaintiff to impose uniform PILOT charges in a manner impermissible under the statute. Therefore, the trial court properly declined to enforce the ordinance to the extent that it conflicted with state law.

4. The parties' contracts provided defendants with the benefits of tax exemption under MCL 125.1415a in exchange for a PILOT, pursuant to the statute, and 240 Ionia's and 345 State Street's limited partnership agreements specifically acknowledged that the "PILOT Agreement" was the resolution passed by plaintiff's City Commission approving a PILOT for each low-income housing project. The trial court appropriately noted that defendants' managing members were aware that, pursuant to the resolutions, the PILOT charges to be imposed by plaintiff would be compliant with MCL 125.1415a, including different charges for rent-restricted units and market-rate units as directed by MCL 125.1415a(6). Further, the court appropriately determined that the resolutions constituted the PILOT agreements and defined the terms of the contracts, along with other evidence. Therefore, the court properly concluded that defendants had breached the parties' agreements when they had refused to pay the contractually defined amounts billed by plaintiff and had instead paid an amount pursuant to their incorrect PILOT calculations based on the defective ordinance. Because the parties' agreements complied with MCL 125.1415a, they were valid and enforceable.

Affirmed.

MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ACT — LOW-INCOME HOUSING DEVELOPMENTS — PAYMENTS IN LIEU OF TAXES — MUNICIPAL ORDINANCES.

MCL 125.1415a(2) of the Michigan State Housing Development Authority Act, MCL 125.1401 *et seq*., directs owners of tax-exempt low-income housing developments to pay an annual service charge or payment in lieu of taxes (PILOT) for public services; MCL 125.1415a(2) authorizes a municipality to set the amount of the PILOT for a housing project by enacting an ordinance, and MCL 125.1415a(6) clarifies that the PILOT-calculation method must differentiate between occupants who are low-income persons or families and those who are not; under MCL 125.1415a(6), the owners must pay the equivalent of ad valorem property tax for the portion of the project not occupied by low-income persons or families and must pay the PILOT established by the municipal ordinance or MCL 125.1415a(2) for the portion of the property occupied by low-income residents; the PILOT amount required by the municipality must be consistent with the requirements of the statute.

Elizabeth J. Fossel, Director of Civil Litigation, and *Toby Koenig*, Assistant City Attorney, for the city of Grand Rapids.

Loomis, Ewert, Parsley, Davis & Gotting, PC (by *Kevin J. Roragen*) for Brookstone Capital LLC, 240 Ionia Avenue Limited Dividend Housing Association Limited Partnership, and 345 State Street Limited Dividend Housing Association Limited Partnership.

Amicus Curiae:

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Lisa M. Barwick* and *Samantha L. Reasner*, Assistant Attorneys General, for the Michigan State Housing Development Authority.

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

REDFORD, J. Defendants, Brookstone Capital LLC (Brookstone), 240 Ionia Avenue Limited Dividend Hous-

ing Association Limited Partnership (240 Ionia), and 345 State Street Limited Dividend Housing Association Limited Partnership (345 State Street), appeal as of right the trial court's order granting plaintiff, the city of Grand Rapids, summary disposition under MCR 2.116(C)(10) and denying defendants' competing motion for summary disposition under MCR 2.116(I)(2). We affirm.

I. FACTUAL BACKGROUND

Brookstone developed 240 Ionia and 345 State Street as affordable low-income housing projects pursuant to the Michigan State Housing Development Authority Act (the MSHDA Act), MCL 125.1401 *et seq*., following approval by the Grand Rapids City Commissioners via adopted resolutions and approval by MSHDA. Some portions of 240 Ionia and 345 State Street are exempt from ad valorem property taxation under MCL 125.1415a, but both must pay plaintiff an annual service charge for public services in lieu of taxes. Plaintiff sued defendants for breaches of agreements for payments in lieu of taxes (PILOT) and unjust enrichment for their failure to pay the amount of charges billed by plaintiff for its 2015, 2016, and 2017 billing cycles as required under Grand Rapids Code, §§ 1.410 to 1.413 (the PILOT Ordinance) and plaintiff's resolutions approving the 240 Ionia and 345 State Street projects. Brookstone counterclaimed against plaintiff for a declaratory judgment that plaintiff had to calculate the PILOT payments for 240 Ionia and 345 State Street based on 4% of annual shelter rents of all occupants of the subject housing projects. Brookstone also asked the court to declare that plaintiff could not charge PILOT amounts based on the ad valorem tax rate for the units that were not rent or income re-

stricted. The parties disputed the interpretation and application of the MSHDA Act, particularly MCL 125.1415a, and the PILOT Ordinance. The parties filed opposing motions for summary disposition, and the trial court ruled in favor of plaintiff, giving rise to this appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 135; 892 NW2d 33 (2016). We also review de novo a trial court's interpretation and application of a statute. *Id*. at 136. "Municipal ordinances are interpreted and reviewed in the same manner as statutes." *Id*. (citation omitted). Therefore, we review de novo a trial court's ordinance interpretation and apply the rules governing statutory interpretation to a municipal ordinance. *Id*.

III. ANALYSIS

A. OVERVIEW

Defendants argue that the trial court erred by ruling in favor of plaintiff because plaintiff calculated and charged ad valorem taxes for the market-rate units contrary to plaintiff's PILOT Ordinance. Defendants contend that the PILOT Ordinance bound plaintiff to charge 4% of the annual shelter rents for all occupied units in the subject housing projects, whether the tenants were low-income persons or families paying reduced housing charges or were persons or families paying the full market rate. Defendants further assert that the PILOT Ordinance complied with MCL 125.1415a. We disagree.

The issues presented in this appeal concern the interpretation of both a state statute and a municipal ordinance. We review de novo the trial court's interpretation of both the MSHDA Act and plaintiff's PILOT Ordinance. *Sau-Tuk*, 316 Mich App at 136. As explained in *Sau-Tuk*:

> 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.
>
> Similarly, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body. The most reliable evidence of that intent is the language of the ordinance itself, which must be given its plain and ordinary meaning. When the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written. [*Id*. at 136-137 (quotation marks and citations omitted).]

Courts "may not pick and choose what parts of a statute to enforce" but "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). "Judicial construction of a statute is only permitted when statutory language is ambiguous," and ambiguity exists "only if it creates an irreconcilable conflict with another provision or it is equally susceptible to more than one meaning." *Noll v Ritzer*, 317 Mich App 506, 511; 895 NW2d 192 (2016). Courts may not infer legislative intent from the absence of action by the Legislature. *McCahan v Brennan*, 492 Mich 730, 749; 822 NW2d 747 (2012). "[A] legislature legislates by legislating, not by doing nothing, not by keeping silent." *Id*. (quotation marks and citation omitted). This Court defers "to a deliberate act of a legislative body, and does not inquire into the wisdom of its legislation." *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014) (citation omitted).

In *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Coop*, 329 Mich App 163, 178; 942 NW2d 38 (2019), this Court explained the application of the *in pari materia* doctrine of statutory construction:

> Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law to effectuate the legislative purpose as found in harmonious statutes. If two statutes lend themselves to a construction that avoids conflict, that construction should control. When two statutes are *in pari materia* but conflict with one another on a particular issue, the

> more specific statute must control over the more general statute. . . . [Quotation marks and citation omitted.]

In *Summer v Southfield Bd of Ed*, 324 Mich App 81, 93; 919 NW2d 641 (2018), this Court explained, however, that the *in pari materia* doctrine is a rule of statutory construction that is not implicated if the language of the statute is unambiguous and the legislative intent is clearly expressed. In such circumstances, judicial construction is prohibited, and this Court must enforce the statute as written. *Id*. "Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction." *Id*. (quotation marks and citation omitted). In *Voorhies v Judge of Recorder's Court*, 220 Mich 155, 157-158; 189 NW 1006 (1922), our Supreme Court explained:

> The rule, *in pari materia*, cannot be invoked here for the reason that the language of the statute is clear and unambiguous. . . .
>
> * * *
>
> The rule, *in pari materia*, does not permit the use of a previous statute to control by way of former policy the plain language of a subsequent statute; much less to add a condition or restriction thereto found in the earlier statute and left out of the later one. The contention made, if allowed, would go beyond the construction of the statute, and engraft upon its provisions a restriction which the legislature might have added but left out. . . .

"Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest." *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998). In *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), our Supreme Court directed that

> the construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and while not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature. [Quotation marks, citation, and brackets omitted.]

B. MCL 125.1415a

For resolution of the issues raised in this appeal, this Court must first consider and interpret MCL 125.1415a of the MSHDA Act, which provides in relevant part:

> (1) If a housing project owned by a nonprofit housing corporation, consumer housing cooperative, limited dividend housing corporation, mobile home park corporation, or mobile home park association is financed with a federally-aided or authority-aided mortgage or advance or grant from the authority, then, except as provided in this section, the housing project is exempt from all ad valorem property taxes imposed by this state or by any political subdivision, public body, or taxing district in which the project is located. The owner of a housing project eligible for the exemption shall file with the local assessing officer a notification of the exemption, which shall be in an affidavit form as provided by the authority. The completed affidavit form first shall be submitted to the authority for certification by the authority that the project is eligible for the exemption. The owner then shall file the certified notification of the exemption with the local assessing officer before November 1 of the year preceding the tax year in which the exemption is to begin.

(2) The owner of a housing project exempt from taxation under this section shall pay to the municipality in which the project is located an annual service charge for public services in lieu of all taxes. Subject to subsection (6), the amount to be paid as a service charge in lieu of taxes shall be for new construction projects the greater of, and for rehabilitation projects the lesser of, the tax on the property on which the project is located for the tax year before the date when construction or rehabilitation of the project was commenced or 10% of the annual shelter rents obtained from the project. A municipality, by ordinance, may establish or change, by any amount it chooses, the service charge to be paid in lieu of taxes by all or any class of housing projects exempt from taxation under this act. However, the service charge shall not exceed the taxes that would be paid but for this act.

* * *

(6) Notwithstanding subsection (2), the service charge to be paid each year in lieu of taxes for that part of a housing project that is tax exempt under subsection (1) and that is occupied by other than low income persons or families shall be equal to the full amount of the taxes that would be paid on that portion of the project if the project were not tax exempt. The benefits of any tax exemption granted under this section shall be allocated by the owner of the housing project exclusively to low income persons or families in the form of reduced housing charges.

(7) For purposes of this section only, "low income persons and families" means, with respect to any housing project that is tax exempt, persons and families eligible to move into that project. For purposes of this subsection, the authority may promulgate rules to redefine low income persons or families for each municipality on the basis of conditions existing in that municipality.

The provisions of MCL 125.1415a lack ambiguity. Subsection (1) grants ad valorem property-tax exemption to housing projects developed with federal- or

state-aided financing, grants, or advances. It also specifies the process required for the owner of the housing project to establish eligibility for favorable tax treatment.

Subsection (2) orders tax-exempt housing project owners to pay an annual service charge for public services in lieu of all taxes, i.e., PILOT. Subject to the provisions of Subsection (6), Subsection (2) establishes a default service charge in the amount of the greater of either the property tax amount for the preceding year or 10% of the annual shelter rents obtained from the project.[1] Subsection (2) provides further that a municipality may set the amount of PILOT applicable to all or any class of housing project by enacting an ordinance for this purpose, so long as the service charge it imposes does not exceed the ad valorem tax amount that would otherwise apply but for the exemption granted under the MSHDA Act.

While the general provisions of PILOT are set forth in MCL 125.1415a(2), Subsection (6) clarifies that the service charges to be paid in lieu of taxes by a housing project owner require two calculations. Subsection (6) plainly indicates that the PILOT-calculation method must differentiate between the occupants who are low-income persons or families and those who are not. Subsection (6) specifies that the amount to be paid each year for the portion of the property occupied by persons "other than low income persons or families shall be equal to the full amount of the taxes that would be paid on that portion of the project if the project were not tax exempt." Subsection (6), therefore,

[1] MCL 125.1451(2)(e) defines "shelter rent" as "the rental or carrying charges established for occupancy in housing projects, exclusive of payments for taxes and charges for heat, light, water, cooking fuel, and other necessary utilities."

plainly commands that owners shall pay the equivalent of the amount of ad valorem property tax for the portions of a project not occupied by low-income persons or families. For the portions of the project occupied by low-income persons or families, the owner must pay the PILOT, either as established under Subsection (2), or the amount defined by the municipality's PILOT Ordinance. Subsection (6) lacks ambiguity. Accordingly, a municipality must adhere to and enforce these statutory requirements.

Subsection (7) defines the terms "low income persons and families" for purposes of MCL 125.1415a only. The Legislature, therefore, determined that the other sections of the MSHDA Act that define and differentiate between categories of persons, families, and households of low and moderate income, such as MCL 125.1411(g); MCL 125.1451(2)(f); and MCL 125.1458(2)(e), (g), and (*l*), do not apply for purposes of calculating and charging the applicable PILOT amounts. The first sentence of Subsection (7) specifies that "low income persons and families" "means, with respect to any housing project that is tax exempt, persons and families eligible to move into that project." Discerning the Legislature's intent requires an understanding of the word "eligible." The MSHDA Act does not define the term "eligible." "Terms that are not defined in a statute must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions." *Anzaldua v Neogen Corp*, 292 Mich App 626, 632; 808 NW2d 804 (2011) (citation omitted).

Merriam-Webster's Collegiate Dictionary (11th ed) defines the term "eligible," in relevant part, as "qualified to participate or be chosen" or "worthy of being chosen." *Black's Law Dictionary* (11th ed) similarly

defines the term as, "Fit and proper to be selected or to receive a benefit; legally qualified for an office, privilege, or status." To be eligible, therefore, means to be qualified, worthy, or fit to participate or receive a benefit. In the context of low-income housing, such housing is available to persons who are eligible, i.e., qualified, worthy, and fit to receive a benefit by virtue of their income level. The benefit conferred in the context of low-income housing is paying reduced rent to occupy a unit because of one's low-income status. Persons of financial means do not qualify for rent-restricted housing because they lack eligibility to receive the benefit conferred by virtue of their income level. This interpretation of the term "eligible" comports with the overall public purpose of the MSHDA Act as set forth in MCL 125.1401, i.e., to provide safe and sanitary dwelling accommodations within the financial means of low-income persons and families. This interpretation of the term also enables a harmonious interpretation of the plain language of MCL 125.1415a, particularly Subsections (6) and (7).

The second sentence of Subsection (7) grants MSHDA discretion to promulgate rules to redefine who "low income persons or families" are for a given municipality depending on the conditions existing in that municipality. This sentence makes clear that the definition of "low income persons or families" specifically pertains to eligible persons' financial means as compared with the financial wherewithal of the general community.

Defendants argue that the Legislature meant that the term "low income persons and families" for purposes of MCL 125.1415a encompasses all persons so long as they are "eligible to move into the housing project," irrespective of the occupant's income level or

the portion of the project occupied. In other words, they argue that the Legislature intended that no distinction be made for purposes of calculating the PILOT between the income levels of occupants or the type of unit a person occupies. The term "low income persons and families," they contend, is all-encompassing because eligibility means merely being able to move into the project. This interpretation of Subsection (7) is flawed because it forces an unnatural, illogical interpretation of Subsection (6). Defendants' interpretation requires disregarding the specific directive in Subsection (6) to distinguish between occupants of low-income units and occupants of all other portions of a low-income housing project. Defendants' interpretation reads into Subsection (6) an unstated distinction between residential and nonresidential tenants. In Subsection (6), however, the Legislature drew a distinct line between "low income persons and families" and tenants "other than low income persons or families." The operative distinguishing feature focuses on income status and commands municipalities to charge owners differently for the two types of occupants. The Legislature plainly required that owners shall be charged equal to the full ad valorem tax amount on the portion of the project that tenants "other than low income persons or families" occupy.

Occupants of market-rate units fall within the portions of a low-income housing project occupied by persons "other than low income persons or families." Under Subsection (6), the PILOT charges for all portions of defendants' low-income housing projects occupied by persons "other than low income persons or families" must be "equal to the full amount of the taxes that would be paid on that portion of the project if the project were not tax exempt." Further, Subsection (6) requires that the benefits of tax exemption are to be

allocated by the owners solely "to low income persons or families in the form of reduced housing charges." If we were to define the phrase "low income persons or families" according to defendants' interpretation, the owners of housing projects would be required to convey the benefits of reduced housing charges to all residential occupants. That outcome, of course, is contrary to the express purpose of the MSHDA Act as defined by the Legislature in MCL 125.1401 and is contrary to the plain language of MCL 125.1415a(6). Defendants' interpretation of MCL 125.1415a(7), therefore, would negate the distinction between low-income units and market-rate units by making all residential units subject to reduced housing charges under Subsection (6). Under defendants' interpretation, Subsections (6) and (7) cannot be harmonized without creating an absurd result. MCL 125.1415a(6) plainly does not require or permit conveying the benefit of reduced rent to all residential occupants or permit a municipality to charge owners of low-income housing projects a uniform charge irrespective of the income level of the occupants of the project.

We conclude, as did the trial court, that the Legislature intended the meaning clearly expressed when it enacted the statute. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006). And because statutes must be interpreted to prevent absurd results, injustice, or prejudice to the public interest, *McAuley*, 457 Mich at 518, we decline to adopt defendants' interpretation. Rather, we interpret MCL 125.1415a as requiring that plaintiff impose an annual PILOT charge to be paid by defendant owners of the subject low-income housing projects calculated for the units occupied by low-income persons or families, either pursuant to the default amounts set by Subsection (2), or the amount plaintiff established by ordinance as permitted under

Subsection (2). Further, MCL 125.1415a(6) requires that plaintiff impose an annual PILOT charge on defendant owners, respecting all portions of the subject housing projects occupied by "other than low income persons or families" equal to the full amount of the ad valorem taxes that would have been required if the projects were not tax-exempt.

In this case, the record reflects that the trial court considered the plain language of MCL 125.1415a in the context of the purpose of the MSHDA Act and read that provision's subsections in harmony with one another. The trial court properly determined that the statute did not permit the imposition of a uniform PILOT charge based on the annual shelter rent collected for the total number of units in the project. Further, the trial court correctly interpreted the statute as requiring differentiation of PILOT charges for the rental units occupied by low-income persons and families from those occupied by persons other than low-income persons or families who paid the market rate. The trial court did not err by interpreting MCL 125.1415a(1), (2), (6), and (7) together and in harmony. Further, it correctly concluded that plaintiff could appropriately charge 4% of annual shelter rents collected for units occupied by low-income persons or families. It also correctly determined that, under MCL 125.1415a(6), plaintiff must charge an amount equal to the full amount of the ad valorem taxes for the annual shelter rents collected on defendant's market-rate rental units.

C. THE GRAND RAPIDS PILOT ORDINANCE

Defendants argue that plaintiff's PILOT Ordinance bound plaintiff to impose a uniform PILOT charge based on the total number of units in a housing project,

irrespective of the financial status of the persons occupying the unit and the unit's designation as a low-income or market-rate unit. Defendants contend that the PILOT Ordinance required plaintiff to charge 4% of the annual shelter rents collected for all occupied units. Plaintiff counters that the provision of MCL 125.1415a(6) requiring payment of PILOT charges for occupancy of market-rate units equal to the ad valorem tax must be read into the PILOT Ordinance. Thus, plaintiff contends that its ordinance may be understood to have authorized the manner in which it calculated the PILOT charges for the subject low-income housing projects. The parties' respective arguments, therefore, require us to consider and interpret plaintiff's PILOT Ordinance.

Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt ordinances relating to municipal concerns is subject to the Constitution and state law. State law may preempt a regulation by any inferior level of government that attempts to regulate the same subject matter as a higher level of government. See *McNeil v Charlevoix Co*, 275 Mich App 686, 697 n 11; 741 NW2d 27 (2007). "[O]rdinances are treated as statutes for purposes of interpretation and review. . . ." *Bonner*, 495 Mich at 221-222. "Since the rules governing statutory interpretation apply with equal force to a municipal ordinance, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body." *Id*. at 222 (citation omitted). "The most reliable evidence of that intent is the language of the ordinance itself and, therefore, the words used in an ordinance must be given their plain and ordinary meanings." *Id*. When an ordinance is unambiguous, this Court may not engage in judicial construction but must enforce

the ordinance as written. *Kalinoff v Columbus Twp*, 214 Mich App 7, 10; 542 NW2d 276 (1995).

In *Ter Beek v City of Wyoming*, 495 Mich 1, 19-20; 846 NW2d 531 (2014), our Supreme Court reiterated the fundamental hierarchy of law in Michigan as follows:

> Under the Michigan Constitution, the City's "power to adopt resolutions and ordinances relating to its municipal concerns" is "subject to the constitution and the law." Const 1963, art 7, § 22. As this Court has previously noted, "[w]hile prescribing broad powers, this provision specifically provides that ordinances are subject to the laws of this state, i.e., statutes." *AFSCME v Detroit*, 468 Mich 388, 410; 662 NW2d 695 (2003). The City, therefore, "is precluded from enacting an ordinance if . . . the ordinance is in direct conflict with the state statutory scheme, or . . . if the state statutory scheme preempts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *People v Llewellyn*, 401 Mich 314, 322; 257 NW2d 902 (1977) (footnotes omitted). A direct conflict exists when "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id*. at 322 n 4. [Alteration in original.]

Plaintiff's PILOT Ordinance at times relevant to this matter provided, in pertinent part, as follows:

> Sec. 1.410. — Eligible Housing Projects.
>
> The tax exemption established in [MCL 125.1415(a)(1)] shall apply to housing projects within the boundaries of the City of Grand Rapids which meet all of the following criteria, upon approval of the City Commission:
>
> (1) Projects which are financed with a Federally-aided or State Housing Development Authority-aided mortgage or with an advance or grant from such Authority,
>
> (2) Projects which serve lower-income families, elderly, and/or handicapped, and

> (3) Projects which are owned by "consumer housing cooperatives," "qualified nonprofit housing corporations," and "limited dividend housing associations" as defined in Act No. 346 of the Public Acts of 1966, as amended.
>
> Sec. 1.411. — Property Tax Exemption.
>
> Housing projects which qualify under Section 1.410 above shall have the tax exemption provided in [MCL 125.1415a(1)], provided the owner of a housing project has complied with the [MHSDA] Act, is current with all taxes and assessments on the subject property, and has annually filed before August 1st an audited financial statement for each previous calendar year, as requested, with the City Assessor.
>
> Sec. 1.412. — Service Charge in Lieu of Taxes.
>
> The service charge in lieu of property taxes shall be paid by the housing project owner as follows:
>
> (1) . . . Annual shelter rent is defined as the total collections from all occupants of a housing project exclusive of any charges for gas, electricity, heat, or other utilities furnished to the occupants.
>
> (2) Housing projects approved for tax exemption under this ordinance on or after January 1, 1991 shall pay a service charge in the amount equal to four (4) percent of annual shelter rent. Annual shelter rent is defined as the total rent collections from all occupants of a housing project exclusive of any charges for gas, electricity, heat, or other utilities furnished to occupants.[2]

Plaintiff's PILOT Ordinance lacks ambiguity. Plaintiff enacted the ordinance as permitted under MCL 125.1415a(2). Sections 1.410 and 1.411 authorize tax exemption of housing projects developed within plaintiff's boundaries as permitted under the MSHDA Act. The PILOT Ordinance indicates that plaintiff opted under MCL 125.1415a(2) to charge annual service fees in lieu of property taxes in an amount different from

---

[2] As amended by Grand Rapids Ordinance No. 91-54, § 1.

the statutory default options. Section 1.412 requires PILOT charge payments by a housing project owner in the amount of 4% of annual shelter rent which is defined as the total collections from all occupants of a housing project exclusive of charges for utilities provided to them. Section 1.412, however, fails to follow all requirements of MCL 125.1415a(6). Notably absent from § 1.412 is any provision that honors the command of MCL 125.1415a(6) to charge fees in lieu of taxes equal to the ad valorem tax for portions of projects occupied by "other than low income persons and families." Nothing in MCL 125.1415a authorizes a municipality to impose PILOT charges in such a uniform manner irrespective of the financial status of the occupants of low-income housing projects. Consequently, plaintiff's PILOT Ordinance is defective to the extent that it fails to comply with MCL 125.1415a(6). A direct conflict exists between the PILOT Ordinance and MCL 125.1415a because the ordinance essentially permits what the statute prohibits. The plain, unambiguous language of MCL 125.1415a(6) and the plain, unambiguous language of the PILOT Ordinance cannot be read together to eliminate the direct conflict. Accordingly, to the extent that the PILOT Ordinance conflicts with state law, it is preempted, and that portion of it is unenforceable. *Ter Beek*, 495 Mich at 19-20.

Defendants seek enforcement of the PILOT Ordinance to evade plaintiff's charges of the equivalent of ad valorem tax for the portions of the subject housing projects occupied by other than low-income persons or families. An ordinance that conflicts with a superior authorizing statute, however, cannot be enforced to the extent that the inferior legislative body enacted an ordinance that fails to do what the superior legislative body required. Enforcement of the plain language of

the PILOT Ordinance in this case in the manner desired by defendants, therefore, would violate state law.

Accordingly, defendants' arguments in this regard lack merit because they incorrectly interpret MCL 125.1415a and claim entitlement to treatment contrary to the specific, unambiguous directive set forth in MCL 125.1415a(6). The trial court, therefore, did not err by not interpreting and enforcing the PILOT Ordinance as requested by defendants.

MSHDA argues in its amicus curiae brief that it has always interpreted MCL 125.1415a in the same manner as defendants, and it argues that the PILOT Ordinance interprets and applies MCL 125.1415a correctly. MSHDA urges this Court to reverse the trial court. We do not agree with MSHDA's arguments.

Courts generally give respectful consideration to the interpretation of a statute by those charged with executing it, and courts ought not overrule the agency without cogent reasons. *In re Rovas Against SBC Mich*, 482 Mich at 103. "However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Id*. MSHDA's interpretation and its historic application of MCL 125.1415a conflict with the Legislature's intent as expressed in the plain language of MCL 125.1415a. For the reasons previously explained in this opinion regarding the proper interpretation of MCL 125.1415a, we decline to adopt MSHDA's errant interpretation.

D. THE INAPPLICABILITY OF *IN PARI MATERIA* TO THE MATTER AT BAR

Plaintiff argues that the trial court and this Court should look beyond the unambiguous language of the

PILOT Ordinance and interpret it either as having the absent directive of MCL 125.1415a(6) inherent in it or engrafted into it by employing the *in pari materia* statutory-construction doctrine. The trial court adopted plaintiff's argument and construed the PILOT Ordinance as authorizing the charging of the equivalent of ad valorem tax for the occupied market-rate units in the subject projects. The trial court arrived at its ruling, in part, by employing the *in pari materia* statutory-construction doctrine to harmonize MCL 125.1415a and the PILOT Ordinance, concluding that "you have to read all of these elements in pari materia and if you do that, you can't help but reach the conclusion that the City has properly calculated the PILOTs and the ad valorem taxes in this case."

Where, as here, the intent of the Legislature in enacting MCL 125.1415a can be discerned based on the statutory section's plain language, it must be enforced as written and no further judicial construction is required or permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). The plain language of the PILOT Ordinance also clearly expresses the inferior legislative body's intent, similarly prohibiting further judicial construction. *Id*. "Once the intention of the Legislature is discovered, this intent prevails regardless of any conflicting rule of statutory construction." *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). Therefore, as explained in *Voorhies*, 220 Mich at 157, the *in pari materia* doctrine of statutory construction cannot be invoked when the language of a statute is clear and unambiguous. Further, the doctrine does not permit adding a condition or restriction of a previously enacted statute that the legislative body left out of a later-enacted statute. *Id*. at 158. Our Supreme Court reiterated in *Tyler v Livonia Pub Sch*, 459 Mich 382,

392; 590 NW2d 560 (1999), the principle articulated in *Voorhies* that "the interpretive aid of the doctrine of in pari materia can only be utilized in a situation where the section of the statute under examination is itself ambiguous." This Court has similarly reiterated the same fundamental principles. *Summer*, 324 Mich App at 93.

In this case, the trial court invoked the *in pari materia* doctrine to reconcile the statute and the ordinance. Under *Voorhies*, *Tyler*, and *Summer*, however, the *in pari materia* doctrine lacked applicability because both legislative enactments, the statute and the ordinance, lacked ambiguity. Accordingly, the trial court erred in this regard.

Plaintiff invoked the *in pari materia* doctrine in reliance on *Hughes v Almena Twp*, 284 Mich App 50; 771 NW2d 453 (2009). Plaintiff contends that *Hughes* requires that a statute and an ordinance be read *in pari materia*. Plaintiff also relied on *Hughes* for the proposition that the provisions of a statute may be read into an ordinance. Plaintiff asserted that, as in *Hughes*, the absent statutory requirement set forth in MCL 125.1415a(6) must be read into its PILOT Ordinance to reconcile and harmonize the MSHDA Act with the ordinance. The record indicates that the trial court agreed.

In *Hughes*, the trial court held that the decision of the township's zoning board of appeals upholding the township board's denial of a preliminary site plan did not comport with law or proper procedure. *Id*. at 58-59, 61. According to the trial court, the zoning ordinance's provisions regarding review and approval of a planned unit development conflicted with the review and approval process of the Township Zoning Act, MCL 125.271 *et seq*., in part because the township's ordi-

nance did not specify that the township board had to conduct a public hearing. *Id*. at 61-66. This Court ruled that the ordinance remained valid despite failing to mention the township board's statutory duty to hold a public hearing. This Court explained:

> Additionally, the ordinance is not invalid for failing to mention the township board's statutory duty to hold a public hearing. The Legislature is presumed to be aware of all existing statutes when enacting a new statute, particularly laws on the same subject. Statutes that are *in pari materia* must be read together as one law and should be reconciled if possible even if they appear to conflict. Here, the ordinance requires the planning commission, but not the township board, to hold a public hearing. The township board was required to hold a public hearing pursuant to MCL 125.286c(5), which it did in this case. Thus, we read this requirement into the ordinance. [*Id*. at 66 (citations omitted).]

The *Hughes* Court invoked the *in pari materia* doctrine without finding an ambiguity in the controlling statute or the township's ordinance, and the Court relied on the doctrine for the general principle that laws on the same subject should be read together and reconciled if possible, even if they appear to conflict. The *Hughes* Court, however, applied the doctrine of statutory construction to engraft provisions of the controlling statute into the ordinance. Both the application of the doctrine and the engrafting of an absent statutory provision into the ordinance contradict our Supreme Court's explanations in *Voorhies* and *Tyler* regarding when and to what extent the *in pari materia* doctrine may be used to construe statutory language. *Hughes* stands alone in its use of the doctrine to engraft statutory requirements into an ordinance that failed to incorporate the statute's requirement. We question the validity of the trial court's reliance on

Hughes because the principles articulated in *Voorhies* and *Tyler* by our Supreme Court precluded the trial court's invocation of the *in pari materia* doctrine in this case and did not permit the doctrine's use to engraft into the defective PILOT Ordinance the absent statutory requirement set forth in MCL 125.1415a(6). Nevertheless, we are not compelled to disturb the trial court's decision.

The trial court did not have to reconcile the statute with the defective ordinance. Because MCL 125.1415a lacked ambiguity, Michigan law required that it be enforced as written. The PILOT Ordinance, however, directly conflicted with MCL 125.1415a(6) making it unenforceable to the extent that it conflicted with state law. The trial court, therefore, could not enforce the ordinance as written, and as desired by defendants, because doing so would have required plaintiff to impose uniform PILOT charges in a manner impermissible under the statute. The trial court properly declined to enforce the ordinance to the extent that it conflicted with state law.

E. THE UNDERLYING BREACH OF AGREEMENT BY DEFENDANTS

Moreover, lost in all of the arguments made by defendants regarding justification for interpreting MCL 125.1415a to evade what MCL 125.1415a(6) requires is the core issue whether defendants breached their contracts with plaintiff. This case required the trial court to decide this question, as well as the proper interpretation of MCL 125.1415a and the PILOT Ordinance. The record establishes that the parties admitted the essential facts of the case and agreed that no genuine issue of material fact existed that would preclude summary disposition. The trial court examined all of the record evidence and determined that the

parties had entered contracts, the terms of which provided defendants the benefits of tax exemption for the low-income housing projects pursuant to MCL 125.1415a in exchange for PILOT pursuant to MCL 125.1415a. The record reflects that 240 Ionia's and 345 State Street's limited partnership agreements specifically acknowledged that the "PILOT Agreement" in each instance constituted the resolution passed by the City Commission that approved the PILOTs for each low-income housing project. The trial court appropriately discerned that defendants' managing members were fully aware the resolutions specified that plaintiff would impose annual PILOT charges in compliance with the provisions of MCL 125.1415a, including the different charges for rent-restricted units occupied by low-income tenants and market-rate units as directed under MCL 125.1415a(6). The trial court, therefore, did not substitute the resolutions for the defective PILOT Ordinance and did not treat them as the de facto ordinance because it recognized and specifically acknowledged that Michigan law does not permit plaintiff to legislate by resolution. See *Rollingwood Homeowners Corp, Inc v City of Flint*, 386 Mich 258, 267; 191 NW2d 325 (1971). The trial court correctly determined that the resolutions to which the parties agreed constituted the PILOT Agreements. The trial court properly considered the resolutions among other evidence as defining the terms of the parties' contracts. The trial court did not err in this regard.

The record also reflects that, when billed pursuant to the parties' contracts, defendants refused to pay the contractually defined amounts required by plaintiff, and defendants thereby breached the agreements. The trial court correctly concluded that, based upon the admissible evidence before it, defendants breached the agreements and owed plaintiff the difference between

what defendants paid under their incorrect PILOT-calculation method based on the defective ordinance and the amount plaintiff billed that accorded with the contracts' terms and MCL 125.1415a, including MCL 125.1415a(6). Because the parties' agreements complied with MCL 125.1415a, they were valid and the trial court could enforce them. The trial court did not have to engraft the provisions of the statute into the defective PILOT Ordinance to make it comply with the statute when the parties' agreements required compliance with state law. The trial court, therefore, did not err by enforcing the terms of the parties' contracts and enforcing the PILOT Ordinance to the extent that it did not directly conflict with state law.

IV. CONCLUSION

We hold that the trial court correctly determined that MCL 125.1415a of the MSHDA Act required plaintiff to calculate the annual PILOT charges for the subject low-income housing projects by distinguishing the portions of the properties occupied by low-income persons and families from the portions occupied by other than low-income persons or families. The trial court correctly ruled that plaintiff had a statutory obligation to charge defendants fees based upon plaintiff's PILOT Ordinance in the amount of 4% of the annual shelter rents for low-income persons and families who occupied the housing projects, exclusive of any charges for gas, electricity, heat, or other utilities furnished to the occupants, and to charge defendants pursuant to MCL 125.1415a(6) in amounts equal to the ad valorem taxes for the portions of the housing projects occupied by persons other than low-income persons or families. The trial court's decision comported with and enforced the

plain language of MCL 125.1415a and enforced plaintiff's PILOT Ordinance to the extent that it complied with state law. The trial court, therefore, properly declined to enforce the PILOT Ordinance as written to charge a uniform amount for all units of the subject projects because that provision of the ordinance conflicted with MCL 125.1415a(6). Further, the trial court correctly treated the resolutions as evidence, in conjunction with other evidence, of the terms of the parties' contractual agreements. The trial court correctly ruled, based upon the admissible evidence before it, that defendants had breached the terms of their contracts with plaintiff and were liable for the difference between the amount they had paid plaintiff and the amount they were obligated to pay plaintiff under their contract.

Affirmed. No taxable costs pursuant to MCR 7.219, a question of public policy involved.

LETICA, P.J., and K. F. KELLY, J., concurred with REDFORD, J.

PEOPLE v KORKIGIAN

Docket No. 352444. Submitted September 2, 2020, at Detroit. Decided October 29, 2020, at 9:10 a.m. Leave to appeal denied 507 Mich 994 (2021).

Alexan A. Korkigian was bound over for trial in the Oakland Circuit Court on one count of manufacturing a controlled substance (marijuana) in violation of MCL 333.7401(2)(d)(*iii*). Defendant had used a process called butane extraction, also known as open blasting, to distill tetrahydrocannabinol (THC) from marijuana plant material in his garage. Defendant moved to dismiss the charge or, in the alternative, to raise a personal-use affirmative defense at trial. Defendant contended that he could not be charged with or convicted of manufacturing marijuana because the definition of manufacture excludes preparing or compounding marijuana for personal use. Defendant further contended that the Public Health Code, MCL 333.1101 *et seq*., was unconstitutionally vague as applied to him because it does not sufficiently define the terms marijuana, marijuana resin, manufacture, preparation, and compounding. At an evidentiary hearing, defendant presented an expert who explained the process of open blasting, which contains two phases: primary extraction and postprocessing extraction. During primary extraction, the user places marijuana plant material inside a glass tube. The user adds a solvent, such as butane, to dissolve the resin from the plant. The resin and the butane form a solution. Using a filter, such as a coffee filter, the user separates the butane/resin solution from the plant material. The butane/resin solution is then left in the open air to allow the butane to evaporate into the atmosphere. The solution then distills down to the resin extract, whereupon the postprocessing phase begins. The resin is dissolved in a polar solvent like ethanol so that fat molecules can be separated and filtered out. The ethanol is removed by heating the material to over 100 degrees Celsius, which converts the tetrahydrocannabinol acid (THCA), a nonpsychoactive agent, into THC, the psychoactive element in marijuana. Following the hearing, the circuit court, Jeffery S. Matis, J., denied both motions, concluding that defendant engaged in the manufacturing of marijuana because

the open-blasting operation constituted "conversion" or "processing." The court also rejected defendant's constitutional challenge. Defendant appealed.

The Court of Appeals *held*:

1. MCL 333.7106(3) defines "manufacture," in pertinent part, as the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. However, under MCL 333.7106(3)(a), "manufacture" does not include the preparation or compounding of a controlled substance by an individual for his or her own use. In this case, defendant's open-blasting operation started and ended with materials defined as marijuana under the Public Health Code; however, the evidence supported that defendant's actions amounted to processing or conversion. Even though defendant presented an expert who testified that defendant's actions constituted preparation or compounding of marijuana, a jury could conclude that defendant's open-blasting operation to distill concentrated THC from raw plant material involved a significantly higher degree of activity than rolling a marijuana cigarette or baking brownies, which were examples of preparation for personal use. Accordingly, the evidence precluded dismissal of the charge against defendant.

2. A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overbroad and impinges on First Amendment freedoms. For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. In this case, contrary to defendant's challenge, the Public Health Code does sufficiently define the terms marijuana, marijuana resin, manufacture, preparation, and compounding. MCL 333.7106(4) defines which parts of the marijuana plant constitute marijuana and which parts do not; this definition put defendant on clear notice that the plant material he possessed and the resin he extracted were "marijuana," as was the THCA and THC he attempted to derive from the resin. Moreover, MCL 333.7106(3) comprehensively defines "manufacture," and caselaw has used dictionary definitions to determine the meaning of the terms used within the definition of "manufacture." Given that precedent and

the plain language of the statutes at issue, the Public Health Code was not unconstitutionally vague as applied to defendant.

3. To establish an affirmative defense, a defendant must present some competent evidence of preparation or compounding for personal use. Defendant presented an expert who claimed that defendant was in the process of preparation or compounding; however, whether defendant's actions as described by his expert satisfied the criteria for preparation or compounding for personal use was a legal question of statutory interpretation. In this case, the butane-extraction process that the expert described did not come within the meaning of either "compounding" or "preparation." Defendant was not "compounding" ingredients when he attempted to "blast" the concentrated THC from the marijuana plant; to the contrary, defendant was in the process of extracting resin from the plant material. Defendant also was not "preparing" marijuana through the butane-extraction technique, which was dissimilar from the examples of rolling marijuana into cigarettes or combining marijuana with other ingredients to make brownies. The open-blasting process of transforming raw marijuana into usable resin involves more than just "preparing" the marijuana for personal use; it is far from a simple, routine, and safe act. The butane-extraction method requires multiple steps, none of which is easy or uncomplicated. The method incorporates the use of volatile chemicals, filtration, evaporation of the solvent, dissolving of the product in a polar solvent, additional filtration, and heating the resulting material under a vacuum. Accordingly, this method was more appropriately characterized as "production" or "processing." The circuit court did not err by holding that the affirmative defense of personal use was unavailable to defendant.

Affirmed.

STATUTES — PUBLIC HEALTH CODE — WORDS AND PHRASES — "PRODUCTION" AND "PROCESSING" OF MARIJUANA — OPEN-BLASTING PROCESS.

The open-blasting process of transforming raw marijuana into usable resin—which uses a volatile chemical solvent, filtration, evaporation of the solvent, dissolving of the product in a polar solvent, additional filtration, and heating the resulting material under a vacuum—does not constitute the "preparation" or "compounding" of marijuana for personal use but rather constitutes the "production" or "processing" of marijuana (MCL 333.7106(3)(a)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attor-

ney, *Thomas R. Grden*, Appellate Division Chief, and *Nicholas K. McIntyre*, Assistant Prosecuting Attorney, for the people.

Law Offices of Barton Morris (by *Barton W. Morris, Jr.*, and *Stephanie A. Achenbach*) for defendant.

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM. The district court bound Alexan Korkigian over for trial on one count of manufacturing a controlled substance (marijuana) in violation of MCL 333.7401(2)(d)(*iii*). Korkigian filed a circuit court motion to dismiss the charge or, in the alternative, to raise a personal-use affirmative defense at trial. The circuit court denied both motions. We affirm.

I. BACKGROUND

On November 20, 2018, an explosion leveled Korkigian's garage. At the time, Korkigian was using a process called butane extraction or open blasting to distill tetrahydrocannabinol (THC) from marijuana plant material. As a result of this conduct, the district court bound Korkigian over for trial on one count of manufacturing a controlled substance in violation of MCL 333.7401(2)(d)(*iii*). The statute provides:

> (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> * * *

> (d) Marihuana, a mixture containing marihuana, or a substance listed in [MCL 333.7212(1)(d)] is guilty of a felony punishable as follows:
>
> * * *
>
> (*iii*) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than $20,000.00, or both.

"Manufacture" is defined elsewhere in the Public Health Code, MCL 333.1101 *et seq*. MCL 333.7106(3)(a) provides:

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that *it does not include . . . the following*:
>
> (a) The *preparation or compounding* of a controlled substance by an individual *for his or her own use.* [Emphasis added.]

Marijuana is defined in the Public Health Code as

> all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; *the resin extracted from any part of the plant*; and *every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin*. Marihuana does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from those stalks, fiber, oil, or cake, or any sterilized seed of the plant that is incapable of germination. [MCL 333.7106(4) (emphasis added).]

In the circuit court, Korkigian contended that he could not be charged with or convicted of manufacturing marijuana because the definition of manufacture excludes preparing or compounding marijuana for personal use. He filed a motion to either dismiss the charge against him or to bring a personal-use affirmative defense at trial.

The circuit court conducted an evidentiary hearing on Korkigian's motion. Korkigian presented an expert to explain how his actions amounted to conduct excepted from the definition of manufacturing marijuana. Alex Goodnough, a chemist at Precision Extraction Solutions, testified that there are two phases to open blasting—primary extraction and postprocessing extraction. During primary extraction, the user places marijuana plant material inside a glass tube. The user adds a solvent, such as butane, to dissolve the resin from the plant. The resin and the butane form a solution. The formation of the solution is not a chemical reaction, Goodnough asserted. Using a filter, such as a coffee filter, the user separates the butane/resin solution from the plant material. The butane/resin solution is then left in the open air to allow the butane to evaporate into the atmosphere. It was likely at this point of the process that the explosion occurred in Korkigian's garage. If the solution is left in an area without adequate ventilation, flammable butane gas can build up and a small spark can trigger an explosion.

Had the explosion not occurred, the solution in Korkigian's garage would have distilled down to the resin extract. This begins the postprocessing phase. The resin is then dissolved in "a polar solvent like ethanol" so fat molecules can be separated and filtered out. The ethanol is removed by heating the material to over 100 degrees Celsius. This "pop[s] . . . off" tetrahydrocannabinol acid

(THCA), a nonpsychoactive agent, and converts it into THC, the psychoactive element in marijuana. This final conversion can be achieved as simply as heating THCA in the oven (while baking edibles) or using a lighter to smoke marijuana products. The conversion from THCA to THC is a chemical reaction, according to Goodnough.

Goodnough ultimately opined that the process used by Korkigian in this case involved the "preparation" of marijuana. Korkigian was "isolat[ing] the cannabinoids away from [the] carbon" in the marijuana plant to increase the concentration of THC and make smoking healthier. After reviewing the statutory definition of marijuana, the expert testified that both the primary extraction material and final product were "marijuana."

In his motion to dismiss, Korkigian emphasized that a person preparing or compounding marijuana for personal use is exempted from the statutory manufacturing prohibition. Korkigian relied on *People v Baham*, 321 Mich App 228, 240; 909 NW2d 836 (2017), in which this Court held that the personal-use exemption "applies only to a controlled substance already in existence, and it does not encompass the creation of a [new] controlled substance." This language avoids imposing criminal liability on a person who already possesses the controlled substance and is merely readying it for his or her own use. Korkigian asserted that he did not create a new controlled substance. Rather, he maintained that he possessed marijuana and was in the process of preparing THC, which is also marijuana, according to precedent of both this Court and the Supreme Court.

Korkigian further contended that his act of extracting THC from marijuana plant material merely separated the THC from the plant material and was actually a less involved process than making marijuana brownies, which this Court placed within the personal-use

exemption in *Baham*. He maintained that rendering THC from the plant material did not involve a chemical reaction, which he claimed was required for manufacturing. In this regard, Korkigian relied on *People v Hunter*, 201 Mich App 671, 676-677; 506 NW2d 611 (1993), in which this Court held that the process of converting powder cocaine into crack cocaine requires a chemical alteration of the substance that amounted to manufacturing.

Korkigian additionally argued that the Public Health Code is unconstitutionally vague as applied to him. Specifically, Korkigian complained that the code does not "sufficiently" define "marijuana," "marijuana resin," "manufacture," or the activities that constitute manufacturing—"preparation" and "compounding."

The prosecution replied that the personal-use exemption does not broadly apply to any and all activities readying marijuana for personal use. Rather, the statute exempts only preparation and compounding, but not production, propagation, conversion, or processing. In this case, the prosecution argued, Korkigian's activities went beyond preparation and compounding. Preparation and compounding of marijuana involve simple activities, like rolling a joint or making "special" brownies. But more complex activities, like converting powder cocaine into crack cocaine or "cooking" methamphetamines, are manufacturing acts outside the scope of the personal-use exemption. The open blasting used in this case was more akin to the second category, in the prosecution's estimation.

The circuit court denied Korkigian's motion to dismiss the charges and the alternative motion to raise a personal-use defense at trial. The court agreed that Korkigian's extraction process both began and ended with the same substance—marijuana. But the court

concluded that Korkigian nevertheless engaged in "manufacturing" because the marijuana changed its form as a result of Korkigian's manipulation. And Korkigian "engaged in a significantly higher degree of activity involving the controlled substance beyond merely preparing or compounding it for use." Rather, Korkigian's open-blasting operation constituted "conversion" or "processing" under the statute, precluding dismissal of the charge or reliance on the personal-use affirmative defense. The court further rejected Korkigian's constitutional challenge, as this Court had previously interpreted the relevant statute with ease.

II. ANALYSIS

We review for an abuse of discretion a trial court's denial of a motion to dismiss charges against a criminal defendant. *People v Morrison*, 328 Mich App 647, 650; 939 NW2d 728 (2019). "An abuse of discretion occurs when the trial court's decision falls outside the range of principled outcomes." *Id*. (cleaned up). We review de novo the lower court's determination "[w]hether a defendant's conduct falls within the scope of a penal statute." *Id*. (cleaned up). We also review de novo the availability of affirmative defenses for a statutory crime. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

At its core, this case is about the proper interpretation and application of controlled-substance statutes.

> The primary goal in interpreting the meaning of a statute is to ascertain and give effect to the intent of the Legislature. The first step in determining legislative intent is consideration of the statutory language itself. Statutory language must be read in the context of the act as a whole, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we enforce the

> statute as written. [*People v Kowalski*, 489 Mich 488, 497-498; 803 NW2d 200 (2011) (cleaned up).]

A. MOTION TO DISMISS

Korkigian argues that the charge against him is legally unsupportable and must be dismissed. Extracting THC from marijuana plant material constitutes the preparation or compounding of marijuana under MCL 333.7106(3)(a), Korkigian insists, and therefore falls within the personal-use exemption. The prosecution does not dispute that Korkigian intended to manufacture marijuana for his own use. Rather, the prosecution contends that Korkigian's actions were not equivalent to the simple preparation or compounding of marijuana, but required a high degree of activity going well beyond that shielded by the personal-use exemption.

As a reminder,

> "Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. . . . It includes the packaging or repackaging of the substance or labeling or relabeling of its container, except that it does not include . . .
>
> (a) The preparation or compounding of a controlled substance by an individual for his or her own use. [MCL 333.7106(3)(a).]

The term "manufacture" encompasses six forbidden activities: production, preparation, propagation, compounding, conversion, and processing. But two of those activities—preparation and compounding—are permitted if the product is a controlled substance intended for personal use. Accordingly, if a person engages in

production, propagation, conversion, or processing, his or her actions do not fall within the exemption, even if the product is for personal use. See *Baham*, 321 Mich App at 238-241.

This Court defined "preparation" and "compounding" in *Baham*, 321 Mich App at 240:

> [T]he term "preparation" means "the action or process of making something ready for use . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). Likewise, in pertinent part, "compounding" denotes the action or process of putting "together (parts) so as to form a whole," such as by combining ingredients. *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "compound" and "-ing").

The four terms exempted from the personal-use exemption require something more:

> In contrast to preparation and compounding, the other four methods of manufacturing controlled substances—i.e., production, propagation, conversion, and processing—contemplate a significantly higher degree of activity involving the controlled substance, and thus these manufacturing activities are felonies regardless of whether the controlled substance so manufactured was for personal use or for distribution. [*Baham*, 321 Mich App at 241 (cleaned up).]

Based on these definitions, this Court stated in *Baham*, 321 Mich App at 240, that "the plain intent of the statutory personal use exception is to avoid imposing felony liability on individuals who, already in possession of a controlled substance, make it ready for their own use or combine it with other ingredients for use." (Cleaned up.) This Court then provided "[t]ypical examples of preparation or compounding" marijuana: "making marijuana ready for use by 'rolling marijuana into cigarettes for smoking' or combining marijuana with other ingredients to make it ready for use by 'making the so-called "Alice B. Toklas" brownies con-

taining marijuana.' " *Id*. at 241, quoting *Stone v State*, 348 Ark 661, 667; 74 SW3d 591 (2002). This Court summarized, "In both instances, the controlled substance already exists in finished form, and any further action is undertaken merely to enable use of the substance." *Baham*, 321 Mich App at 241.

To differentiate "preparation" and "compounding" from the more intensive forms of manufacturing, this Court explained in *Baham*, 321 Mich App at 241-243:

> While we do not attempt to provide an exhaustive account of the activities that constitute production, propagation, conversion, and processing, we note that "production" has been statutorily defined as "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance." MCL 333.7109(6). In turn, "manufacture" means "to make" from materials. *Merriam-Webster's Dictionary* (11th ed). In comparison, as commonly understood, (1) "propagation" involves "the act or action of propagating," such as to "increase (as of a kind of organism) in numbers," (2) "conversion" is "the act of converting," and (3) "processing" refers to "a series of actions or operations conducing to an end" or "a continuous operation or treatment esp. in manufacture." *Merriam-Webster's Dictionary* (11th ed) (defining "process" and adding "-ing"). From these various definitions, courts have recognized that production, propagation, conversion, and processing encompass "planting, growing, cultivating or harvesting a controlled substance," *creating* a controlled substance "by any synthetic process or mixture of processes," as well as the *alteration or extraction of a controlled substance, such as "taking a controlled substance and, by any process or conversion, changing the form of the controlled substance or concentrating it." State v Childers*, 41 NC App 729, 732; 255 SE2d 654 (1979). See also [*Hunter*, 201 Mich App at 676-677].
>
> In view of these different methods of manufacturing, . . . we hold that one may not claim the personal-use exception for making or cooking methamphetamine. Mak-

> ing or cooking methamphetamine clearly involves the creation of methamphetamine, meaning that it constitutes production, propagation, conversion, or processing of methamphetamine as opposed to the mere "preparation or compounding" of existing methamphetamine for personal use. [Emphasis added.]

This Court also provided guidance in *Hunter*, 201 Mich App at 674, in which the defendant was convicted of manufacturing crack cocaine. The evidence included a jar of water in which the defendant was dissolving powder cocaine. An expert testified that "the cocaine was in the 'wet phase' stage of being manufactured into crack cocaine." *Id*. The expert

> further testified that powder cocaine is converted into crack cocaine by means of a chemical process in which the powder cocaine is mixed with sodium bicarbonate or ammonia hydroxide in a container of water and heated. The heating process chemically alters the composition of the powder cocaine and transforms it into free-base cocaine that is essentially one hundred percent pure cocaine. [*Id*. at 676-677.]

In this case, Korkigian's open-blasting operation started and ended with materials defined as marijuana under the Public Health Code. However, as noted below, this fact is not dispositive. After all, the defendant in *Hunter* both began and ended his manufacturing process with cocaine but was held accountable for manufacturing because of the intensity of the process and the nature of the change to the substance. Moreover, contrary to Korkigian's insistence, *Hunter* does not hold that a "chemical reaction" must change the form of the substance in order for liability to be found. Rather, this Court held that the defendant in *Hunter* manufactured cocaine within the meaning of the statute because he converted powder cocaine into crack cocaine through chemical synthesis. *Hunter*, 201 Mich

App at 676-677. Chemical synthesis is only one way to manufacture a controlled substance under the statute. The manufacture of a controlled substance can also occur "directly or indirectly by extraction from substances of natural origin." MCL 333.7106(3).

And although Korkigian presented an expert opinion that his acts were mere preparation or compounding of marijuana, the evidence also supported that Korkigian's actions amounted to processing or conversion.

> [A] trial court, in considering a motion to dismiss . . . , must first decide if the evidence introduced at the time the motion was made, viewed in the light most favorable to the prosecution, is insufficient to justify a reasonable man in concluding that all the elements of the crime were established beyond a reasonable doubt. [*People v Wright*, 99 Mich App 801, 818; 298 NW2d 857 (1980).]

Even a cursory review of Goodnough's testimony supports that a jury could conclude that open blasting to distill concentrated THC from raw plant material involves a "significantly higher degree of activity" than rolling a marijuana cigarette or baking brownies. Goodnough explained that butane is used to dissolve the plant material to extract the plant's resin. Once the butane evaporates away from the resin, the maker adds ethanol to cool the resin, causing the fat molecules to congeal so they can be separated out. The remaining resin must be heated to convert THCA to THC, leaving the manufacturer with a concentrated, pure product. The evidence precludes dismissal of the charge against Korkigian.

B. CONSTITUTIONALITY

Dismissal also was not warranted on constitutional grounds. We review de novo Korkigian's contention

that the statutes involved in this case are unconstitutionally vague. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001). We approach such challenges presuming the statute's constitutionality. *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998).

> A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overbroad and impinges on First Amendment freedoms. [*People v Newton*, 257 Mich App 61, 66; 665 NW2d 504 (2003).]

Korkigian contends that the statute failed to provide him notice that extraction via butane is prohibited. "Fair or proper notice exists if the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited." *People v Dillon*, 296 Mich App 506, 511; 822 NW2d 611 (2012). "For a statute to be sufficiently definite, its meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004). A court considers a vagueness challenge in light of the facts at issue. *Id*.

Contrary to Korkigian's challenge, the Public Health Code *does* sufficiently define "marijuana," "marijuana resin," "manufacture," and the activities that constitute "manufacturing," including the terms "preparation" and "compounding." "Marijuana" is statutorily defined under MCL 333.7106(4) as "all parts of the plant Cannabis sativa L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, deriva-

tive, mixture, or preparation of the plant or its seeds or resin." Moreover, the definition also explains when the stalks and seeds of the plant (and the fibers, oils, and cakes made from those parts of the plant) do not constitute marijuana. This definition put Korkigian on clear notice that the plant material he possessed and the resin he extracted were "marijuana," as was the THCA and THC Korkigian attempted to derive from the resin.

Moreover, MCL 333.7106(3) comprehensively defines "manufacture." While the six activities encompassing "manufacture" are not separately defined in the statute, this does not render the statute unconstitutionally vague. Meaning can be gleaned from judicial interpretations and dictionaries. This Court defined the means of manufacture in *Baham*, giving special attention to the terms specifically challenged in this case—preparation and compounding. The *Baham* Court relied on dictionary definitions in describing the terms. Given the precedent of this Court and the plain language of the statutes at issue, there is no ground to invalidate the statutory scheme.

C. AFFIRMATIVE DEFENSE

Korkigian asserts that absent dismissal of the charge, he is nevertheless entitled to raise an affirmative defense under the personal-use exemption codified in MCL 333.7106(3)(a). Because the personal-use exemption is not an element of the manufacturing offense, the prosecution is not required to prove the absence of the personal-use exemption to levy a charge against a defendant. Rather, Korkigian bears the burden of proving the exemption as an affirmative defense. *Baham*, 321 Mich App at 244. To establish the affirmative defense, a defendant must "present some

competent evidence of preparation or compounding for personal use." *Id*. at 244-245.

Relying on Goodnough's testimony, Korkigian claims that he was in the process of "the preparation or compounding" of his marijuana for personal use when the explosion occurred. Therefore, Korkigian reasons, he has satisfied his obligation to come forward with evidence of an affirmative defense, and the personal-use exemption applies to his conduct. Whether Korkigian's acts as described by Goodnough satisfy the criteria for preparation or compounding for personal use is a legal question of statutory interpretation, however, that we review de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

Even fully accepting Goodnough's testimony, the butane-extraction process he described does not come within the meaning of either "compounding" or "preparation." In *Baham*, 321 Mich App at 240, we defined "compounding" as "the action or process of putting together (parts) so as to form a whole, such as by combining ingredients." (Cleaned up.) By way of example, the United States Supreme Court has described "compounding" as "a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient." *Thompson v Western States Med Ctr*, 535 US 357, 360-361; 122 S Ct 1497; 152 L Ed 2d 563 (2002). Korkigian was not "compounding" ingredients when he attempted to "blast" the concentrated THC from the marijuana plant. To the contrary, he was in the process of *extracting* resin from the plant material.

Nor was Korkigian "preparing" marijuana for personal use through the butane-extraction technique. In *Baham*, 321 Mich App at 240, the Court employed a dictionary definition of "preparation," proposing that

the term embraces "the action or process of making something ready for use . . . ." (Cleaned up.) As we noted above, the Court invoked two examples of preparation: rolling marijuana into cigarettes for smoking and combining marijuana with other ingredients to make "Alice B. Toklas" brownies. *Id*. at 241.[1] In a broad sense, Korkigian was making the marijuana "ready for use" as resin that could, in turn, be transformed into oil or butter. But in the context of this case, the *Baham* definition of "preparation" is inapt.

"Indiscriminate reliance on definitions found in dictionaries can often produce absurd results. Words are used in many senses and often have diametrically opposed meanings, depending upon the sense in which they are used." *Liebscher v Boothroyd*, 46 CCPA 701, 705; 258 F2d 948 (1958). The abbreviated definition of "preparation" applied in *Baham* embraces conduct that is also consistent with the additional actions described in the statute, particularly "production" and "processing." Reflexive adoption of that definition here elides the facts underlying this case and a necessary contextual analysis.

Korkigian likens his acts to making a cup of tea or brewing a pot of coffee, which he characterizes as equivalent to the mere "preparation" of those beverages, making their raw ingredients "ready for use."

---

[1] Alice B. Toklas's brownie recipe required "pulveris[ing]" a "bunch of cannabis sativa." That simple act is a far cry from the butane-extraction process. See Emily Temple, Literary Hub, *Here It Is! Alice B. Toklas's Recipe for Hash Brownies* <https://lithub.com/here-it-is-alice-b-toklass-recipe-for-hash-brownies/> (posted November 20, 2018) (accessed October 21, 2020) [https://perma.cc/27PU-9Q2G]; Layla Eplett, Scientific American, *Ask Alice: The History of Toklas' Legendary Hashish Fudge* <https://blogs.scientificamerican.com/food-matters/go-ask-alice-the-history-of-toklas-8217-legendary-hashish-fudge/> (posted April 20, 2015) (accessed October 21, 2020) [https://perma.cc/B7AU-RH3S].

Preparing coffee or tea involves pouring hot water over an organic substance, a two-step process blending two readily available components. "Open blasting," however, is far from a simple, routine, and safe act. The butane-extraction method makes marijuana "ready for use" through multiple steps, none of which is easy or uncomplicated. We reject the notion that the open-blasting technique merely "makes ready" marijuana plant material for personal use.

Moreover, an overly generous interpretation of "preparation" in the context of this case would conflict with the surrounding words and their meanings. We must assume that the words chosen by the Legislature and placed in MCL 333.7106(3) have different connotations and are not synonymous or interchangeable. *Pohutski v Allen Park*, 465 Mich 675, 683-684; 641 NW2d 219 (2002). To qualify as "preparation" for personal use, Korkigian's acts must diverge from those "manufacturing" efforts specifically prohibited by the statute: production, propagation, conversion, and processing. And in interpreting those words, we are further guided by the rule that we "must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory." *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

The "open blasting" process of transforming raw marijuana into usable resin involves more than just "preparing" the marijuana for personal use. Goodnough described the technique as incorporating the use of a volatile chemical (butane), combined with filtration, followed by evaporation of the solvent, dissolving of the product in a polar solvent, additional filtration, and heating the resulting material under a vacuum. This process is more appropriately characterized as

"production" or "processing." While Korkigian is correct that in one sense he was engaged in "preparing" the marijuana for his own use, he was doing so by processing it in several different ways to arrive at an end product. Were we to hold that Korkigian's manufacturing activity was merely "preparation" because that word, too, fits his actions, the "preparation" aspect of the personal-use exemption would swallow the prohibited conduct described in the rule. Thus, the circuit court did not err by concluding that as a matter of law, the affirmative defense of personal use is unavailable to Korkigian.[2]

We affirm.

LETICA, P.J., and FORT HOOD and GLEICHER, JJ., concurred.

---

[2] As a final aside we note that the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., specifically prohibits open blasting. The act does not permit a person to "[s]eparate plant resin from a marihuana plant by butane extraction in any public place or motor vehicle, or inside or within the curtilage of any residential structure," or "in a manner that demonstrates a failure to exercise reasonable care or reckless disregard for the safety of others." MCL 333.26427(b)(6) and (7). Neither does the subsequent initiative legalizing marijuana under state and local law for adults over the age of 21. See MCL 333.27954(d) ("This act does not authorize . . . separation of plant resin by butane extraction . . . in any public place, motor vehicle, or within the curtilage of any residential structure[.]").

PEOPLE v LATHAM (ON RECONSIDERATION)

Docket No. 338891. Submitted January 7, 2020, at Detroit. Decided October 29, 2020, at 9:15 a.m. Leave to appeal denied 507 Mich 959 (2021).

Terreik J. Latham was convicted following a bench trial in the Wayne Circuit Court, Bruce U. Morrow, J., of first-degree criminal sexual conduct (CSC-I), MCL 750.520b (multiple variables), and was sentenced to 4 to 10 years of imprisonment. In sentencing defendant, the court assigned him 50 offense variable (OV) points, which equated to OV Level III. The sentencing guidelines recommended a minimum prison sentence of 51 to 85 months. The court sentenced defendant to 4 to 10 years of imprisonment; thus, the minimum sentence imposed was lower than the minimum sentence recommended by the guidelines. Defendant moved in the trial court to correct an invalid sentence, arguing that he was entitled to resentencing because the trial court incorrectly assigned 25 points for OV 11 when the court should have assigned zero points pursuant to MCL 777.41(2)(c). Defendant asserted that had OV 11 been properly scored, he would have been sentenced at OV Level II, not OV Level III. He further contended that the recommended minimum sentence range under the guidelines would have been 42 to 70 months, rather than 51 to 85 months. The trial court granted defendant's motion to rescore OV 11 at zero points but denied defendant's motion for resentencing. The trial court corrected defendant's original sentencing information report and lowered the guidelines recommended minimum sentence range to 42 to 70 months. The trial court's order stated that resentencing was not required because defendant's original minimum sentence of 48 months of imprisonment was within the recalculated guidelines minimum sentence range. Defendant appealed.

The Court of Appeals *held*:

The issue whether a defendant is entitled to resentencing is a legal question that is reviewed de novo. *People v Francisco*, 474 Mich 82 (2006), held that a defendant is entitled to resentencing when the trial court erred in scoring the sentencing guidelines even though the original sentence was within the appropriate,

rescored guidelines range because the appellate court could not know whether the trial court would have imposed the same sentence had the guidelines been accurately scored. This case, however, presented circumstances that were unlike those described in *Francisco*. In this case, the trial court's order stated that resentencing was not required because defendant's original minimum sentence of 48 months of imprisonment was within the recalculated guidelines minimum sentence range. The trial court had the opportunity to resentence defendant after rescoring OV 11, and it expressly declined to do so. The trial court's explanation in its order and its familiarity with this matter demonstrated the trial court's intent to maintain the same sentence, regardless of the prior scoring error. Accordingly, resentencing was not required.

Affirmed.

JANSEN, J., dissenting, would have concluded that the trial court erroneously denied defendant's motion for resentencing because defendant was entitled to be resentenced on the basis of accurate information under *Francisco*. MCL 769.34(10) provides, in pertinent part, that if a minimum sentence is within the appropriate sentencing guidelines range, the Court of Appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. *Francisco* concluded that it would be in derogation of the law, and fundamentally unfair, to deny a defendant the opportunity to be resentenced on the basis of accurate information. Moreover, Michigan caselaw has affirmed the legal principle that regardless of whether a defendant's sentence falls within the minimum sentencing guidelines range, a defendant is entitled to resentencing when the sentence was calculated from erroneously scored guidelines or the trial court relied on inaccurate information when sentencing the defendant. The small caveat outlined in *People v Mutchie*, 468 Mich 50 (2003)—that resentencing is not required when a trial court would have imposed the same sentence regardless of the scoring error—did not apply in this case because the trial court did not indicate in its order that it would have imposed the same sentence. Rather, the trial court's order stated that it was denying defendant's motion because the "original sentence" imposed "falls within the guidelines of the advisory guideline minimum range." Judge JANSEN would have concluded that this reasoning was legally deficient and that defendant was constitutionally entitled to be sentenced on accurate information. Therefore, she would have remanded the case for resentencing.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Daniel E. Hebel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Christine A. Pagac*) for defendant.

ON RECONSIDERATION

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

RIORDAN, P.J. Defendant appeals as of right his bench-trial conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b (multiple variables). Defendant was sentenced to 4 to 10 years of imprisonment for CSC-I. We affirm.

I. FACTS & PROCEDURAL HISTORY

Defendant contacted the victim, a prostitute who advertised her services online, and after agreeing on a price and specific services, they met up at a gas station and walked together to a nearby abandoned house. Before engaging in any sexual acts, the victim asked to be paid. Defendant refused to pay, held a sharp object to the victim's throat, and forced her to engage in oral and vaginal sex.

Defendant was found guilty of CSC-I. He was assigned 10 points for Offense Variable (OV) 1, 5 points for OV 2, 10 points for OV 4, and 25 points for OV 11. In total, defendant was assigned 50 OV points, which equated to an OV Level III. The sentencing guidelines recommended a minimum prison sentence of 51 to 85 months. The court sentenced defendant to 4 to 10 years of imprisonment.

Defendant then filed a motion to correct an invalid sentence in the trial court and argued that he was entitled to resentencing because the trial court incorrectly assigned 25 points for OV 11 when, he said, the trial court should have assigned zero points pursuant to MCL 777.41(2)(c). Defendant asserted that if OV 11 had been properly scored, he would have been sentenced at OV Level II, not OV Level III. He contended that the recommended sentencing guidelines range would have been 42 to 70 months, rather than the 51 to 85 months that was used at sentencing. Therefore, defendant argued, he was entitled to resentencing. The prosecution responded that OV 11 was properly scored and that, even if the guidelines were initially improperly scored, defendant's sentence should not be altered because defendant's sentence was below the original recommended sentencing guidelines range and was tailored to defendant.

The trial court granted defendant's motion to rescore OV 11 at zero points but denied defendant's motion for resentencing. The trial court corrected defendant's original sentencing information report, and the recommended minimum sentencing guidelines range was lowered to 42 to 70 months. The trial court's order states that resentencing was not required because defendant's original sentence of 48 to 120 months of imprisonment is within the recalculated recommended minimum sentencing guidelines range. Defendant now appeals.

II. ANALYSIS

Defendant argues that he is entitled to resentencing pursuant to *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006), because he was sentenced on the basis of inaccurate information and an inaccurate guidelines range. We disagree.

The issue whether defendant is entitled to resentencing is a legal question that we review de novo. *Id*. at 85.

In *Francisco*, 474 Mich at 88-92, our Supreme Court held that the defendant was entitled to resentencing when the trial court erred in scoring the sentencing guidelines even though the original sentence was within the appropriate, rescored guidelines range. The Supreme Court remanded that case for resentencing because an appellate court cannot know whether the trial court would have imposed the same sentence if the guidelines had been accurately scored. *Id*. at 91-92. The Supreme Court reasoned that "appellate correction of an erroneously calculated guidelines range will always present this dilemma, i.e., the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *Id*. "Thus, requiring resentencing in such circumstances not only respects the defendant's right to be sentenced on the basis of the law, but it also respects the trial court's interest in having defendant serve the sentence that it truly intends." *Id*. at 92.

The matter before us presents us with circumstances that are unlike those described in *Francisco*. We know the trial court would impose the same sentence for defendant under the now accurately scored guidelines range. The trial court's order states that resentencing was not required because defendant's original sentence of 48 to 120 months of imprisonment is within the recalculated recommended minimum sentencing guidelines range. The trial court had the opportunity to resentence defendant, and it expressly declined to do so. After rescoring OV 11 and recalculating the correct guidelines range, the trial court decided to maintain

defendant's original sentence. Thus, the trial court's explanation in its order and its familiarity with this matter—particularly in light of the procedural posture and its ultimate disposition of the case—demonstrate the trial court's intent to maintain the same sentence, regardless of the prior scoring error. Thus, "[r]esentencing is . . . not required [because] the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *Id*. at 89 n 8, citing *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). Therefore, resentencing also is not required in the matter before us.[1]

III. CONCLUSION

We are not confronted with a *Francisco* error. There was no remand to the trial court for resentencing. Here, the trial court only decided a posttrial motion, corrected

[1] Defendant raised for the first time at oral argument the claim that the trial court violated his due-process right to be sentenced on the basis of accurate information. He did not raise this issue in his written brief on appeal, nor did he provide any supplemental briefing on it. He cited only *Francisco*, 474 Mich at 88-89, 89 n 6, for the proposition that "[a] defendant is entitled to be sentenced by a trial court on the basis of accurate information." However, *Francisco* considers only the issue of resentencing pursuant to MCL 769.34(10) and MCR 2.613(A); its analysis does not consider any due-process implications. Although this issue presents a purely legal question, we nonetheless decline to consider it further because it was not properly raised by defendant, nor was it briefed by the parties. See *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993) ("The court is *obligated* only to review issues that are properly raised and preserved; the court is *empowered*, however, to go beyond the issues raised and address any issue that, in the court's opinion, justice requires be considered and resolved."), rev'd on other grounds 445 Mich 502 (1994). Because the issue is insufficiently briefed, we now decline to craft defendant's argument for him. See *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

the applicable guidelines range, and then maintained defendant's original sentence.

Affirmed.

SAWYER, J., concurred with RIORDAN, P.J.

JANSEN, J. (*dissenting*). I would conclude that the trial court erroneously denied defendant's motion for resentencing because defendant is entitled to be resentenced on the basis of accurate information under *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). Therefore, I respectfully dissent.

I. RELEVANT FACTUAL BACKGROUND

On September 5, 2016, between 4:00 a.m. and 4:30 a.m., defendant contacted the victim, a prostitute who advertised her services on Backpage.com. Defendant agreed to pay $60 for vaginal and oral sex with the victim. Defendant and the victim met at a Citgo gas station located on Patton Street and Seven Mile Road in Detroit. When the victim asked to be paid, defendant held a sharp object to her throat and forced her to have vaginal sex.

Defendant was found guilty of first-degree criminal sexual conduct. Defendant was assigned 10 points for Offense Variable (OV) 1, 5 points for OV 2, 10 points for OV 4, and 25 points for OV 11. Defendant was assigned a total of 50 OV points, which equated to an OV level III. Defendant's recommended minimum prison sentence under the guidelines was 51 to 85 months. The court sentenced defendant to 4 to 10 years' imprisonment.

On November 27, 2017, defendant filed in the trial court a motion to correct an invalid sentence and argued that he was entitled to resentencing because

the trial court incorrectly assigned 25 points for OV 11. Defendant argued that the trial court should have assigned zero points for OV 11 in accordance with MCL 777.41(2)(c). Defendant asserted that if OV 11 had been properly scored, his minimum sentencing guidelines range would have been reduced from 51 to 85 months to 42 to 70 months, which would have placed him on the sentencing grid at OV Level II, rather than OV Level III. Thus, defendant argued, he was entitled to be resentenced based on accurate information.

The trial court granted defendant's motion in part, agreeing that OV 11 was incorrectly scored. The trial court ordered that OV 11 be assigned zero points, thus reducing the minimum sentencing guidelines range to 42 to 70 months. However, the trial court denied defendant's motion for resentencing. The trial court stated in its order that defendant's "original sentence of 48 to 120 months falls within the guidelines of the advisory guideline minimum range." This appeal followed.

II. MOTION FOR RESENTENCING

Defendant argues that the trial court erroneously denied his motion for resentencing because he is entitled to be resentenced on the basis of accurate information under *Francisco*, 474 Mich at 88. I agree.

The issue whether defendant is entitled to resentencing is a legal question which this Court reviews de novo. *Francisco*, 474 Mich at 85.

Under MCL 769.34(10),[1] "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall

[1] This Court explicitly held in *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016), that MCL 769.34(10) was not altered or

not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Moreover, in *Francisco*, our Supreme Court concluded that it would be "in derogation of the law, and fundamentally unfair, to deny a defendant . . . the opportunity to be resentenced on the basis of accurate information." *Francisco*, 474 Mich at 89-90. This Court continues to affirm the legal principle that regardless of whether a defendant's sentence falls within the minimum sentencing guidelines range, a defendant is entitled to resentencing when the sentence was calculated from erroneously scored guidelines or the trial court relied on inaccurate information when sentencing a defendant. See *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016); *People v Sours*, 315 Mich App 346, 350-351; 890 NW2d 401 (2016); *People v Carpenter*, 322 Mich App 523, 532; 912 NW2d 579 (2018).

A small caveat does exist, as outlined in *People v Mutchie*, 468 Mich 50; 658 NW2d 154 (2003). If a trial court indicates that "it would have imposed the same sentence[] regardless of the scoring [error]," resentencing is not required. *Id*. at 51 (quotation marks and citation omitted). However, I would conclude that this caveat does not apply here, because the trial court did not indicate in its order that it would have imposed the same sentence. Rather, in its order denying defendant's motion for resentencing, the trial court stated that it was denying defendant's motion because the "original sentence" imposed "falls within the guidelines of the advisory guideline minimum range." I

diminished by the Michigan Supreme Court's decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015) (holding that the guidelines are only advisory).

would conclude that this reasoning is legally deficient. I believe defendant's original sentence is invalid because it was based on inaccurate information, i.e., the incorrect scoring of OV 11. *Francisco*, 474 Mich at 89. Because defendant is constitutionally entitled to be sentenced on accurate information, I would conclude that a remand for resentencing is required.

SMITH v LANDRUM

Docket No. 347402. Submitted October 6, 2020, at Grand Rapids. Decided October 29, 2020, at 9:20 am.

Beth E. Smith and John G. Smith filed a quiet-title action in the Baraga Circuit Court against Stephen E. Landrum and Maureen E. Landrum, claiming a prescriptive easement over a part of defendants' land. That land was located within the L'Anse Reservation. The Keweenaw Bay Indian Community's territorial jurisdiction embraces the land within the original boundary lines of the L'Anse Reservation, which were established by treaty. Although the property was within the exterior boundaries of the reservation, none of the involved parties was an Indian. The land had previously been owned by Mark Perrault, who was a member of the Keweenaw Bay Indian Community, and at that time the land was trust or restricted property within the reservation. After Perrault died, a United States Department of the Interior administrative law judge determined that the land passed out of federal-trust status to Perrault's wife, Noreen, a non-Indian, and that her share of the land would therefore be subject to Michigan's jurisdiction. Noreen thereafter conveyed the land to Perrault's four children, who in turn conveyed the land to defendants. After plaintiffs filed this action, defendants moved for summary disposition, arguing that even though the parties were all non-Indian, the circuit court lacked subject-matter jurisdiction to impose a prescriptive easement because (1) the land was located within the exterior boundaries of the reservation and (2) a previous owner in the chain of title (Perrault) was a member of the Keweenaw Bay Indian Community. Defendants asserted that under those facts, the action had to be adjudicated in federal court under 28 USC 1360 if the tribal court did not take jurisdiction. The circuit court, Charles R. Goodman, J., agreed and granted defendants summary disposition, reasoning that the tribal court or a federal district court had jurisdiction over the dispute because the land was located within a reservation. Plaintiffs appealed.

The Court of Appeals *held*:

The phrase "non-Indian fee land" refers to land that was originally allotted to tribal members that was later transferred in

fee to non-Indians and never reacquired in trust. Under 18 USC 1151, "Indian country" includes all of the territory within the exterior boundaries of an Indian reservation. As a result, land owned by non-Indians within a reservation is Indian country as long as that land is within the exterior boundaries of a reservation. However, once tribal land is converted into non-Indian fee land, the tribe loses plenary jurisdiction over it. In *Williams v Lee*, 358 US 217 (1959), the United States Supreme Court established the test to be applied in determining whether a state court has jurisdiction to decide a dispute involving non-Indians on reservation land. Under *Williams*, a state court can exercise jurisdiction over a dispute involving non-Indians on reservation land so long as doing so (1) is not preempted by federal law or (2) does not unlawfully infringe the rights of the tribe to make and live by its own rules. Applying the first part of the *Williams* test to this case, neither party suggested that federal law was incompatible with the circuit court's exercise of jurisdiction over an easement dispute between non-Indians on the reservation. In analyzing the second part of the *Williams* test—whether the exercise of state court jurisdiction would infringe on the tribe's interest in self-government—the Court was guided by the analysis developed in *Montana v United States*, 450 US 544 (1981), in which the Supreme Court addressed the related question of tribal jurisdiction over disputes involving non-Indians on reservation land. The inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe; thus, efforts by a tribe to regulate nonmembers on non-Indian fee land, even within a reservation, are presumptively invalid. Nonetheless, under the *Montana* test, a tribal court can exercise jurisdiction over a non-Indian on non-Indian fee land in Indian country if precluding tribal jurisdiction over the non-Indian would directly affect the tribe's political integrity, economic security, health, or welfare. Applying the second part of the *Williams* test to this case, the exercise of state court jurisdiction over the dispute would not interfere with the tribe's power to control and govern its members and internal affairs given that none of the parties was an Indian, the action involved non-Indian fee land, and the dispute only concerned an easement. The circuit court's exercise of jurisdiction over the easement dispute would not affect the powers critical to tribal self-government (e.g., the power to determine tribal membership; the power to legislate and tax on-reservation activities, including some activities by nonmembers; and the power to exclude people from the reservation). Accordingly, the circuit

court had subject-matter jurisdiction to hear the easement dispute, and the circuit court erred by granting defendants summary disposition on that issue.

Reversed and remanded.

JURISDICTION — CIRCUIT COURTS — CIVIL DISPUTES BETWEEN NON-INDIANS ON NON-INDIAN FEE LAND WITHIN AN INDIAN RESERVATION.

Circuit courts have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute expressly prohibits the court from exercising jurisdiction or gives another court exclusive jurisdiction over the subject matter of the suit; circuit courts have subject-matter jurisdiction over civil disputes between non-Indians on non-Indian fee land within an Indian reservation so long as the dispute (1) is not preempted by federal law or (2) would not unlawfully infringe the rights of the tribe to make and live by its own rules (Const 1963, art 6, § 13; MCL 600.605).

Bridges and Bridges (by *Caroline Bridges*) for plaintiffs.

F. Gregory Murphy for defendants.

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

MURRAY, C.J. The question presented in this quiet-title action is whether a state court has subject-matter jurisdiction to decide an easement dispute in favor of a non-Indian on land owned by a non-Indian when the land is located on an Indian reservation. The trial court concluded that it did not and therefore entered a final order granting defendants' motion for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction).[1] For the reasons outlined below, we hold that the trial court had subject-matter jurisdiction over the easement dispute. We therefore re-

[1] According to defendants' response, defendant Maureen Landrum is deceased. Use of the singular "defendant" will refer to defendant Stephen Landrum.

verse the order granting defendant's motion for summary disposition and remand for further proceedings.

I. BACKGROUND

The material facts relating to the jurisdictional issue are undisputed. The land at issue is owned by defendant, who is not an Indian. Plaintiffs, who seek a prescriptive easement over a part of defendant's land, are also not Indians. The land, however, is located within the L'Anse Reservation, but it is not held in trust for the tribe or any tribal member (or any Indian, for that matter).[2]

Although the land is not currently owned by an Indian, it was previously owned by Mark Perrault, who was a member of the Keweenaw Bay Indian Community. Specifically, the record shows that two "Deeds to Restricted Indian Land" were issued by the United States Department of the Interior, Bureau of Indian Affairs, conveying the property at issue to "[t]he United States of America in trust for Mark H. Perrault, Chippewa Indian." The deeds state that "[t]his conveyance is made pursuant to the provisions of the Act of June 18, 1934 ([25 USC 461 *et seq*., now 25 USC 5101], 48 Stat., 984.)," and that the deeds were recorded in the "Bureau of Indian Affairs . . . , Inherited Indian Land Deed Book."

After Perrault died, a Department of the Interior administrative law judge held a proceeding "to determine the heirs, to determine the validity of the Last Will and Testament, and to settle the estate" of Perrault, which included "trust or restricted prop-

[2] The Keweenaw Bay Indian Community's reservation is the L'Anse Reservation in Baraga County.

erty" located on the L'Anse Reservation.[3] As a result of the hearing, the property passed to Perrault's wife, Noreen, with the order stating that Noreen's share "will pass to her in unrestricted or non-trust status by virtue of the fact that she is non-Indian, and her share shall become subject to the jurisdiction of the state where the land is located. Estate of Dana A Knight, 9 IBIA 82, 88 I.D. 987 (1981); Bailess v. Paukune, [344 US 171; 73 S Ct 198; 97 L Ed 197] (1952); Levindale Lead [& Zinc Mining Co] v. Coleman, [241 US 432; 36 S Ct 644; 60 L Ed 1080] (1916)." Noreen subsequently conveyed the property to Perrault's son and three daughters, all of whom are Indians, by warranty deed dated January 23, 2002, and she registered the deed with the Baraga County Register of Deeds. These four owners then conveyed the property to defendant (again, a non-Indian) by warranty deed dated August 3, 2012, and that deed was also registered with the county register of deeds.

After the complaint was filed and served, defendant moved for summary disposition under MCR 2.116(C)(4), arguing that the circuit court lacked subject-matter jurisdiction because defendant's property is located within the borders of the reservation and a previous owner in the chain of title, Perrault, was a tribal member. Relying on the Keweenaw Bay Indian Community Tribal Code, §§ 1.102 and 1.103, defendant argued that a state court does not have subject-matter jurisdiction to impose a prescriptive easement over land located within the exterior bound-

[3] 25 USC 373 governs the disposal by will of allotments held under trust and states that "no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior[.]" The statute also provides that the Secretary of the Interior may "cause patent in fee to be issued to the devisee or devisees[.]" *Id*.

aries of an Indian reservation, even when the land owner and parties are non-Indians. Defendant maintained that under 28 USC 1360,[4] the case must be adjudicated in federal court if the tribal court does not take jurisdiction.

For their part, plaintiffs argued that the circuit court had subject-matter jurisdiction because the land is owned in fee simple by defendant and is not held in trust by the United States government for an Indian person. Plaintiffs contended that defendant's argument rested on the erroneous assertion that defendant's land is held in federal trust for an Indian, when, in fact, the parcel was transferred out of trust through the September 14, 2001 order and has never been transferred back into trust.

After holding a hearing on defendant's motion, the trial court subsequently issued a written opinion and order granting the motion. The trial court expressed concern for creating a "'checkerboard' jurisdiction causing confusion, inconsistencies and potentially disruptive land use problems" and ultimately opined that because the land was located within the reservation, either that tribe's tribal court, or a federal district court, had jurisdiction over the dispute, and depending on where the case was refiled, that other court should decide whether it had jurisdiction:

> Indian tribes are sovereign nations with the inherent authority to regulate both their members and their territories. Our Michigan Court of Appeals, in the unpublished case of *State Treasurer v Duty*, [unpublished per curiam opinion of the Court of Appeals, issued January 12, 2016 (Docket No. 323854), p 2,] quoted the United States Supreme Court:

---

[4] As discussed later, 28 USC 1360 governs state jurisdiction in actions in which Indians are parties.

> "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government, and the Indian tribe inhabiting it, and not with the States." *Alaska v Native Village of Venetie Tribal Gov't*, 522 US 520, 527 n 1; 118 S Ct 948; 140 L Ed 2d 30 (1998).

The Tribal Code of the Keweenaw Bay Indian Community conforms to the above set forth statement. Section 1.102 of the code states:

> "The territorial jurisdiction of the Tribal Court shall encompass all areas within the exterior boundaries of the L'Anse Indian Reservation, Michigan, as well as all areas within the exterior boundaries of any other lands or waters which now or hereafter shall be held in Trust by the United States of America for the Keweenaw Bay Indian Community or any of its members.
>
> "Further, and for the purpose of enforcement of approved tribal hunting, trapping, gathering, farming, and fishing regulations enacted to regulate treaty protected off-reservation hunting, trapping, gathering, farming, and fishing activities, such territorial jurisdiction shall extend to all areas where such treaty rights shall exist."

It is to be noted that the Tribal Code says "all" areas within the exterior boundaries of the L'Anse Indian Reservation without limitation. All areas within the exterior boundaries of the L'Anse Indian Reservation would include not only land owned by the tribe, itself, but also land owned both by tribal member and nonmembers alike.

As a practical matter, Sec 1.102 of the Keweenaw Bay Indian Community Tribal Code makes sense. A system where state courts have jurisdiction over fee lands owned by non-tribal members, and tribal and/or federal courts have jurisdiction over all remaining lands would, within an Indian reservation, create "checkerboard" jurisdiction causing confusion, inconsistencies and potentially disruptive land use problems.

> The issue presented in this case is not whether the tribal court has jurisdiction over non-tribal members based upon the nonmember[']s conduct, but instead, the issue is whether the tribe has jurisdiction to decide issues concerning Indian country land located within the L'Anse Indian Reservation. Our Court of Appeals in the unpublished case of *Joseph K Lumsden Bahweting Public School Academy v Sault Ste. Marie Tribe of Chippewa Indians*, [unpublished per curiam opinion of the Court of Appeals, issued October 26, 2004 (Docket No. 252293)], questioned whether a state court has jurisdiction to entertain the issue of whether a tribal court would have subject matter jurisdiction.
>
> * * *
>
> This Court believes, without deciding, that the Keweenaw Bay Indian Community Tribal Court could exercise jurisdiction over the matter in dispute in this lawsuit; and thus, this Court is not a proper forum to decide the jurisdiction of the Keweenaw Bay Indian Community Tribal Court and/or the federal court in the setting of his lawsuit; and therefore, summary disposition is hereby GRANTED pursuant to the provisions of [MCR] 2.116(C)(4).

This appeal ensued.

II. ANALYSIS

The question whether a court has subject-matter jurisdiction to hear a particular claim is a question of law that this Court reviews de novo. *Jamil v Jahan*, 280 Mich App 92, 99-100; 760 NW2d 266 (2008). "The burden is on the plaintiff to establish jurisdiction." *Universal Am-Can Ltd v Attorney General*, 197 Mich App 34, 37; 494 NW2d 787 (1992).

"Subject[-]matter jurisdiction in particular is defined as the court's ability to exercise judicial power over that class of cases; not the particular case before

it, but rather the abstract power to try a case of the kind or character of the one pending." *Campbell v St John Hosp*, 434 Mich 608, 613-614; 455 NW2d 695 (1990) (quotation marks and citations omitted). Circuit courts are courts of general jurisdiction and derive their power from the Michigan Constitution. *Okrie v Michigan*, 306 Mich App 445, 467; 857 NW2d 254 (2014). Specifically, Const 1963, art 6, § 13 provides:

> The circuit court shall have original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with rules of the supreme court; and jurisdiction of other cases and matters as provided by rules of the supreme court.

The Revised Judicature Act[5] also provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605.

In light of these statutory provisions, a circuit court is presumed to have subject-matter jurisdiction over a civil action unless Michigan's Constitution or a statute (1) expressly prohibits it from exercising jurisdiction or (2) gives to another court exclusive jurisdiction over the subject matter of the suit. *Prime Time Int'l Distrib, Inc v Dep't of Treasury*, 322 Mich App 46, 52; 910 NW2d 683 (2017). " '[W]here this Court must examine certain statutory language to determine whether the Legislature intended to deprive the circuit court of jurisdic-

[5] MCL 600.101 *et seq*.

tion,' this Court has explained, '[t]he language must leave no doubt that the Legislature intended to deprive the circuit court of jurisdiction of a particular subject matter.' " *Id*. (citation omitted; alterations in original).

There is no dispute that the land at issue is within the exterior boundaries of the L'Anse Reservation.[6] There is also no dispute that the land is non-Indian fee land, as it is land originally allotted[7] to tribal members, but later transferred in fee to non-Indians and never reacquired in trust. Under 18 USC 1151,[8] "Indian country" includes all of the territory within the exterior boundaries of an Indian reservation. Consequently, land that non-Indians own in fee simple is also Indian country if it lies within the exterior boundaries of an Indian reservation. See *Seymour v Superintendent of Washington State Penitentiary*, 368 US 351, 357-358; 82 S Ct 424; 7 L Ed 2d 346 (1962), *McGirt v Oklahoma*, 591 US ___, ___; 140 S Ct 2452, 2464; 207 L Ed 2d 985 (2020), and *United States v Webb*, 219 F3d 1127, 1131 (CA 9, 2000) ("[I]f the property is within boundaries of the reservation, it is Indian country irrespective of whether title is now held by a non-Indian.").

The trial court opined that the dispositive issue was whether the tribal court had jurisdiction over the reser-

---

[6] According to *Solem v Bartlett*, 465 US 463, 470; 104 S Ct 1161; 79 L Ed 2d 443 (1984), "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."

[7] "Allotment is a term of art in Indian law. It refers to the distribution to individual Indians of property rights to specific parcels of reservation." *Yankton Sioux Tribe v Gaffey*, 188 F3d 1010, 1015 (CA 8, 1999).

[8] Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to also apply in civil matters. See *Alaska*, 522 US at 527.

vation land dispute, but the issue presented by defendant's motion was whether the circuit court had jurisdiction, and though that question is partially resolved by looking to whether the exercise of state jurisdiction would affect the tribe's self-governance, ultimately, the question is whether the state court had jurisdiction over this dispute. In deciding that issue, the parties and the trial court should have focused on *Williams v Lee*, 358 US 217, 220; 79 S Ct 269; 3 L Ed 2d 251 (1959), as that decision set forth the "infringement test" for determining whether a *state court* can exercise jurisdiction over a dispute involving non-Indians and their property located on a reservation. *Pueblo of Santa Ana v Nash*, 972 F Supp 2d 1254, 1262 (D NM, 2013) ("The seminal United States Supreme Court decision concerning state civil adjudicatory authority in Indian country is *Williams v Lee*.").[9] We now turn to *Williams* and its progeny.

According to *Williams*, a state court can exercise jurisdiction over a dispute involving non-Indians and Indians on reservation land so long as doing so (1) is not preempted by federal law or (2) does not unlawfully infringe the right of the tribe to make and live by its own rules. *Williams*, 358 US at 220. Because states have an interest in resolving disputes involving non-Indians, and tribes have an interest in what occurs within their reservations, the *Williams* test "was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *McClanahan v State Tax Comm of*

[9] Some of the decisions address state jurisdiction in ways other than through a state court, like action by a state administrative agency. But it matters little which form of state jurisdiction is asserted (regulatory or adjudicatory), as the question is resolved through the same analysis. See *C'Hair v Dist Court of the Ninth Judicial Dist*, 357 P3d 723, 729-730 (Wy, 2015).

Arizona, 411 US 164, 179; 93 S Ct 1257; 36 L Ed 2d 129 (1973). In *C'Hair v Dist Court of the Ninth Judicial Dist*, 357 P3d 723, 730 (Wy, 2015), the Wyoming Supreme Court nicely summarized the *Williams* test:

> In summary, *Williams* and its progeny stand for the rule that a state may assert jurisdiction over an activity or a dispute involving a non-Indian and arising within the boundaries of a tribal reservation if: 1) the state's exercise of authority is not preempted by incompatible federal law; and 2) the state's exercise of authority does not infringe on the right of reservation Indians to make their own laws and be ruled by them. As the Supreme Court has observed, "The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973) (citations omitted). [Some citations omitted.]

Neither party has pointed to any federal law that would be incompatible with a state court's exercise of jurisdiction over an easement dispute between non-Indians on the reservation. Thus, we turn to the second *Williams* test—whether the exercise of state authority over this easement dispute would infringe the tribe's interest in self-government.[10]

In making this determination, we are guided, in part, by an exception to the preclusion of tribal court jurisdiction over non-Indians on Indian land developed in *Montana v United States*, 450 US 544, 564-565; 101 S Ct

---

[10] Indian tribes are recognized as "distinct, independent political communities" whose sovereignty "is of a unique and limited character." *Plains Commerce Bank v Long Family Land & Cattle Co, Inc*, 554 US 316, 327; 128 S Ct 2709; 171 L Ed 2d 457 (2008) (quotation marks and citation omitted). See also *Paquin v St Ignace*, 504 Mich 124, 134-135; 934 NW2d 650 (2019).

1245; 67 L Ed 2d 493 (1981), a case in which the Court held that an Indian tribe did not have jurisdiction to preclude hunting and fishing by non-Indians on non-Indian fee land. Much like the *Williams* infringement test, the second exception to the *Montana* rule focuses on whether precluding tribal jurisdiction over non-Indians would "directly affect[] the tribe's political integrity, economic security, health, or welfare." *Evans v Shoshone-Bannock Land Use Policy Comm*, 736 F3d 1298, 1303 (CA 9, 2013) (quotation marks omitted), quoting *Strate v A-1 Contractors*, 520 US 438, 446; 117 S Ct 1404; 137 L Ed 2d 661 (1997). As can be seen, there is an overlap in the tests to determine when state jurisdiction exists (under *Williams*) and when tribal jurisdiction exists (under *Montana*) because both tests focus, in large part, on what effect (if any) jurisdiction would have on the right of a tribe to make and live by its own rules. See *C'Hair*, 357 P3d at 731 ("Although the *Williams* test is controlling in determining whether the district court properly assumed jurisdiction . . . , we also must consider the principles announced by the Supreme Court in its 1981 decision in *Montana* . . . . These cases are relevant to our analysis because, although they address tribal sovereignty from the perspective of limitations on tribal jurisdiction over non-Indians, rather than limitations on state jurisdiction, their holdings closely parallel the *Williams* analysis and inform the application of that analysis."), *Gustafson v Poitra*, 916 NW2d 804, 810; 2018 ND 202 (2018) ("the lack of tribal jurisdiction is a factor to be considered in determining whether state court jurisdiction exists"), and *Cordova v Holwegner*, 93 Wash App 955, 967; 971 P2d 531 (1999) ("The [*Williams*] infringement test and the *Montana* analysis examine the limits of tribal inherent sovereignty from different perspectives, the former by examining the extent of state jurisdiction and the latter by

examining the extent of tribal jurisdiction. In some respects, the infringement test and the *Montana* analysis are merely different formulations of the same underlying concept.").

Turning to an application of *Williams* to the undisputed material facts, we readily conclude that the exercise of state jurisdiction over this easement dispute would in no way interfere with the tribe's power to control and govern its members and internal affairs. *Williams*, 358 US at 220. This holds true for several reasons. First and foremost, neither party is an Indian, and the land is neither land held in trust for the tribe (or a tribal member) nor owned individually by an Indian. Instead, it is fee land located within the reservation, or what the Supreme Court has termed "non-Indian fee land." *Strate*, 520 US at 446. And with respect to non-Indian fee land, the Supreme Court has made clear that "once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it." *Plains Commerce Bank v Long Family Land & Cattle Co, Inc*, 554 US 316, 328; 128 S Ct 2709; 171 L Ed 2d 457 (2008). Indeed, "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.' " *Id*. at 330 (citation omitted). As the *Plains Commerce Bank* Court concluded, this holds true, in part, because any harm to a tribe's interest in regulating reservation land is generally lost once the land is sold by an Indian to a non-Indian:

> By definition, fee land owned by nonmembers has already been removed from the tribe's immediate control. See *Strate*, 520 U.S., at 456 (tribes lack power to "assert [over non-Indian fee land] a landowner's right to occupy and exclude"). It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land's sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to *be* tribal land.

> Nor can regulation of fee land sales be justified by the tribe's interests in protecting internal relations and self-government. Any direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage. [*Id*. at 336 (alteration in original).]

Here, the land over which the easement allegedly exists is owned in fee by defendant, a non-Indian. The land has been considered non-Indian fee land since it was transferred out of Indian possession in 2012, and since that time, the tribal interest in regulating that land has been *de minimis*.[11] To the extent that divestiture of land harmed the tribe's economic security or political integrity (and there is no suggestion that it did), it would have resulted from the 2012 transaction, not when and if a state trial court rules on an easement dispute unrelated to the sale of the land from an Indian to a non-Indian.

Additionally, a state court decision on the existence of an easement would not interfere with the ability of the tribe to determine its own rules and govern itself and its members. The tribal powers most frequently

---

[11] For this reason, as well as several others, defendant's citation to *Boisclair v Superior Court of San Diego Co*, 51 Cal 3d 1140; 801 P2d 305 (1990), does not help defendant. For one thing, *Boisclair* involved many parties, some of whom were Indians, and part of the dispute centered on Indian trust property. *Id*. at 1144. Additionally, the central jurisdictional issue centered on a federal statute, 28 USC 1360, that has no application to Michigan. *Id*. at 1146. Finally, the court ruled that to the extent the dispute involved non-Indians and non-Indian fee land, state court jurisdiction existed. *Id*. at 1157.

cited by courts as critical to tribal self-government are the power to determine tribal membership, to legislate and tax on-reservation activities, including some activities by nonmembers, and to exclude people from the reservation. *Id*. at 328-330. None of these tribal self-government interests would be impacted by the circuit court's decision on the easement dispute since it does not involve tribal members or land owned by tribal members. Nor does this case involve a zoning or other land-use issue that could affect land-use regulations.

As is evident, critical to resolution of the jurisdictional issue is both the status of the land as non-Indian fee land and that both parties are non-Indians. As we noted earlier, *Montana* articulated a " ' "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" ', . . . [and thus] efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid[.]' " *Plains Commerce Bank*, 554 US at 330, quoting *Atkinson Trading Co, Inc v Shirley*, 532 US 645, 651, 659; 121 S Ct 1825; 149 L Ed 2d 889 (2001), in turn quoting *Montana*, 450 US at 565. Accordingly, tribes face a "formidable burden" in meeting the second *Montana* exception, as " 'with only "one minor exception, [the Supreme Court has] never upheld under *Montana* the extension of tribal civil authority over nonmembers *on non-Indian land*." ' " *Evans*, 736 F3d at 1303 (alteration in original), quoting *Plains Commerce Bank*, 554 US at 333, in turn quoting *Nevada v Hicks*, 533 US 353, 360; 121 S Ct 2304; 150 L Ed 2d 398 (2001).[12] See also, *Strate*, 520 US at 446 (describing the

[12] That one exception came in a fractured opinion that concluded that a tribe had the authority to regulate certain use of non-Indian fee land through zoning regulations. *Brendale v Confederated Tribes & Bands of Yakima Indian Nation*, 492 US 408; 109 S Ct 2994; 106 L Ed 2d 343

"general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation").

Though no Michigan case has yet to apply *Williams* to a reservation land dispute between non-Indians,[13] our Court recognized years ago that the state has a significant jurisdictional interest in resolving criminal matters that arise between non-Indians on reservation land. *People v Collins*, 298 Mich App 166, 175-177; 826 NW2d 175 (2012), citing, in part, *United States v Antelope*, 430 US 641, 643 n 2; 97 S Ct 1395; 51 L Ed 2d 701 (1977). This same state interest in maintaining criminal jurisdiction over non-Indian actions on non-Indian fee land within a reservation—and the lower tribal interest in regulating the same—applies to civil disputes, a conclusion also reached by the New Mexico Court of Appeals in a case involving a permit dispute between two non-Indians on reservation land. See *Alexander v Cook*, 90 NM 598, 601; 566 P2d 846 (NM App, 1977) (the court recognized that the tribal interest in regulating civil disputes on reservation land is at its lowest point when the dispute involves non-Indians, just as state and federal courts have held with respect to identical situations under criminal law).

Finally, we look to an analogous case, *Gustafson*, 916 NW2d 804, which addressed whether the second *Montana* exception applied to give tribal courts jurisdiction over non-Indian fee land. In that quiet-title

(1989). Although the trial court's concern regarding a "checkerboard" reservation might have merit if this were a zoning or other land-use case, it is not a concern with respect to an isolated easement question based on existing use.

[13] Actually, *Williams* has never been cited by any Michigan court, at least as far as we have found.

action filed in state district court, the defendants argued that the state court had no jurisdiction to resolve the dispute because the land was located within the borders of an Indian reservation. *Id*. at 805. The trial court concluded that neither of the *Montana* exceptions applied and ruled that it had jurisdiction. *Id*. at 805-806. Relying upon a prior decision[14] holding that when a tribal member conveys "a parcel of fee land '*to non-Indians*, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands,' " and "[a]s a general rule, then, 'the tribe has no authority itself, by way of tribal ordinance or action in the tribal courts, to regulate the use of fee land' " absent application of one of the *Montana* exceptions, *id*. at 808, the court held that neither applied to grant a tribal court jurisdiction over the non-Indian fee land dispute. (First alteration in original.) The court reasoned:

> The second exception from *Montana* . . . has been narrowed to conduct that must "imperil the subsistence" of the tribal community and that "tribal power must be necessary to avert catastrophic consequences." *Fredericks* [*v Fredericks*, 888 NW2d 177; 2016 ND 234, ¶ 9 (2016)] (citing *Plains Commerce* [*Bank*, 554 US] at 341 . . .). The quiet title action in the current case for the fee land at issue simply doesn't rise to these heightened requisites. Should this Court quiet title to this land in Gustafson, such action would not imperil the subsistence of the Turtle Mountain Tribal Community, nor would the reservation of the tribal power be necessary to avert catastrophic consequences. *Id*. While the loss of this formerly Indian-owned fee land to a third party non-Indian is quite possibly disappointing to the Turtle Mountain Tribe, it cannot be called catastrophic for tribal self-governance. *Id*. at ¶ 10.

---

[14] *Fredericks v Fredericks*, 888 NW2d 177; 2016 ND 234 (2016).

> We agree with the district court's analysis. This is not an action by the Poitras to collect on a claimed breach of a lease of their land to Gustafson. See *Gustafson v. Estate of Poitra*, 2011 ND 150, ¶¶ 3-5, 8, 14-15; 800 N.W.2d 842 (vacating state court judgment involving interpretation of lease for Indian-owned fee land within the exterior boundaries of Turtle Mountain Indian Reservation where non-Indian lessee brought action against Indian lessors in state court). Rather, this is a quiet title action by Gustafson, a non-Indian owner of fee land within the reservation, to clear his record title to the land and to recover damages for the Poitras' conduct in filing a lessor's lien with the Rolette County Register of Deeds and notifying Gustafson's bank about the lessor's lien. At the time this action was brought, Gustafson, a non-Indian, was the record title owner of the fee land. See *Plains Commerce Bank*, 554 U.S, at 339, 128 S. Ct. 2709; *Fredericks*, 2016 ND 234, ¶ 7; 888 NW2d 177. The fee land at issue in this case had previously passed to Gustafson in the foreclosure action, and at that point, passed outside the immediate control of the Tribe and the Poitras. Gustafson's quiet title action works no additional intrusion on tribal relations or self-government and does not imperil the subsistence of the Tribe or the tribal community and cannot fairly be called catastrophic for tribal self-government. See *Fredericks*, at ¶ 11. We conclude the district court did not err in deciding the tribal court does not have jurisdiction over Gustafson's action to quiet title and to recover damages under the *Montana* exceptions. [*Gustafson*, 916 NW2d at 809-810.]

The same holds true here. Exercise of jurisdiction by the circuit court would have no significant, catastrophic-type consequences to the tribe and its power to control and govern its members and affairs. *Williams*, 358 US at 220. Frankly, there would be little interference, if any, with tribal self-government as a result of the circuit court's ruling. The tribe lost control of the disputed land (perhaps not all activity on that land, but the land itself) when it was transferred by

Indians to non-Indians in 2012. Now that the land is non-Indian fee land, the presumption is against tribal jurisdiction, and resolution of the easement dispute between non-Indians on non-Indian fee lands will have no meaningful impact on the tribe's authority over the reservation and its members. State court jurisdiction exists to decide this matter.[15]

III. CONCLUSION

For these reasons, we reverse the trial court's order granting defendant's motion for summary disposition and remand for further proceedings. We do not retain jurisdiction. No costs to either party, a question of public significance being raised.

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

---

[15] The unpublished case relied upon by the trial court, *Joseph K Lumsden Bahweting Pub Sch Academy v Sault Ste Marie Tribe of Chippewa Indians*, unpublished per curiam opinion of the Court of Appeals, issued October 26, 2004 (Docket No. 252293), has no bearing on this issue. Aside from the fact that it is unpublished, it has no persuasive authority because it involved an agreement between an Indian and a non-Indian that contained a forum-selection clause requiring certain litigation in the tribal court. There is no agreement between these parties with regard to a particular forum. Additionally, the Court's discussion of the efficacy of determining whether a tribal court *could* exercise jurisdiction (an issue we are not confronted with) was in the context of an argument over sovereign immunity, an issue also not present in this case.

BARNES v 21ST CENTURY PREMIER INSURANCE COMPANY

Docket No. 347120. Submitted October 14, 2020, at Detroit. Decided November 5, 2020, at 9:00 a.m.

Plaintiff, Curtis Barnes, brought an action in the Wayne Circuit Court, seeking no-fault benefits from defendant, 21st Century Premier Insurance Company (CPIC), for injuries arising out of a motor vehicle crash. Total Toxicology Labs, LLC; Alwayz On Time Transportation; Synergy Spine and Orthopedic Surgery Center, LLC; and St. John Macomb-Oakland Hospital subsequently intervened, seeking no-fault benefits for services provided to plaintiff. The claims of Alwayz On Time Transportation and Total Toxicology Labs were dismissed before trial. It was undisputed that on the date of the crash Barnes was living in the same two-story house as his grandparents, but the property was separated into "upstairs" and "downstairs" units. Barnes resided in the upstairs unit, and his grandparents resided in the downstairs unit. The grandparents had a no-fault automobile insurance policy through CPIC when the crash occurred. Barnes and intervening plaintiffs argued that the evidence showed that the two units constituted one household for purposes of MCL 500.3114(1), and CPIC contended that the evidence reflected that the two units were separate and distinct households under MCL 500.3114(1). CPIC moved for summary disposition, and the trial court, Brian R. Sullivan, J., denied the motion, concluding that a genuine issue of material fact existed regarding whether the house encompassed one or two households. CPIC subsequently renewed its motion for summary disposition, mostly reiterating its previous arguments. At the motion hearing, the trial court only considered the import of the sole piece of new evidence CPIC had presented—a 2010 no-fault insurance application listing another grandson as a household member but failing to list Barnes as one. The trial court denied the renewed motion for summary disposition. CPIC subsequently stipulated to the entry of an order that the question of Barnes's domicile would be decided at trial. At trial, CPIC moved for a directed verdict after the close of plaintiffs' proofs. The trial court denied the motion, determining that plaintiffs had presented evidence sufficient to create a factual issue for the jury to resolve regarding whether

the property consisted of one household or two. The jury rendered a special verdict, finding that Barnes was domiciled in the same household as his grandparents when the crash occurred. CPIC subsequently consented to entry of judgment against it while reserving the right to appeal the underlying rulings and verdict. CPIC appealed.

The Court of Appeals *held*:

1. MCL 500.3114(1) of the no-fault act, MCL 500.3101 *et seq*., provides, in pertinent part, that a no-fault 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. In determining whether a person is a resident of an insured's household, four factors are weighed: (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place the person contends is his or her "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; and (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household. In this case, the sole question was whether Barnes was domiciled in the same household as his grandparents. CPIC relied on evidence that the upstairs and downstairs units had their own entrances, living rooms, bedrooms, kitchens, bathrooms, gas and electric meters, furnaces, hot water heaters, thermostats, and doorbells. CPIC also pointed to evidence that the two units were separated by an interior door equipped with a deadbolt, that Barnes and his grandmother testified in their depositions that Barnes had everything he needed in the upstairs unit, that Barnes paid his own gas and electric bills, and that Barnes paid half of the mortgage and water bills for the house. The trial court did not err by concluding that a genuine issue of material fact existed regarding whether the house encompassed one or two households and therefore did not err by denying CPIC's motions for summary disposition. Viewing the evidence in a light most favorable to Barnes and the intervening plaintiffs, the evidence supported a conclusion that Barnes and his grandparents formed one family unit living together under the same roof. The house had been used as a family residence and domicile for nearly 50 years; only family members had lived in the home. The key in this particular case was not the physical structure or design of the house, in and of itself, but rather the conduct and

behavior of the people living in the house in the context of that specific structure or design. Furthermore, the payment of rent was not very telling in determining whether two separate households existed within the same structure. Rental or other payments connected to a living space do not really shed light on whether persons are living together as a family unit under the same roof. Finally the four factors weighed in favor of finding that Barnes was domiciled in his grandparents' household: Barnes had no other place of lodging at the time of the crash; he was living in the same house as his grandparents; he intended, at the time of the crash, to remain in the upstairs unit of his grandparents' house for an indefinite length of time; and he had a close and informal relationship with his grandparents. Finally, the insurance application was found to be a red herring. The fact that Barnes's grandfather did not view Barnes as being a household member had little to no bearing on the statutory question whether Barnes was domiciled in the same household as his grandparents. Barnes's grandfather was not engaged in a legal analysis of—or making a legal determination under—MCL 500.3114(1) when he was filling out the no-fault insurance application. To the extent that the insurance application had any relevancy, the evidence did not demand summary dismissal of the complaint. Accordingly, the trial court did not err by denying CPIC's motions for summary disposition.

2. A directed verdict is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. The principles guiding analysis of motions for a directed verdict parallel those applicable to analyzing motions for summary disposition. In this case, the evidence presented at trial essentially mimicked the evidence the parties submitted in support of the motions for summary disposition. The jury was presented with evidence that Barnes and his grandparents were living together as a family unit, i.e., that Barnes was domiciled in the same household as his grandparents. Accordingly, the trial court did not err by denying CPIC's motion for a directed verdict.

3. Under MCR 2.611(A)(1)(e), a trial court may grant a new trial when a jury's verdict was against the great weight of the evidence or contrary to law. In this case, CPIC failed to file a motion for a new trial as required to preserve an appellate argument that a jury's verdict was against the great weight of the evidence. Moreover, even if properly preserved, CPIC's argument failed. It was for the jury to assess Barnes's credibility and that of his grandmother, both of whom testified at trial. The record did not

reveal that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Accordingly, the jury's verdict was not against the great weight of the evidence.

Affirmed.

Romano Law, PLLC (by *Daniel G. Romano* and *Richard A. Moore*) and *Steven A. Hicks* for Curtis Barnes.

Christensen Law (by *Dustin C. Hoff* and *David E. Christensen*) and *Steven A. Hicks* for Synergy Spine and Orthopedic Surgery Center, LLC.

Bruce K. Pazner and *Joshua S. Havens* for St. John Macomb-Oakland Hospital.

Hewson & Van Hellemont, PC (by *Grant O. Jaskulski* and *Jordan A. Wiener*) for 21st Century Premier Insurance Company.

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM. Defendant, 21st Century Premier Insurance Company (CPIC), appeals by right a consent judgment that was entered following a one-day jury trial in which jurors solely determined that plaintiff Curtis Barnes was domiciled in the same household as his grandparents on the date that Barnes was injured in a motor vehicle accident. The grandparents had a no-fault automobile insurance policy through CPIC when the accident occurred. MCL 500.3114(1) generally provides that a no-fault 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." (Emphasis added.) This case presented the question

whether Barnes was domiciled in the same household as his grandparents, and the trial court denied two motions for summary disposition filed by CPIC, as well as CPIC's motion for a directed verdict raised during the trial. On appeal, CPIC argues that the trial court erred by denying the motions for summary disposition and a directed verdict and that the jury's verdict was against the great weight of the evidence. We disagree and affirm.[1]

I. OVERVIEW

Barnes sustained injuries in a car accident on September 27, 2013, at which time his grandparents held the no-fault policy issued by CPIC. It is undisputed that on that date Barnes was living in the same two-story house as his grandparents, but the property was separated into "upstairs" and "downstairs" units. Barnes resided in the upstairs unit, and his grandparents resided in the downstairs unit. The parties presented substantial evidence at summary disposition and at trial. Barnes and intervening plaintiffs argued that the evidence showed that the two units constituted one household for purposes of MCL 500.3114(1), and CPIC contended that the evidence reflected that the two units were separate and distinct households under MCL 500.3114(1). As previously indicated, the trial court denied motions for summary disposition and a directed verdict brought by CPIC, and the jury rendered a verdict in favor of Barnes, after which CPIC consented to entry of judg-

[1] The claims of intervening plaintiffs Alwayz On Time Transportation and Total Toxicology Labs, LLC, neither of which is a party to this appeal, were dismissed before trial. Intervening plaintiffs Synergy Spine and Orthopedic Surgery Center, LLC, and St. John Macomb-Oakland Hospital provided medical services to Barnes, and they are parties to this appeal.

ment against it while reserving the right to appeal the underlying rulings and verdict.

II. THE PERTINENT EVIDENCE

CPIC relied on evidence that the upstairs and downstairs units had their own entrances, living rooms, bedrooms, kitchens, bathrooms, gas and electric meters, furnaces, hot water heaters, thermostats, and doorbells. Barnes's grandfather referred to the "five and five," meaning that there were five rooms downstairs and the same five rooms upstairs (living room, two bedrooms, kitchen, and bathroom). CPIC also pointed to evidence that the two units were separated by an interior door equipped with a deadbolt, that Barnes and his grandmother testified in their depositions that Barnes had everything he needed in the upstairs unit, that Barnes paid his own gas and electric bills, and that Barnes paid half of the mortgage and water bills for the house. Additionally, CPIC cited a copy of the no-fault insurance application that Barnes's grandfather had submitted on December 7, 2010, which listed another grandson, who lived with the grandparents in the downstairs unit, as a "household member," while failing to list Barnes as such.

Barnes and the intervening plaintiffs relied on evidence that only family members had lived in the house for nearly 50 years; that the cable bill was the only utility bill that Barnes paid;[2] that the interior doors of the house were never locked, including the door between the lower and upper levels; that Barnes regularly and freely entered the downstairs unit to do laundry and to retrieve items such as food, towels, and

[2] Barnes indicated that a cousin lived with him in the upstairs unit, and Barnes did not know if his cousin perhaps paid other utility bills associated with the upstairs unit.

linen; and that Barnes contributed money toward expenses of the house but had no rental agreement with his grandparents. They further cited evidence that the cost of house repairs was evenly split regardless of whether only one unit or level was involved; that the house had only one mailbox and address, which Barnes used as his own personal address; that the home was zoned single-family residential; that Barnes and his grandparents had a very close relationship; that Barnes kept personal effects in the house; and that the grandparents set rules for the upstairs unit concerning noise, company, and similar matters. There was also testimony developed at trial showing that Barnes's grandparents could and did enter the upstairs unit at will without the need to obtain Barnes's permission; that the grandmother would sometimes cook using the stove in the upstairs level; that Barnes was always welcome and spent time in the downstairs unit, where he sometimes cooked; and that on occasion they all shared meals together.

III. THE TRIAL COURT'S RULINGS

With respect to the initial motion for summary disposition, CPIC argued that, in light of the evidence, there was no genuine issue of material fact that Barnes's upstairs unit constituted a separate household distinct from the downstairs unit where the grandparents resided. The trial court concluded that a genuine issue of material fact existed regarding whether the house encompassed one or two households, distinguishing the caselaw on which CPIC relied. The trial court deemed it important that there was free, easy, and exercised access between the upstairs and downstairs units that could have been prevented using readily available means but that those

means had never been employed for nearly 50 years, during which time exclusively family members lived in the residence.

Subsequently, CPIC renewed its motion for summary disposition on the issue of domicile, mostly reiterating its prior arguments. At the ensuing motion hearing, the trial court refused to reconsider the question of Barnes's domicile as a whole, reasoning that it had already decided that issue when ruling in regard to CPIC's initial motion for summary disposition. Instead, the court stated that it would only consider the import of the sole piece of new evidence that CPIC had presented—the December 7, 2010 insurance application. CPIC's attorney argued that the grandfather's failure to list Barnes as a household member on the insurance application revealed the grandfather's "subjective belief" that Barnes resided in a "separate" household in the upstairs unit. The trial court questioned CPIC's counsel with respect to the *temporal* relevance of the insurance application, asking whether Barnes even lived in the house at the time of the application. Counsel replied, "My understanding is that Mr. Barnes did live there, at the time." When the court asked about supporting evidence, CPIC's attorney cited unspecified "answers to interrogatories," admitting that CPIC had failed to submit those answers to the court. And, without any evidentiary support, counsel also argued that in subsequent "renewals of the policy" the grandfather had failed to list any additional residents. On the other hand, Barnes's counsel indicated that he was uncertain whether Barnes was residing at the house when the grandfather submitted the insurance application.

Thereafter, the trial court chastised the parties for creating "a morass of total confusion." The court ob-

served that it had "insufficient information to make a ruling" on CPIC's renewed motion for summary disposition in the absence of any record evidence to establish the temporal relevance of the insurance application. The trial court denied the renewed motion for summary disposition without prejudice to CPIC's right to bring a similar motion at a later date. The court allowed the parties 45 days to conduct further discovery. Rather than renewing the motion for summary disposition after conducting the permitted discovery, CPIC subsequently stipulated to the entry of an order that the question of Barnes's domicile would be decided at trial. At trial, CPIC moved for a directed verdict after the close of plaintiffs' proofs. The trial court denied the motion, distinguishing caselaw cited by CPIC and determining that plaintiffs had presented evidence sufficient to create a factual issue for the jury to resolve regarding whether the property consisted of one household or two. The jury subsequently rendered a special verdict, finding that Barnes was domiciled in the same household as his grandparents when the accident occurred. Because CPIC did not dispute that Barnes was injured in the motor vehicle accident, it agreed to entry of a consent judgment, but the stipulation also reserved the right for CPIC to appeal on the issue of domicile. That appeal is before us now.

IV. ANALYSIS

A. SUMMARY DISPOSITION

CPIC first argues that the trial court erred by failing to grant summary disposition in its favor under MCR 2.116(C)(10). CPIC contends that the evidence established as a matter of law that Barnes was not domiciled in the same household as his grandparents but

rather that he resided in a separate and distinct household—the upstairs unit of the house. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo issues of statutory interpretation. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

MCR 2.116(C)(10) provides that summary disposition is appropriate when, "[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." A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's action. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013). "A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact." *Id*. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Pioneer State*, 301 Mich App at 377. A court may only consider substantively admissible evidence actually proffered by the parties when ruling on the motion. *Maiden v Rozwood*, 461 Mich 109, 121; 597

NW2d 817 (1999); see also MCR 2.116(G)(6). "Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

Once again, MCL 500.3114(1) generally provides that a no-fault 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." (Emphasis added.) The no-fault act, MCL 500.3101 *et seq*., does not define the terms "domiciled" and "household." The phrase "domiciled in the same household" has been examined in several appellate decisions. In *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477, 486-487; 274 NW2d 373 (1979), the seminal case on the matter, the plaintiff was injured in a motor vehicle accident, and shortly before the date of the crash, she had been living in a travel trailer that was owned by her insured father-in-law. The travel trailer was located on the father-in-law's property and was situated approximately 40 to 50 feet from his house. *Id*. The Michigan Supreme Court affirmed the trial court's ruling that the plaintiff was "domiciled in the same household" as her father-in-law for purposes of MCL 500.3114(1). *Id*. at 486. Our Supreme Court observed:

> [B]oth our courts and our sister state courts, in determining whether a person is a "resident" of an insured's "household" or, to the same analytical effect, "domiciled in the same household" as an insured, have articulated a number of factors relevant to this determination. In considering these factors, no one factor is, in itself, determinative; instead, each factor must be balanced and weighed with the others. Among the relevant factors are the

following: (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he contends is his "domicile" or "household"; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; [and] (4) the existence of another place of lodging by the person alleging "residence" or "domicile" in the household[.] [*Id*. at 496-497 (citations omitted).][3]

---

[3] In applying the four factors to the evidence and finding in favor of the plaintiff, the *Workman* Court stated:

> First, the record reveals facts indicating it was plaintiff's intention to remain living in the trailer on the property of [her father-in-law] for at least an indefinite length of time. Plaintiff testified that although she, her husband and child were temporarily staying with her younger sister in her mother's home when the accident occurred, if the accident had not happened, it was her family's intention to have gone back to the trailer and remain living there "for an indefinite period of time." Plaintiff further testified that she and her husband were not looking for any other place to live and that she considered the trailer as her home. In addition, she testified that her family's mailing address was the same as her father-in-law's. Second, the record reveals facts indicating that the relationship between plaintiff, her husband and child, and her father-in-law's family was informal and friendly. Plaintiff testified that she was welcome to use and did use all of the facilities of the house (i.e., telephone, washers and dryers, and electricity, by cord from the house to the trailer), that her family ate meals with the senior Workman's family, and that during the day she and her child were "in and out" of the house. Third, the record reveals that the trailer in which plaintiff and her family lived was unquestionably on the same premises, or property, as her father-in-law's house, and that the trailer belonged to her father-in-law. The trailer was located forty to fifty feet from the house. The electrical power for the trailer was supplied by a cord attached to the house and water for the trailer was provided by means of a hose connected to the house. Furthermore, testimony established there was no fence or physical barrier of any type between the house and the trailer. Fourth, the record reveals that plaintiff and her family had left the apartment they were living in prior to

The continuing viability of these four factors was recognized in *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 497; 835 NW2d 363 (2013). The *Grange* Court also noted that this Court in *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 682; 333 NW2d 322 (1983), added five more factors to consider for determining domicile when adult children with complicated living arrangements and insured parents are involved. *Grange*, 494 Mich at 497 n 41.[4] The Supreme Court further indicated that "a person may have one—and *only* one—domicile." *Id*. at 494. "A domicile determination is generally a question of fact; however, where the underlying material facts are not in dispute, the determination of domicile is a question of law for the circuit court." *Id*. at 490.

Aside from the factors mentioned earlier, which are not very helpful in the context of the instant case, we must also examine the specific meaning of the term "household." Again, although the word is not defined in the statute, this Court has addressed the meaning of "household" as used in an insurance policy, relying on dictionary definitions.[5] In *Thomas v Vigilant Ins Co*,

---

moving into the trailer and had no intention of returning there (or to any other lodging). [*Workman*, 404 Mich at 497-498 (citations omitted).]

[4] The *Dairyland* panel stated:

> Other relevant indicia of domicile include such factors as whether the claimant continues to use his parents' home as his mailing address, whether he maintains some possessions with his parents, whether he uses his parents' address on his driver's license or other documents, whether a room is maintained for the claimant at the parents' home, and whether the claimant is dependent upon the parents for support. [*Dairyland*, 123 Mich App at 682.]

[5] We note that it is appropriate to consider dictionary definitions of statutory terms left undefined by the Legislature. See *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 253 n 14; 931 NW2d 571 (2019).

156 Mich App 280, 282-283; 401 NW2d 351 (1986), this Court stated:

> *Black's Law Dictionary* (rev 4th ed), p 873, defines "household" as: "a family living together . . . [t]hose who dwell under the same roof and compose a family." *Webster's Third New International Dictionary* (1971) defines "household" as: "[t]hose who dwell under the same roof and compose a family; a domestic establishment; specifically, a social unit comprised of those living together in the same dwelling place." *The American Heritage Dictionary of the English Language* (1976) defines "household" as: "[a] domestic establishment including the members of a family and others living under the same roof." The commonly understood meaning of the word "household" is a family unit living under the same roof. [Alterations and ellipsis in original.]

We hold that the trial court did not err by denying CPIC's motions for summary disposition. Viewing the evidence in a light most favorable to Barnes and the intervening plaintiffs, we agree that the evidence supported a conclusion that Barnes and his grandparents formed one family unit living together under the same roof. The house has been used as a family residence and domicile for nearly 50 years; only family members have lived in the home. In our view, the key in this particular case is not the physical structure or design of the house, in and of itself, but rather the conduct and behavior of the people living in the house in the context of that specific structure or design. Of course, the fact that the upstairs unit can stand alone as a fully functional home—having bedrooms, a bathroom, a living room, and a kitchen—is a relevant consideration, as is the fact that the upstairs unit has its own furnace, hot water heater, gas and electric meters, thermostat, and doorbell. The evidence, however, also revealed that interior doors were not locked, including

the door between the upper and lower units; that Barnes regularly went into the downstairs unit for various purposes absent the need for permission; that the grandparents had free and unconstrained access to the upstairs unit, which was exercised on occasion; and that Barnes pitched in financially at times by helping cover costs associated with the whole house and not just the upstairs unit. If the evidence had conclusively established that the connecting door between the two units was always locked; that Barnes never accessed the lower unit, nor had the liberty to do so; that his grandparents never accessed the upper unit, nor had the freedom to do so; and that costs were never shared, we would conclude that Barnes and his grandparents were not "living together" as a family unit in the same household and were instead, effectively, living separately in two distinct households. But that was simply not the situation presented in this case—it was just the opposite. Indeed, we believe that the trial court could have properly entered summary judgment in favor of Barnes and the intervening plaintiffs.

Furthermore, the whole discussion regarding whether Barnes was effectively paying rent and that he paid costs associated with the upstairs unit is of limited relevance in determining whether there were two separate and distinct households. Had there been a typical upstairs for a two-story house, e.g., a couple of bedrooms and a bathroom, and had Barnes lived in the house and slept in one of the upstairs bedrooms, his payment of rent to stay in the home or his financial contributions for a pro rata share of utility usage would not change the fact that he was domiciled in the same household as his grandparents. In other words, adult children and grandchildren sometimes pay "rent" to their parents or grandparents when living in their homes, or otherwise help with expenses associated

with stays in a home, regardless of the physical configuration of a particular house. Consequently, the payment of rent is not that telling in determining whether two separate households exist within the same structure. Rental or other payments connected to a living space do not really shed light on whether persons are living together as a family unit under the same roof.

Next, the *Workman* factors favor a finding that Barnes was domiciled in his grandparents' household. Barnes had no other place of lodging at the time of the accident; he was living in the same house as his grandparents; he intended, at the time of the accident, to remain in the upstairs unit of his grandparents' house for an indefinite length of time; and he had a close and informal relationship with his grandparents. See *Workman*, 404 Mich at 496-497. The *Dairyland* factors that pertain to adult children are not really relevant and do not squarely fit the situation, although Barnes and his grandparents did share the same mailing address, which weighs in Barnes's favor. *Dairyland*, 123 Mich App at 682.

With respect to the insurance application, we find it to be a red herring. *Assuming* that Barnes was living in the house and upstairs unit when his grandfather filled out the insurance application in 2010, the fact that his grandfather did not view Barnes as being a household member really has little to no bearing on the statutory question whether Barnes was domiciled in the same household as his grandparents. Barnes's grandfather was not engaged in a legal analysis of—or making a legal determination under—MCL 500.3114(1) when he was filling out the application. Stated otherwise, the grandfather's presumed subjective assessment that Barnes did not reside in the

grandparents' household does not and cannot control the determination under MCL 500.3114(1). Our position would be the same had the grandfather listed Barnes as a household member in the insurance application—doing so would not make it so for purposes of MCL 500.3114(1). And we suspect that CPIC would make that very argument if Barnes had been identified in the application as a household resident. To the extent that the insurance application had any relevancy, the evidence certainly did not demand summary dismissal of the complaint.

We do find it necessary to address a couple cases on which CPIC relies. CPIC places a great deal of weight on this Court's opinion in *Fowler v Auto Club Ins Ass'n*, 254 Mich App 362; 656 NW2d 856 (2002). In *Fowler*, the plaintiff was injured while repairing a truck, and under MCL 500.3114(1), he sought insurance benefits pursuant to a no-fault policy the defendant insurer issued to his mother, claiming the status of a relative domiciled in his mother's household. *Id*. at 363. The trial court determined as a matter of law that the plaintiff was not domiciled in his parents' household. *Id*. After noting the factors set forth in *Workman* and *Dairyland*, the *Fowler* panel ruled as follows:

> In this case, at the time of the accident plaintiff was divorced, was approximately thirty years old, and lived with his girlfriend in a carriage house apartment located next to his parents' house. Plaintiff had lived in the carriage house apartment for more than three years before he was injured, and did not have any plans to move. The carriage house and the main house had a shared address; however, the carriage house had its own entrance, its own set of locks, and its own walkway. The apartment consisted of a kitchen, a bathroom, a living room, and four bedrooms. Plaintiff testified that the carriage house had its own water, electric, gas, and telephone service, and that he or his girlfriend paid the utility bills.

> Plaintiff paid his parents, who had keys to the carriage house, rent of $500 a month, although the rental agreement was not reduced to a writing. Until he was injured, plaintiff and his girlfriend both worked and they shared housekeeping, laundry, and grocery shopping responsibilities. Plaintiff performed lawn maintenance and snow removal for his parents, and had an informal relationship in which he was allowed full access to their home. Plaintiff and his parents often ate together.
>
> We find that the trial court properly concluded that the carriage house residence was a self-sufficient, freestanding, and independent residence, and that after weighing the pertinent factors it was clear that plaintiff was not domiciled with his parents. Unlike the arrangement in *Workman*, the evidence in this case established that plaintiff's living arrangement was independent from his parents' household. Plaintiff did not have a room in his parents' house, he did not rely on his parents for utilities or appliances, and plaintiff paid rent until he was injured. The fact that plaintiffs' parents had keys to the carriage house and that plaintiff stored items of personal property in his parents' house was insufficient in the face of the other evidence to make him a member of their household. *Dairyland*, [123 Mich App] at 684. On these facts, the trial court correctly determined as a matter of law that plaintiff was not domiciled in his parents' household and therefore was not entitled to benefits under his mother's no-fault policy. [*Fowler*, 254 Mich App at 365-366.]

First, "a self-sufficient, freestanding, and independent residence," a carriage house, was at issue in *Fowler*, not a mere single-family house structure. The facts in *Fowler* did not reach the level of depicting a group of individuals living together as a family unit. Furthermore, while the plaintiff in *Fowler* had access to his parents' home, it does not appear that he actually accessed and utilized his parents' home as regularly as Barnes did in relation to the downstairs unit of his grandparents' house. As opposed to the circumstances in *Fowler*, there was evidence here that Barnes's living

arrangement was not independent from his grandparents' household.

In *Hicks v Auto Club Ins Ass'n*, 189 Mich App 420, 421-422; 473 NW2d 704 (1991), the plaintiff was injured while alighting from a vehicle, and she filed suit against her son's insurer, arguing that she and her son were domiciled in the same household. The trial court concluded that the plaintiff and her son were not domiciled in the same household. *Id*. at 422. And this Court held that the trial court did not commit error. *Id*. The evidence established that the plaintiff and another individual, McMillan, had "purchased a house which was divided into two separate units, one upstairs and one downstairs." *Id*. The plaintiff and McMillan lived in the lower unit, and the plaintiff's son and his family occupied the upper unit. *Id*. "Each unit had its own living area, sleeping quarters, kitchen, and bathroom." *Id*. And "[t]he units had separate entrances, post office addresses, telephone lines, and electric bills." *Id*. Additionally, there was a formal agreement pursuant to which plaintiff's son paid her $200 per month in rent. *Id*.

Hicks made no mention whatsoever regarding cross-access and cross-use of the upper and lower units by the family members, which renders *Hicks* of little value to us. Contrary to the evidence in this case, there is no indication in *Hicks* that the plaintiff, McMillan, the plaintiff's son, and the son's family were living together as a family unit in the house.

In sum, we conclude that the trial court did not err by denying CPIC's motions for summary disposition because there was a genuine issue of material fact regarding whether Barnes was domiciled in the same household as his grandparents.

B. MOTION FOR A DIRECTED VERDICT

CPIC next argues that the trial court erred by denying its motion for a directed verdict. This Court reviews de novo a trial court's ruling on a motion for a directed verdict. *Nahshal v Fremont Ins Co*, 324 Mich App 696, 718-719; 922 NW2d 662 (2018). A motion for a directed verdict challenges the sufficiency of the evidence. *Id*. at 719. A directed verdict "is only appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Id*. If reasonable persons could honestly reach different conclusions regarding whether the nonmoving party established a claim, the motion for a directed verdict must be denied, with the case being resolved by the jury. *Id*. With respect to a motion for a directed verdict, "[a]n appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). "Credibility determinations are inappropriate" for purposes of ruling on a motion for a directed verdict. *Williamstown Twp v Hudson*, 311 Mich App 276, 287; 874 NW2d 419 (2015).

The evidence presented at trial essentially mimicked the evidence the parties submitted in support of the motions for summary disposition and their responses to them. And the principles guiding analysis of motions for summary disposition parallel those applicable to analyzing motions for a directed verdict. See *Monaco v Home-Owners Ins Co*, 317 Mich App 738, 745; 896 NW2d 32 (2016) ("The test with respect to a motion for summary disposition brought under MCR 2.116(C)(10) is essentially the same in regard to a

motion for a directed verdict . . . ."). The jury was presented evidence that Barnes and his grandparents were living together as a family unit, i.e., that Barnes was domiciled in the same household as his grandparents. Accordingly, for the reasons discussed earlier, we hold that the trial court did not err by denying CPIC's motion for a directed verdict.

C. GREAT WEIGHT OF THE EVIDENCE

Finally, CPIC argues that the jury's verdict was against the great weight of the evidence. Under MCR 2.611(A)(1)(e), a trial court may grant a new trial when a jury's verdict was "against the great weight of the evidence or contrary to law." In *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003), this Court stated:

> Plaintiff next argues that the trial court abused its discretion by denying plaintiff's motion for a new trial on the asserted ground that the jury's verdict was against the great weight of the evidence. We review the trial court's denial of a motion for a new trial for an abuse of discretion. In deciding whether to grant or deny a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court gives substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. This Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. [Citations omitted.]

"The jury's verdict should not be set aside if there is competent evidence to support it." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). The question of witness credibility is generally

left for the finder of fact to assess. *Dawe v Dr Reuven Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). Similarly, it is for the jury to decide how much weight should be given to testimony. *Id*.

CPIC failed to file a motion for a new trial as required to preserve an appellate argument that a jury's verdict was against the great weight of the evidence. *Hyde v Univ of Mich Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997); see also MCR 7.211(C)(1)(c) (providing that there is no need for an appellant to file a motion for remand or a motion for a new trial following a *bench* trial in order to preserve a claim that the verdict was against the great weight of the evidence). Moreover, even if properly preserved, CPIC's argument fails. It was for the jury to assess Barnes's credibility and that of his grandmother, both of whom testified at trial.[6] The record simply does not reveal that the evidence, which we discussed at length, preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Indeed, there was competent evidence to support the jury's verdict that Barnes was domiciled in the same household as his grandparents when the accident occurred. We thus conclude that the jury's verdict was not against the great weight of the evidence.

We affirm. Having fully prevailed on appeal, Barnes and intervening plaintiffs may tax costs under MCR 7.219.

BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ., concurred.

---

[6] The deposition testimony of Barnes's grandfather was read to the jury.

PEOPLE v STOVALL

Docket No. 342440. Submitted June 9, 2020, at Detroit. Decided November 5, 2020, at 9:05 a.m. Second-degree murder sentence vacated and case remanded 510 Mich ___ (2022).

In 1991, Montez Stovall pleaded guilty in the Recorder's Court, Thomas E. Jackson, J., to two counts of second-degree murder, MCL 750.317, and two counts of possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b(1), after he shot and killed two men while he was a juvenile. In exchange for defendant's guilty pleas, the prosecution reduced the charges in one of the cases from first-degree murder, MCL 750.316, to second-degree murder, MCL 750.317, with defendant sentenced to two concurrent sentences of life imprisonment with the possibility of parole after 10 years and the mandatory two-year sentence for the felony-firearm convictions. Over the next quarter-century, defendant filed several motions for relief from judgment in the trial court, all of which were denied. In 2016, after several United States Supreme Court decisions regarding the sentencing of juvenile offenders, defendant again moved for relief from judgment in the Wayne Circuit Court, asserting that there had been a retroactive change in the law warranting the withdrawal of his guilty plea and the vacation of his sentences. The court, Kelly Ramsey, J., determined that defendant was not entitled to relief from judgment. Defendant appealed.

The Court of Appeals *held*:

1. MCR 6.502(G)(2) provides, in pertinent part, that a defendant may file a second or subsequent motion for relief from judgment on the basis of a retroactive change in law that occurred after the first motion for relief from judgment. It was undisputed that the United States Supreme Court's decisions in *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), brought about a retroactive change in the law after defendant filed his first motion for relief from judgment in 1995. While these Supreme Court cases may not, as the trial court concluded, provide substantive support for defendant's

motion, they tenuously met the procedural requirement to allow defendant to file a successive motion for relief from judgment.

2. An illusory plea bargain is one in which the defendant is led to believe that the plea bargain has one value when, in fact, it has another lesser value. In this case, the prosecution reduced the first-degree-murder charge for defendant's killing of an individual in exchange for defendant pleading guilty to two counts of second-degree murder. Defendant's assertion that his plea bargain was illusory because he pleaded guilty to a lesser offense to avoid an unconstitutional sentence was not supported by the facts or the law. Under the terms of the second-degree-murder statute, MCL 750.317, defendant could have been sentenced to imprisonment for any term of years in the sentencing court's discretion. But, consistently with the terms of the plea agreement, defendant was sentenced to life imprisonment with the possibility of parole after serving 10 years of the second-degree-murder sentences and the two-year felony-firearm sentence. Wholly apart from avoiding the unconstitutional sentence, defendant received the benefit of a certain date at which he would become eligible for consideration of release on parole and avoided the risk of being found guilty of first-degree murder, which would have constituted a more severe sentence. Moreover, *Miller* and *Montgomery* did not categorically bar sentences of life imprisonment without parole for juveniles but, rather, required an individualized sentencing hearing to determine whether such a sentence is proportionate after considering a defendant's juvenile status. Thus, defendant's choice to plead guilty to a lesser offense definitively removed a life imprisonment without parole sentence from the range of possible penalties facing defendant. As a result, defendant received a benefit for having pleaded guilty apart from avoiding an unconstitutional sentence. Yet, even if the only benefit defendant received was the avoidance of an unconstitutional sentence, this did not, as a matter of law, render the plea bargain illusory. There was nothing in the record to suggest that the prosecution or defendant's counsel misrepresented the applicable law to defendant when defendant chose to accept the plea bargain or enter his guilty plea. Nor was there any evidence that any party in this case was aware that mandatory sentences of life imprisonment without the possibility of parole for juvenile offenders were impermissible under the Eighth Amendment. Finally, given that defendant was 18 years old when he agreed to the plea bargain and that defendant stated on the record that he understood the terms of his plea agreement, the sentencing court did not err by failing to consider defendant's purported juvenile status when it accepted his guilty pleas under the terms of the plea bargain.

3. The trial court did not err by denying defendant's successive motion for relief from judgment. The United States Supreme Court's decisions in *Miller* and *Montgomery* did not render defendant's sentences of life imprisonment with the possibility of parole invalid. *Miller* held that mandatory sentences of life imprisonment without the possibility of parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishment; the Court in *Miller* specified that a state is not required to guarantee eventual freedom but must provide juveniles some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. *Montgomery* held that the rule announced in *Miller* applied retroactively to juvenile offenders. These cases apply only to mandatory sentences of life imprisonment without the possibility of parole. Accordingly, in this case, defendant's sentences do not violate the Eighth Amendment because defendant did not receive a mandatory sentence of life imprisonment without parole. Further, defendant's sentences comported with the Eighth Amendment's requirement that juvenile offenders be given a meaningful opportunity to obtain release on the basis of maturity and rehabilitation. Defendant was eligible and has been considered for parole, which constitutes a meaningful opportunity for release, as required by *Miller*. The fact that defendant has been unsuccessful in obtaining release does not render his sentences violative of the Eighth Amendment. Additionally, defendant's argument that the parole board's policies have stymied his efforts to obtain release was a matter to be asserted against the parole board; it was not a ground for vacating defendant's sentences. Finally, neither *Miller* nor *Montgomery* supported defendant's proposition that consideration of his juvenile status was a procedural requirement when sentencing all individuals convicted of a crime committed while a juvenile. Defendant was not sentenced to either a mandatory or a discretionary sentence of life imprisonment without the possibility of parole; rather, he received a sentence that expressly provided for the possibility of parole. Accordingly, defendant's sentences of life imprisonment with the possibility of parole did not violate due process or constitute cruel or unusual punishment, and the trial court did not abuse its discretion by denying defendant's successive motion for relief from judgment.

Affirmed.

GLEICHER, P.J., dissenting, would have remanded the case for a resentencing hearing because defendant's sentences rested on misconceptions of law and facts that undercut the sentences'

> credibility. Two changes have undermined the legal foundation for defendant's sentences. First, it has become progressively more difficult for an inmate convicted of second-degree murder to obtain parole. The Legislature has extended the amount of time that must be served before eligibility for parole consideration from 10 to 15 years and has eliminated a prisoner's right to appeal a parole denial. Subsequent statutes have tightened parole procedures, making it more difficult for a prisoner to enter even the initial steps of the process. Second, as a result of these legislative overhauls, Michigan's parole system now affords virtually unbridled discretion to politically appointed parole board members and the sentencing judge. The changes in the law and the parole board's approach, standing alone, did not afford defendant a legal ground for withdrawing his guilty plea or being resentenced; however, combined with the change in the law brought about by *Miller* and *Montgomery*, the shift in the parole processes invalidated defendant's sentences and compelled a resentencing hearing. Defendant's plea and sentences were predicated on two misconceptions, one legal and the other factual: that he would be imprisoned for life without the possibility of parole if convicted of first-degree murder, and that he would have a genuine opportunity for parole after serving 10 years of a parolable life sentence. Legally, had defendant been convicted of or pleaded to first-degree murder, he would have been sentenced to a mandatory term of life imprisonment without parole. But post-*Miller*, likely he would have been automatically eligible to be resentenced to a minimum term of no less than 25 years and no more than 40 years' imprisonment. Factually, if Michigan's parole system functioned in the manner envisioned by the Legislature when it enacted the version of the statute applicable to defendant, defendant would have been considered for release by now, if not paroled. Instead, defendant is serving a de facto sentence of life in prison without the possibility of parole, with no reasonable ability to demonstrate that he has matured and been rehabilitated.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Sofia V. Nelson*) for defendant.

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

SAWYER, J. This case is before us on remand from our Supreme Court for consideration as on delayed leave granted.[1] Defendant appeals the trial court's order denying his successive motion for relief from judgment. We affirm.

In 1991, while still a juvenile, defendant shot and killed two men. As part of a plea agreement with the prosecution, defendant pleaded guilty to two counts of second-degree murder, MCL 750.317, and two counts of possessing a firearm when committing or attempting to commit a felony (felony-firearm), MCL 750.227b(1). In exchange for defendant's guilty pleas, the prosecution reduced the charges in one of the cases from first-degree murder, MCL 750.316, to second-degree murder, MCL 750.317, with defendant sentenced to two concurrent sentences of life imprisonment with the possibility of parole after 10 years and the mandatory two-year sentence for the felony-firearm convictions. In pleading guilty to second-degree murder, defendant avoided the mandatory sentence of life imprisonment without the possibility of parole were he found guilty of first-degree murder.

Over the next quarter-century, defendant filed several motions for relief from judgment in the trial court, all of which were denied. In 2016, after several United States Supreme Court decisions regarding the sentencing of juvenile offenders, defendant filed another successive motion for relief from judgment in the trial court, asserting that there had been a retroactive change in the law warranting the withdrawal of his guilty plea and the vacation of his sentences. After considering defendant's motion, the trial court deter-

[1] *People v Stovall*, 504 Mich 892 (2019).

mined that defendant was not entitled to relief from judgment because of the validity of his sentences. This appeal ensued.

I. STANDARDS OF REVIEW

This Court reviews "a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of facts supporting its decision for clear error. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes or makes an error of law." *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010) (citations omitted). "Interpretation of a court rule is treated like interpretation of a statute, it is a question of law that is reviewed de novo." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). Similarly, questions of constitutional law are reviewed de novo. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

Unpreserved constitutional claims are reviewed against the plain-error standard. *People v Vandenberg*, 307 Mich App 57, 61; 859 NW2d 229 (2014), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actu-

> ally innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. [*Carines*, 460 Mich at 763-764 (quotation marks, citations, and brackets omitted).]

II. APPLICABLE LEGAL PRINCIPLES

Defendant premises much of his argument on two recent cases decided by the United States Supreme Court that exerted a significant change on the sentencing of juvenile offenders. In *Miller v Alabama*, 567 US 460, 479; 132 S Ct 2455; 183 L Ed 2d 407 (2012), the Supreme Court held that the prohibition against cruel and unusual punishment in the Eighth Amendment of the United States Constitution forbids "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In reaching this conclusion, the *Miller* Court was concerned with the mandatory nature of these punishments that denied a sentencing judge the opportunity to make individualized sentencing determinations and to consider a juvenile's age or circumstances before deciding whether a sentence of life imprisonment without the possibility of parole was appropriate. *Id*. at 477-478, 480. However, *Miller* did not categorically reject life imprisonment without the possibility of parole for juvenile offenders. Rather, it required that sentencing courts consider an offender's juvenile status and connected circumstances before determining whether a sentence of life imprisonment without the possibility of parole was a proportionate sentence. *Id*. at 479.

Six years later, the United States Supreme Court revisited its *Miller* holding in *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016). Writing for the majority, then Justice Anthony Kennedy described *Miller* as holding "that a juvenile convicted of

a homicide offense could not be sentenced to life in prison without parole absent consideration of the juvenile's special circumstances in light of the principles and purposes of juvenile sentencing." *Id*. at 193-194. While *Miller* expressed a procedural requirement, its holding established that the penological justifications that supported sentencing juvenile offenders to life in prison without the possibility of parole "collapse in light of 'the distinctive attributes of youth.' " *Id*. at 208, quoting *Miller*, 567 US at 472. As a result, *Miller* announced a substantive rule of law that life imprisonment without the possibility of parole is an excessive punishment for juvenile offenders "whose crimes reflect transient immaturity." *Montgomery*, 577 US at 210. And because *Miller* announced a substantive rule of constitutional law, its holding had retroactive effect for those juvenile offenders who had been sentenced before *Miller* was decided. *Id*. at 212. The Supreme Court suggested that, as an alternative to relitigating sentences that violated *Miller*'s holding, states could remedy the situation by providing juvenile offenders serving mandatory sentences of life imprisonment without the possibility of parole the possibility to be considered for parole. *Id*.

Defendant asserts that these two decisions constituted a retroactive change in the law that rendered his sentences of life imprisonment with the possibility of parole invalid. And, as a result, he argues that the trial court erred by denying his successive motion for relief from judgment. We disagree.

III. ANALYSIS

Before turning to defendant's substantive claims, we must first address a procedural argument put forward by the prosecution. Under MCR 6.502(G)(1), one of several court rules that govern motions for relief from

judgment, a criminal defendant is entitled to file "one and only one motion for relief from judgment . . . with regard to a conviction." However, a defendant may file a second or subsequent motion for relief from judgment on the basis of "a retroactive change in law that occurred after the first motion for relief from judgment . . . ." MCR 6.502(G)(2). It is undisputed that *Miller* and *Montgomery* brought about a retroactive change in the law after defendant filed his first motion for relief from judgment in 1995. The court rule allows a defendant to file a motion for relief from judgment on the basis of a retroactive change in the law that occurred after a defendant's first motion for relief from judgment, which is precisely what defendant did in the trial court. And defendant's arguments in the trial court and in this Court rely on the retroactive change defined in *Miller* and *Montgomery*. While these Supreme Court cases may not, as the trial court concluded, provide substantive support for defendant's motion, they tenuously meet the procedural requirement to allow defendant to file a successive motion for relief from judgment. As a result, we will address defendant's substantive claims.

A. ILLUSORY PLEA BARGAIN

Defendant first asserts that the trial court abused its discretion by denying his successive motion for relief from judgment because his guilty plea was the result of an illusory plea bargain. We disagree.

Defendant pleaded guilty to two counts of second-degree murder and two counts of felony-firearm as a result of a plea agreement he entered into with the prosecution. "A defendant pleading guilty must enter an understanding, voluntary, and accurate plea." *People v Brown*, 492 Mich 684, 688-689; 822 NW2d 208

(2012). "To ensure that a guilty plea is accurate, the trial court must establish a factual basis for the plea. In order for a plea to be voluntary and understanding, the defendant must be fully aware of the direct consequences of the plea." *People v Pointer-Bey*, 321 Mich App 609, 616; 909 NW2d 523 (2017) (quotation marks and citations omitted). When, as is the case here, "a plea is offered pursuant to a bargain with the prosecutor, voluntariness depends upon the defendant's knowledge of the actual value of the bargain." *People v Williams*, 153 Mich App 346, 350; 395 NW2d 316 (1986) (quotation marks and citation omitted). "A criminal defendant may be entitled to withdraw his or her guilty plea if the bargain on which the guilty plea was based was illusory, i.e., the defendant received no benefit from the agreement." *Pointer-Bey*, 321 Mich App at 621. Similarly, "an illusory plea bargain is one in which the defendant is led to believe that the plea bargain has one value when, in fact, it has another lesser value." *Williams*, 153 Mich App at 350. In this case, the prosecution reduced the first-degree-murder charge for defendant's killing of an individual in exchange for defendant pleading guilty to two counts of second-degree murder. Defendant asserts that because he pleaded guilty to a lesser offense to avoid an unconstitutional sentence, his plea bargain was illusory. However, this argument is neither supported by the facts nor by the law.

Undoubtedly, defendant's plea bargain allowed him to avoid a sentence that would subsequently be declared unconstitutional by the Supreme Court in *Miller* and *Montgomery*. It does not follow, however, that the plea bargain was wholly without benefit. Under the terms of the second-degree-murder statute, MCL 750.317, defendant could have been sentenced to imprisonment for "any term of years" in the sentencing

court's discretion. But, consistently with the terms of the plea agreement, defendant was sentenced to life imprisonment with the possibility of parole after serving 10 years of the second-degree-murder sentences and the two-year felony-firearm sentence. Wholly apart from avoiding the unconstitutional sentence, defendant received the benefit of a certain date at which he would become eligible for consideration of release on parole and avoided the risk of being found guilty of first-degree murder, which would have constituted a more severe sentence. Moreover, *Miller* and *Montgomery* did not categorically bar sentences of life imprisonment without parole for juveniles but required an individualized sentencing hearing to determine whether such a sentence is proportionate after considering a defendant's juvenile status. *Miller*, 567 US at 479; *Montgomery*, 577 US at 208-210. Thus, defendant's choice to plead guilty to a lesser offense definitively removed a life imprisonment without parole sentence from the range of possible penalties facing defendant. As a result, defendant received a benefit for having pleaded guilty apart from avoiding an unconstitutional sentence.

Yet, even if the only benefit defendant received was the avoidance of an unconstitutional sentence, this would not, as a matter of law, render the plea bargain illusory. As articulated by the United States Supreme Court in *Brady v United States*, 397 US 742, 757; 90 S Ct 1463; 25 L Ed 2d 747 (1970),

> absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against

> him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered. [Citation omitted.]

There is nothing in the record to suggest that the prosecution or defendant's counsel misrepresented the applicable law to defendant when defendant chose to accept the plea bargain or enter his guilty plea. Nor is there any evidence that any party in this case was aware that mandatory sentences of life imprisonment without the possibility of parole for juvenile offenders were impermissible under the Eighth Amendment. Defendant voluntarily admitted to killing two people and received the agreed-upon sentences. As the Supreme Court further articulated in *Brady*, the United States Constitution does not require "that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that . . . the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." *Id*. The record indicates that all parties in this case, including the sentencing judge, moved forward in good faith, applying the law as it was understood at the time. Defendant was aware of the terms of the plea agreement and stated, on the record, that he understood the terms of his sentences. That one part of defendant's calculus in deciding to accept the plea bargain—the mandatory sentence of life without the possibility of parole if found guilty of first-degree murder—was rendered unconstitutional nearly 20 years later does not, under the terms of *Brady*, render the plea bargain illusory or invalidate defendant's pleas.

Finally, defendant asserts that his pleas were invalid because he lacked the capacity to understand the terms and consequences of the plea bargain. He argues that the sentencing court should have considered his juvenile status as part of the plea process and that the court's failure to do so violated due process. We note that defendant did not raise this argument in the trial court as part of his successive motion for relief from judgment; as a result, it is unpreserved for appeal. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). As an unpreserved constitutional error, this claim is subject to plain-error review. *Vandenberg*, 307 Mich App at 61.

Defendant asserts that the sentencing court was required to take account of his juvenile status when accepting his guilty plea in accordance with the terms of the plea bargain. However, defendant was more than 18 years old when he agreed to the plea bargain and entered his plea. At defendant's plea hearing, the court and defendant's counsel explained to defendant the terms of the plea agreement and sentence; moreover, defendant stated on the record that he understood the terms. At no point did defendant state that he did not or could not understand. Further, defendant states in his appellate brief that he understood the terms of the plea agreement to mean that he would be sentenced to life imprisonment and be eligible for parole after serving 10 years. These, of course, are the terms of the plea agreement entered on the record and the sentence defendant received, undermining defendant's assertion that he lacked the capacity to understand the terms of his agreement. Rather, this seems more akin to a defendant seeking to withdraw his plea because he is dissatisfied with the sentence to which he agreed. However, dissatisfaction with a sentence does not render a guilty plea invalid. See *People v Fonville*, 291

Mich App 363, 378; 804 NW2d 878 (2011) (stating that "dissatisfaction with the sentence or incorrect advice from the defendant's attorney" do not constitute justification for withdrawal of a guilty plea). Considering all these factors and the record available, we cannot conclude that the sentencing court erred by failing to consider defendant's purported juvenile status when it accepted his guilty pleas under the terms of the agreed-upon plea bargain.

Because defendant's sentences were not premised on a guilty plea resulting from an illusory plea bargain, it was not outside the range of principled outcomes for the trial court to deny defendant's successive motion for relief from judgment on this basis.

B. CONSTITUTIONAL CLAIMS

Defendant next asserts that the trial court abused its discretion by denying defendant's successive motion for relief from judgment because his sentences violate due process and constitute cruel or unusual punishment. We disagree.[2]

We begin with defendant's claim that his sentences constitute cruel or unusual punishment. "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). Generally, the protection afforded under the Michigan Constitution is considered to be broader than that provided for under the United

[2] Although the trial court did not address these issues in its order denying defendant's motion, we exercise our discretion to resolve these issues that defendant presented to the trial court because the record provides "all the facts necessary to resolve [the] issue[s] . . . ." *Metamora Water Serv, Inc*, 276 Mich App at 382.

States Constitution. As a result, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (quotation marks and citation omitted).

"The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions." *Miller*, 567 US at 469 (quotation marks and citation omitted). In construing this principle, the Supreme Court held in *Miller* that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id*. at 465. While these sentences violate the Eighth Amendment, the Supreme Court stated that "[a] State is not required to guarantee eventual freedom, but must provide [juveniles] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id*. at 479 (quotation marks and citation omitted). Further, in *Montgomery*, the Supreme Court held that the rule announced in *Miller* applied retroactively to juvenile offenders. *Montgomery*, 577 US at 212. This Court has interpreted the holding of these two cases to guarantee that defendants convicted as juveniles "at a maximum . . . are afforded some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. At a minimum, these cases apply only to mandatory sentences of life without the possibility of parole." *People v Williams*, 326 Mich App 514, 521; 928 NW2d 319 (2018) (quotation marks and citations omitted), rev'd on other grounds 505 Mich 1013 (2020).[3]

[3] In *Williams*, unlike the case at bar, the defendant was convicted of both first-degree murder and second-degree murder. The defendant in *Williams* argued that he was entitled under *Miller v Alabama* to be resentenced on his second-degree-murder conviction, and he advanced

Applying these principles as they were construed in *Williams*, we conclude that defendant's sentences do not constitute cruel or unusual punishment. If the rule articulated in *Miller* and *Montgomery* is given a minimal reading, defendant's sentences do not violate the Eighth Amendment because defendant did not receive a mandatory sentence of life imprisonment without parole. *Williams*, 326 Mich App at 521-522. Conversely, if *Miller* and *Montgomery* are given a maximal reading, defendant's sentences still comport with the Eighth Amendment's requirement that juvenile offenders be given a meaningful opportunity to obtain release on the basis of maturity and rehabilitation. *Id*. at 521. As is demonstrated by the record, defendant is eligible and has been considered for parole. Under this Court's decision in *Williams*, this constitutes a meaningful opportunity for release, as required by *Miller*. *Id*. at 522. "And because defendant has some meaningful opportunity to obtain release from his sentence of life with the possibility of parole, that sentence was not

---

two principal arguments: (1) that, like defendant in this case, the decision in *Miller* invalidated his life-with-parole sentence for second-degree murder and (2) that the sentencing judge's belief that the defendant's mandatory sentence of life without parole on the first-degree-murder conviction, now deemed invalid, might have improperly influenced the judge's sentencing decision on the second-degree-murder conviction. This Court rejected both arguments. *Williams*, 326 Mich App at 519. The Michigan Supreme Court thereafter reversed, holding that the trial court "shall consider whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first-degree murder." *Williams*, 505 Mich at 1013. That is, the Court accepted the defendant's second argument, an argument not available to defendant in our case because he was not facing a mandatory life sentence. Our consideration of *Williams* in this case is only in regard to the defendant's first argument—whether *Miller* applies to sentences of life imprisonment with parole for second-degree murder. The Michigan Supreme Court did not consider, nor did it reverse, this Court's analysis and conclusion on that issue.

invalid under *Miller*." *Id*. While defendant has, until now, been unsuccessful in obtaining release, this fact does not render his sentences violative of the Eighth Amendment. *Miller* requires only that defendant be provided a meaningful opportunity to obtain release, not that he be guaranteed eventual freedom. *Miller*, 567 US at 479.

Defendant invites this Court to extend the provisions of *Montgomery* and *Miller* to sentences beyond those labeled "life imprisonment without parole." In support of this invitation, defendant makes mention of a multitude of cases decided by the supreme courts of our sister states and several federal circuit courts of appeal. We note that these sorts of cases lack precedential authority but can be considered for their persuasive value. See *People v Walker (On Remand)*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019) ("While the decisions of lower federal courts and other state courts are not binding on this Court, they may be considered as persuasive authority.") (quotation marks and citation omitted). However, none of the cases on which defendant relies addresses the sentence at issue here—life imprisonment with the possibility of parole in 10 years. Rather, those cases deal with the constitutionality of term-of-years sentences that act as de facto life sentences. "[A] sentence of life *with* the possibility of parole is not a de facto sentence of life *without* the possibility of parole." *Williams*, 326 Mich App at 521 n 3. Defendant's sentences are different not only in degree, but in kind, and the cases on which he relies to extend *Miller* and *Montgomery* are inapposite to this goal.

Defendant also asserts that his sentences constitute cruel or unusual punishment because the parole process for individuals serving sentences of life imprisonment with the possibility of parole denies him the opportunity

to demonstrate his maturity and rehabilitation. This, in turn, he argues, denies him a meaningful and realistic opportunity for release. In support, defendant asserts that the parole-review procedures available for juvenile offenders who were resentenced after *Miller* and *Montgomery* invalidated their unconstitutional mandatory sentences of life imprisonment without the opportunity for parole are less onerous than those defendant faces. Defendant asserts that the parole board must consider his youth at the time of the crime and his subsequent maturity and rehabilitation for his sentences to be constitutional. And in support of this assertion, he relies on an unpublished case from a federal district court.[4] While we accept the possibility that the parole board's policies and procedures might not comport with the requirements of *Miller* and *Montgomery*, a motion for relief from judgment is not the proper procedural method for defendant to pursue those claims. Defendant's sentences, as imposed by the sentencing court, comport with the Eighth Amendment because they provide him with a meaningful opportunity for release. That the parole board's policies stymie defendant's efforts is a matter to be asserted against the parole board; it is not a ground for vacating defendant's sentences.

Finally, defendant asserts that his sentences violate due process because neither the sentencing court nor the parole board has considered his juvenile status and attendant circumstances. However, none of the authorities on which defendant relies supports this as-

[4] While "state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004) (citations omitted). As a result, "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Id*. at 607.

sertion. While *Miller*, 567 US at 480, requires a sentencing court to consider "how [juveniles] are different," these differences are to be considered "before determining that life without parole is a proportionate sentence," *Montgomery*, 577 US at 209-210. The clear language of these opinions does not support the proposition, as defendant asserts, that consideration of a defendant's juvenile status is a procedural requirement when sentencing all individuals convicted of a crime committed while a juvenile. In this case, defendant was not sentenced to either a mandatory or a discretionary sentence of life imprisonment without the possibility of parole. Rather, he received a sentence that expressly provided for the possibility of parole. As a result, he was afforded some "hope for some years of life outside prison walls . . . ." *Id*. at 213.

This discussion also undermines defendant's claim that the parole board's policies and procedures deny him due process. Generally, a parole board's consideration of an individual's application for parole does not implicate a due-process right. " 'That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained . . . a hope which is not protected by due process.' " *Glover v Parole Bd*, 460 Mich 511, 520; 596 NW2d 598 (1999), quoting *Greenholtz v Inmates of Nebraska Penal & Correctional Complex*, 442 US 1, 11; 99 S Ct 2100; 60 L Ed 2d 668 (1979). *Miller* and *Montgomery* undoubtedly establish a procedure at sentencing that requires a sentencing court to weigh a juvenile offender's status before determining whether that individual is one of the rare juvenile offenders who "may be sentenced to life without parole . . . ." *Montgomery*, 577 US at 210. And the Supreme Court's solution in *Montgomery* was to allow those juvenile offenders who had not been given the opportunity to demonstrate that they did not fall into

that class to be considered for parole. *Id*. at 212. But defendant was never a member of that class of offenders and, after serving the required minimum sentence, has always been eligible for parole. There is nothing in these opinions to imply that defendant's sentences to life imprisonment with the possibility of parole are invalid because they deny defendant a parole process aimed toward a meaningful opportunity for release. As discussed earlier, while the parole board's policies and procedures might not comport with the Eighth Amendment, defendant's constitutional claim lies with those policies and not with the validity of his sentences.

Because defendant's sentences of life imprisonment with the possibility of parole do not violate due process or constitute cruel or unusual punishment, the trial court did not abuse its discretion by denying defendant's successive motion for relief from judgment.

Affirmed.

METER, J., concurred with SAWYER J.

GLEICHER, P.J. (*dissenting*). In 1992, the prosecution charged Montez Stovall with one count of first-degree murder, one count of second-degree murder, and two counts of possessing a firearm when committing or attempting to commit a felony (felony-firearm). Stovall was 17 years old. He faced a mandatory sentence of life imprisonment without the possibility of parole if convicted of first-degree murder.

To avoid the imposition of a life-without-parole sentence, Stovall pleaded guilty to two counts of second-degree murder and the felony-firearm charges. At the plea hearing, Stovall's counsel stated, "I've advised him that the statute permits the Parole Board to consider him for probation [sic] at the end of ten years

on this type of life sentence, after the two years [for the felony-firearm charges]." Counsel's advice was consistent with the law then in effect, which provided that Stovall would be eligible for parole consideration after serving 10 years on the murder convictions. MCL 791.234(7)(a).

Stovall's sentencing guidelines were scored in preparation for his sentencing; the calculated minimum sentence ranged from 144 to 300 months, with the maximum being life. Under MCL 750.317, the court alternatively could have sentenced Stovall to "imprisonment in the state prison for life, or any term of years . . . ." The judge imposed a life sentence rather than a guidelines sentence. The life sentence permitted Stovall to be considered for parole after serving 10 years. A guidelines sentence would have delayed his parole eligibility to 12 years of incarceration.

In the 28 years that have elapsed since Stovall entered prison, two changes have undermined the legal foundation for Stovall's sentence. The first was evolutionary. Over time, it became progressively more difficult for an inmate convicted of second-degree murder to obtain parole. In 1992, the Legislature extended the amount of time that must be served before eligibility for parole consideration from 10 to 15 years. MCL 791.234(7)(a).[1] In 1997, the parole board chairperson announced that for the parole board, "life means life":

> It has been a long standing philosophy of the Michigan Parole Board that a life sentence means just that—life in prison. Of course there are exceptions and parole may be appropriate under certain circumstances. It is the parole board's belief that something exceptional must occur which would cause the parole board to request the sentencing

[1] This change does not apply to Stovall, who remained eligible for parole consideration after serving 10 years.

> judge or Governor to set aside a life sentence. Good behavior is expected and is not in and of itself grounds for parole. [Citizens Alliance on Prisons and Public Spending, *No Way Out: Michigan's Parole Board Redefines the Meaning of "Life"* (September 2004), p 10, available at <https://static.prisonpolicy.org/scans/cappsmi/fullliferreport.pdf> (accessed September 30, 2020) [https://perma.cc/US3Q-5BP7] (ellipsis omitted; formatting altered).]

In 1999, the Legislature eliminated a prisoner's right to appeal a parole denial. MCL 791.234(11). Subsequent statutes tightened parole procedures, making it more difficult for a prisoner to enter even the initial steps of the process. See MCL 791.234(8). As a result of these legislative overhauls, Michigan's parole system now affords virtually unbridled discretion to politically appointed parole board members and the sentencing judge. See Citizens Alliance on Prisons and Public Spending, *Parolable Lifers in Michigan: Paying the Price of Unchecked Discretion* (February 2014), available at <https://www.prisonpolicy.org/scans/cappsmi/Parolable-Lifers-in-Michigan-Paying-the-price-of-unchecked-discretion.pdf> (accessed September 30, 2020) [https://perma.cc/5PR4-FGPY].[2] In *People v Carp*, 298 Mich App 472, 533-535; 828 NW2d 685 (2012), rev'd on other grounds, 499 Mich 903 (2016), this Court acknowledged that a parolable life sentence likely results in lifetime imprisonment.

---

[2] For an overview of the changes in Michigan's parole system, see *Foster v Booker*, 595 F3d 353, 358-359 (CA 6, 2010) (summarizing that statutory amendments "(1) altered the structure and composition of the Board; (2) reduced the frequency of parole reviews after an initial ten-year interview; (3) substituted paper reviews for in-person interviews; (4) eliminated [prisoners'] right to appeal a denial of parole; and (5) contained new language consistent with the Board's practice of not giving written reasons for a statement of 'no interest' in moving forward with parole").

Stovall has been incarcerated for 28 years and has not been granted even a single interview, the preliminary step to parole eligibility. Nor have his parole guidelines been scored. Although the statute underlying his guilty plea permitted parole review in 10 years, 28 years have passed without a formal review and, according to the record, Stovall will wait at least another three years for an opportunity for parole consideration.

The changes in the law and the parole board's approach, standing alone, do not afford Stovall a legal ground for withdrawing his guilty plea or being resentenced. See *Jones v Dep't of Corrections*, 468 Mich 646, 651; 664 NW2d 717 (2003) ("A prisoner enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence."). In combination with a much more dramatic change, however, the shift in parole processes invalidates Stovall's sentence and compels a resentencing hearing.

In 2012, the United States Supreme Court held in *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), that a mandatory sentence of life imprisonment without the possibility of parole violates the Eighth Amendment's prohibition of "cruel and unusual punishments" when imposed on an offender who had not reached the age of 18 at the time of his crime. The Supreme Court imbued *Miller* with retroactive effect in *Montgomery v Louisiana*, 577 US 190; 136 S Ct 718; 193 L Ed 2d 599 (2016).

Because "youth matters" in determining whether lifetime incarceration without the possibility of parole is warranted, "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Miller*, 567 US at 473-474 (quotation marks and citation omitted). "*Miller* requires that before

sentencing a juvenile to life without parole, the sentencing judge take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Montgomery*, 577 US at 208 (quotation marks and citation omitted). A mandatory sentence of life imprisonment precludes the individualized consideration that *Miller* and the Eighth Amendment demand and is therefore unconstitutional. Ultimately, *Miller* instructs that a juvenile homicide offender must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Miller*, 567 US at 479 (quotation marks and citation omitted).

Stovall was sentenced to an ostensibly parolable term of life imprisonment that should have afforded him a meaningful opportunity to obtain release if he demonstrated personal growth and positive change. But his plea and sentence were predicated on two misconceptions, one legal and the other factual: that he would be imprisoned for life without the possibility of parole if convicted of first-degree murder, and that he would have a genuine opportunity for parole after serving 10 years of a parolable life sentence.

Legally, had Stovall been convicted of or pleaded guilty or no-contest to first-degree murder, he would have been sentenced to a mandatory term of life imprisonment without parole. But post-*Miller*, likely he would have been automatically eligible to be resentenced to a minimum term of no less than 25 years and no more than 40 years' imprisonment. See MCL 769.25a(4)(c). Factually, if Michigan's parole system functioned in the manner envisioned by the Legislature when it enacted the version of MCL 791.234(7) applicable to Stovall, he would have been considered

for release by now, if not paroled. Instead, Stovall is serving a de facto sentence of life in prison without the possibility of parole, with no reasonable ability to demonstrate that he has matured and been rehabilitated.

A sentence is invalid if it is "based upon . . . a misconception of law . . . ." *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). In my view, the factual misconception at the heart of Stovall's appeal magnifies the injustice of the legal misconception. In two cases somewhat analogous to this one, our Supreme Court has identified a misconception of law necessitating a new sentencing hearing. In *People v Turner*, 505 Mich 954 (2020), the defendant was convicted of first-degree murder at age 16 and sentenced to life without parole. *People v Turner*, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 336406), p 1. He was also convicted of assault with intent to commit murder (AWIM) and sentenced to life imprisonment with the possibility of parole, the same sentence that Stovall received. *Id*. Invoking *Miller* and *Montgomery*, Turner sought resentencing on both his first-degree murder sentence and his AWIM sentence. This Court held that he was not entitled to be resentenced for AWIM "because the retroactive change in law did not apply to the AWIM sentence." *Id*. at 3.

The Supreme Court reversed, explaining that Turner's AWIM sentence could not stand because "[i]n the *Miller* context, a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Turner*, 505 Mich at 954-955. The Court directed that at Turner's *Miller* resentencing, the trial court could exercise its discretion

to resentence Turner for his AWIM conviction "on a concurrent sentence if it finds that the sentence was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense." *Id*. at 955.

And in *People v Williams*, 505 Mich 1013 (2020), the defendant was convicted as a juvenile of both first and second-degree murder and sentenced to life without parole and parolable life, respectively. *People v Williams*, 326 Mich App 514, 517; 928 NW2d 319 (2018), rev'd 505 Mich 1013 (2020). This Court held that Williams was not entitled to resentencing for second-degree murder. *Williams*, 326 Mich App at 521. As in *Turner*, the Supreme Court remanded for consideration of "whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first-degree murder. If so, the trial court may exercise its discretion to resentence the defendant for second-degree murder." *Williams*, 505 Mich at 1013.

The majority in this case holds that *Williams* is simply inapposite here, as Stovall "was not facing a mandatory life sentence," and that *Miller* does not apply to a parolable life sentence for second-degree murder. I disagree for two reasons. First, Stovall *was* facing a mandatory sentence of life without parole. His plea to second-degree murder was based on the legal misconception that if convicted of first-degree murder by verdict or plea, he would serve a mandatory sentence of life without parole. Accordingly, the reasoning of the orders in *Williams* and *Turner* governs this case.

Second, and aside from the legal misconception at the heart of Stovall's sentence, as a juvenile convicted of second-degree murder, Stovall was and is entitled to

a sentencing process focused on any individualized circumstances mitigating his crimes as mandated by *Miller*. The record reflects a host of such circumstances, including severe childhood abuse and neglect. With his background taken into account, *Miller* counsels that Stovall's sentence must offer him a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" unless a judge determines that Stovall is irreparably corrupt. *Miller*, 567 US at 479 (quotation marks and citation omitted).

In 1992, Stovall and his counsel bargained for a sentence that would allow Stovall the ability to work toward his freedom. They believed that parole eligibility would undercut the harshness of a life sentence and offer Stovall a rational hope for release. They fundamentally misconceived two things: that a parolable life sentence was preferable to a nonparolable life sentence, and that Michigan's parole system would allow Stovall to actually demonstrate his growth and rehabilitation. Stovall's sentence was predicated on fundamental legal and factual misunderstandings. Due to the misconception that Stovall's parolable life sentence offered him a realistic opportunity to demonstrate maturity and rehabilitation, Stovall is now serving a functional life sentence without parole in violation of *Miller*.

Ironically, Stovall has fared worse than he would have if convicted of first-degree murder and sentenced to life without parole. In that circumstance, he would have had a right to an individualized resentencing hearing at which he would be able to demonstrate his own growth and evolution and his worthiness for parole. Instead, he has no meaningful opportunity for release before he is elderly. Stovall now serves a life sentence that is parolable in name only and therefore violates the central precepts of *Miller*.

The unlikely chance that he will ever appear before a parole board disinterested in evaluating Stovall's diminished moral culpability at the time he committed the crimes, the "wealth of characteristics and circumstances attendant to" his youth, and the harshness of a functional life sentence, *Miller*, 567 US at 476, is not a substitute for a *Miller* hearing. Uncertain, unpredictable, and unlikely parole does not substitute for factoring in on the "front end" a juvenile's lessened culpability. Because Stovall's sentence rests on misconceptions of the law and facts that undercut the sentence's constitutionality, I would remand for a resentencing hearing consistent with *Miller*.

UPPER PENINSULA POWER COMPANY v VILLAGE OF L'ANSE

Docket No. 349833. Submitted November 4, 2020, at Lansing. Decided November 12, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 945 (2021).

The Upper Peninsula Power Company (UPPCO) brought an action seeking injunctive and declaratory relief in the Baraga Circuit Court against the Village of L'Anse; WPPI Energy, Inc. (WPPI); and Utility Systems Engineering, Inc. (USE), alleging various statutory and common-law claims arising from L'Anse's decision not to renew UPPCO's franchise to provide the village with electrical service after their existing 30-year contract expired in 2018. UPPCO claimed, among other things, that L'Anse, with the help of WPPI and USE, had unlawfully attempted to take UPPCO's existing utility customers. UPPCO also claimed that defendants had unlawfully severed UPPCO's electric lines. Defendants moved for summary disposition. The trial court, Charles R. Goodman, J., granted defendants' motion under MCR 2.116(C)(8), ruling that L'Anse had no duty to enter into another franchise agreement with UPPCO, that L'Anse's decision not to do so was not reviewable, and that the solicitation of UPPCO's customers in anticipation of the franchise's expiration constituted good governance rather than tortious activity. The court also denied injunctive relief with respect to the claim regarding the severed lines because, although UPPCO's equipment seals had been illegally cut when the lines were severed, there was no allegation that defendants intended to interfere with UPPCO's equipment in the future. With respect to the claims alleging antitrust violations and related misconduct, the court ruled that UPPCO's franchise protected it against competition from other public utilities but not against L'Anse, which, as a municipality, had the authority to offer utility services to residents within its service area. UPPCO appealed.

The Court of Appeals *held*:

1. The trial court did not err by ruling that a municipality's decision to deny a utility franchise under Const 1963, art 7, § 29, was not subject to judicial review for reasonableness. Const 1963, art 7, § 29 consists of three clauses that provide, respectively, that

public utilities may not use the rights-of-way of local units of government for electrical infrastructure without the governmental unit's consent, that a utility may not conduct local business without first obtaining a franchise, and that local units of government retain the right to reasonably control their highways, streets, alleys, and public places. UPPCO's claim that L'Anse wrongfully decided not to renew its franchise was governed by the second clause, which does not mention reasonableness. Although the Supreme Court has read a reasonableness requirement into the first clause, which relates to a utility's use of public rights-of-way, the second clause does not similarly affect the local populace, and decisions involving how a utility may operate in public rights-of-way are more nuanced and complicated, leaving the opportunity for a local government to impose an unreasonable requirement on the utility. Further, the Court of Appeals has rejected the proposition that the reasonableness requirement in the third clause applies to the second clause. UPPCO's claim that it was denied due process was without merit because, once its franchise expired, it had no property interest to protect.

2. The trial court did not err by granting defendants summary disposition of UPPCO's unfair-competition claims. The common-law doctrine of unfair competition applies to acts of fraud, bad-faith misrepresentation, misappropriation, or product confusion that result in deception. In its second amended complaint, UPPCO premised its claim of unfair competition on the facts that defendants told UPPCO's customers that once the franchise expired, UPPCO would no longer be able to serve them; that defendants told customers that L'Anse could use its governmental authority to eliminate competition, and that L'Anse had impugned UPPCO's reputation and maligned its cost-competitiveness to UPPCO's customers. However, UPPCO did not argue on appeal that those acts constituted unfair competition, which they could not have because no deception was involved. The franchise granted to UPPCO in 1988 was not only nonexclusive, it was limited to those who could not obtain service from the municipal utility. Accordingly, it was neither unfair nor deceitful for defendants to inform customers that UPPCO would no longer be able to serve them after the franchise expired, and once L'Anse became capable of supplying electric service to any customer—even before the franchise expired—UPPCO's right to serve that customer ceased. Further, UPPCO never alleged that the cost comparisons and estimates that defendants supplied to the customers were not based on the truth. UPPCO's assertion that L'Anse only wanted to serve the

most profitable customers was not supported by the pleadings and, even if it had been, UPPCO did not explain how this would constitute unfair competition.

3. The trial court did not err by granting defendants' motions for summary disposition with respect to UPPCO's claim of tortious interference with a business expectation. In order to prove a claim of tortious interference with a business relationship or expectancy, a plaintiff must prove the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. The trial court correctly determined that UPPCO had no valid business expectation. UPPCO's franchise with L'Anse had an expiration date of July 26, 2018, and UPPCO failed to show that it had anything but a unilateral hope or belief that it would continue to serve its customers after that date. Moreover, UPPCO's 1988 franchise was expressly limited to those customers that could not obtain electric service from L'Anse, and UPPCO has not articulated how it was illegal, improper, or even unfair for L'Anse to expand the geographic boundaries of its municipal utility's service area. Meeting with UPPCO's customers without notifying UPPCO beforehand was not improper, nor was supplying those customers with cost estimates indicating that they could save money by having L'Anse provide service. The fact that these events took place before the expiration of the 1988 franchise was irrelevant.

4. The trial court did not err by declining to rule that L'Anse's acquisition of UPPCO's customers constituted an unconstitutional taking that required compensation. Although UPPCO raised the issue of a takings claim in its response to defendants' motions for summary disposition, it did not do so in its second amended complaint, and UPPCO had no vested property right on which to base such a claim.

Affirmed.

PUBLIC UTILITIES — FRANCHISES — MUNICIPALITIES — REVIEW.

A municipality's decision to grant or deny a franchise to a public utility seeking to transact local business under Const 1963, art 7, § 29 is not subject to judicial review for reasonableness.

Dykema Gossett PLLC (by *Richard J. Aaron*, *Jason T. Hanselman*, *Frank A. Dame, Jr.*, and *Jeffrey A. Caviston*) for the Upper Peninsula Power Company.

Straub, Seaman & Allen, PC (by *Thomas F. Waggoner*, *Brandon G. Warzybok*, and *Megan M. Cuellar*) for Utility Systems Engineering, Inc.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Nolan J. Moody*) for the Village of L'Anse.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittman*, *M. Sean Fosmire*, and *Michael J. Watza*) for WPPI Energy.

Amici Curiae:

Cunningham Dalman, PC (by *Andrew J. Mulder* and *Vincent L. Duckworth*) for the Michigan Municipal League and the Michigan Townships Association.

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

JANSEN, P.J. Plaintiff, Upper Peninsula Power Company (UPPCO), appeals as of right the trial court's opinion and order granting summary disposition to defendants—the Village of L'Anse (the Village), WPPI Energy, Inc. (WPPI), and Utility Systems Engineering, Inc. (USE)—under MCR 2.116(C)(8). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the Village's decision to not issue another franchise to UPPCO after the previous, 30-year franchise expired in July 2018. UPPCO is a utility company providing electric power to customers in Michigan's Upper Peninsula. WPPI is a Wisconsin-based regional power company that sells electricity to 51 locally owned electric utilities, including the Village. USE is a company that helps utilities grow service territory and increase the amount of electricity

those utilities sell. The Village is located in Baraga County in the Upper Peninsula and is a member of WPPI. UPPCO's claims, according to its second amended complaint, arise from "the Village's attempts to take or convert UPPCO's existing utility customers by unlawful means and without UPPCO's consent and WPPI and USE's facilitation and funding of that takeover."

UPPCO had provided utility service in the Village and to the township of L'Anse since the early 1900s. UPPCO's last franchise issued by the Village in 1988 expired on July 26, 2018.[1] The franchise was nonexclusive, and it also provided that "service under this franchise shall be restricted to the Celotex Corporation and other firms, persons or corporations, who are unable to obtain electric service from the municipally owned utility . . . ." In 1994, the Village annexed from the surrounding township of L'Anse parcels of land that constituted an industrial park known as "Dynamite Hill." UPPCO had served customers within that industrial park.

On December 14, 2015, Village Manager Bob LaFave sent an e-mail to USE President Pat Wheeler, stating that he had "received direction to proceed with trying to get the Dynamite Hill area put onto Village power." LaFave asked Wheeler what the next steps would be. Wheeler indicated that he was going to send some "information with which to make potential customer contacts" and that once those contacts were made, a meeting could be set up with either UPPCO or with the potential customers. LaFave replied that he would prefer to meet with the potential customers first.

[1] The maximum length of a utility franchise permitted under Michigan's Constitution is 30 years. Const 1963, art 7, § 30.

On January 7, 2016, the Village sent a letter to all of UPPCO's customers in the Village. The letter stated, in pertinent part:

> The Village of L'Anse is studying an offer of Village electric service to electric consumers within the Village limits who are currently served by UPPCO. In order to approach UPPCO regarding a proposed transfer of service, it is important that the Village determine which electric consumers desire this proposed transfer of service.

The letter went on to state that the Village was setting up a meeting on January 19, 2016, which all the customers could attend. Further, the letter stated, "UPPCO will not be contacted prior to this meeting, and it is asked that electric consumers receiving this letter not discuss this matter with UPPCO prior to this meeting, as this is purely exploratory in nature at this time."

The January 19, 2016 meeting went on as planned without UPPCO's knowledge or participation. At the meeting, the customers were presented with a summary of the savings they could expect if UPPCO was no longer the electric service provider. On February 3, 2016, the Village approached UPPCO about the Village providing electric service to the Dynamite Hill customers. On March 22, 2016, UPPCO informed Wheeler that it "[did] not intend to give up the customers in the industrial park." The communication also stated that a meeting on this issue would not be productive.

At some point, the Village presented UPPCO's Dynamite Hill customers with an "Agreement to Transfer," which some customers executed. On July 17, 2017, the Village notified UPPCO that the Village planned to not renew the current franchise, which was due to expire on July 26, 2018. The letter explained that it was "in a position to provide service to all customers

located in the Village through its own electric distribution system" and "[f]or that reason, the Village has decided not to renew the franchise agreement with [UPPCO]."

On January 19, 2018, the Village sent another letter to the Dynamite Hill electric customers, stating that UPPCO's franchise to serve electric customers in the Village would be expiring and that customers currently receiving electric service from UPPCO would be transferred to the Village's electric system sometime after that franchise expires on July 26, 2018. The Village and Wheeler continued to actively pursue UPPCO's customers with promises of offering electric service for a lower price.

On February 28, 2018, UPPCO again stated that it would not consent to the Village taking UPPCO's customers. UPPCO also explained that the Village could not take over UPPCO's lines within the Village because doing so would prevent UPPCO from serving customers located outside the Village. A couple of weeks later, Village Manager LaFave sent an e-mail to UPPCO stating that there had apparently been a misunderstanding because the Village had no intention of preventing UPPCO from the public rights-of-way to provide service to its customers outside the Village. UPPCO responded that it was pleased to hear this clarification but reiterated that it considered "any action taken by the Village that unreasonably denies the renewal of UPPCO's franchise, seizes UPPCO's distribution assets, or takes UPPCO's customers to be unlawful."

Despite UPPCO's warning, the Village, USE, and WPPI continued to work toward having the Village provide electrical service to UPPCO's customers, including requesting quotes for constructing a duplicate

line to the line UPPCO had already constructed to provide service to the Dynamite Hill area. The quotes were due on May 11, 2018, and the work was to be completed by July 31, 2018.

On May 10, 2018, UPPCO submitted a request for a franchise renewal to the Village. One of the provisions in the requested franchise was that UPPCO would be allowed "to transact local business in the Village for the purposes of producing, storing, transmitting, selling, and distributing electricity into and through the Village and all other matters incidental thereto." On July 24, 2018, the Village sent its proposed revisions to UPPCO, which included the striking of any provisions related to allowing UPPCO to provide service to *any* customers in the Village, not only those who were unable to obtain electric service from the Village.

Before UPPCO's franchise expired, UPPCO discovered that "certain meter and equipment seals belonging to UPPCO had been removed . . . and replaced with WPPI Energy seals." On August 20, 2018, three of UPPCO's customers asked UPPCO to discontinue supplying electric service, but UPPCO refused. UPPCO explained that it had an "ongoing duty and right" to provide electric service to "all . . . customers currently being served in the Village." Thereafter, the Village hired Penokie Electric to sever certain electric lines leading into UPPCO's meters. While performing this work at the Village's water tower, which was located in the Dynamite Hill area, Penokie damaged a wire between the meter and the service panel, creating a dangerous condition. UPPCO had to de-energize the service so the repair could be effectuated.

UPPCO filed its initial complaint on August 1, 2018, seeking injunctive relief for the Village having denied a franchise and severed live electrical lines, and also

seeking declaratory and injunctive relief under the General Law Village Act, MCL 61.1 *et seq*. The complaint further alleged counts of trespass, impairment of contract, unlawful forcible entry and detainer, tortious interference with a business relationship, unfair competition, civil conspiracy, and violations of the Michigan Antitrust Reform Act, MCL 445.771 *et seq*.—one involving unlawful contract, combination, or conspiracy, and one involving unlawful monopoly.[2]

Defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(4), and the trial court granted defendants' motions. The court's ruling first addressed UPPCO's contention that the Village could not deny a franchise to UPPCO. The court noted that a franchise is a contract and that once a franchise expires on its own terms, there is no continuing duty for the parties to enter into a new franchise agreement. The trial court also rejected UPPCO's argument that the Village's decision to not renew the franchise was reviewable for "reasonableness." The court further elaborated that not only was the Village's decision not reviewable for reasonableness, it was not reviewable at all.

Regarding the Village's solicitation of UPPCO's customers, the trial court ruled that such action leading up to the expiration of UPPCO's franchise was not wrongful. Because of the Village's decision to not renew or grant another franchise to UPPCO, the Village's actions, "[r]ather than being tortious interference with [UPPCO's] business expectations and/or unfair competition, such activities, instead, constituted good governance." The court also noted that UPPCO had no business expectations that extended beyond July 26, 2018, the date its franchise with the Village expired.

[2] Two amended complaints were subsequently filed.

In addressing UPPCO's claims related to the purported severing of electric lines, the trial court ruled that MCL 750.383a, the statute UPPCO cited, does not "make a person an outlaw who cuts, breaks, injures or tampers with their own property" and that "[t]he line involved was on the customer's side of [UPPCO's] meter." The court recognized, however, that UPPCO was the owner of its equipment seals and that the cutting of them was wrongful. Despite this illegality, the court declined to grant the requested injunction because there were no allegations that any defendant intended on accessing or interfering with any of UPPCO's meters or equipment in the future.[3]

Regarding UPPCO's allegation of impairment of contract, the trial court noted that the contract at issue for this count—the franchise UPPCO received from L'Anse Township (not the Village)—had expired on April 19, 2019, and therefore the claim was moot. Regardless, the trial court found that there was no merit to the allegation. The trial court also dismissed UPPCO's claims related to antitrust violations and unlawful contract or conspiracy. The court explained that although UPPCO could operate during the time of the franchise without fear of another *public utility*, like DTE or Consumers Energy, taking its customers, a *municipality* has explicit authority to offer utility services within its service area. Consequently, the court held that "the Village violated no law in obtaining the assistance of WPPI and/or USE to aid the Village in its desire to serve the electrical needs of all of its resi-

[3] The trial court noted that it also was relying on MCR 2.116(C)(10) in granting summary disposition on this count. And regarding any damages for this improper act, the court noted that there was no allegation that any damages exceeded $25,000, which deprived the circuit court of jurisdiction.

dents" and that, likewise, WPPI and USE did nothing wrong in aiding the Village with its endeavors.

This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).]

This Court also reviews constitutional issues de novo. *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997).

III. REVIEW OF THE VILLAGE'S FAILURE TO RENEW UPPCO'S FRANCHISE UNDER CONST 1963, ART 7, § 29

UPPCO first argues on appeal that the trial court erred by ruling that a municipality's decision to deny a franchise under Const 1963, art 7, § 29, is not subject to judicial review for reasonableness. We disagree.

This issue deals with the proper interpretation and construction of a constitutional provision. When construing a provision of Michigan's Constitution, the goal is to identify the original meaning that the ratifiers intended to attribute to the words used. *CVS Caremark v State Tax Comm*, 306 Mich App 58, 61; 856 NW2d 79 (2014). In doing so, this Court uses the rule of common understanding, which provides that the meaning that was the most obvious common understanding of the

provision at the time of ratification is the one that should govern. *Id*.

Const 1963, art 7, § 29, provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

As this Court has already stated, § 29 addresses three distinct areas.

> The first [clause] states that public utilities cannot use the rights-of-way of local units of government for wires, poles, conduits, and so forth without consent; the second clause forbids a utility from conducting local business without first obtaining a franchise; and the third clause declares that local units of government retain the right to reasonably control their highways, streets, alleys, and public places. [*TCG Detroit v City of Dearborn*, 261 Mich App 69, 79; 680 NW2d 24 (2004).]

See also *Lansing v Michigan*, 275 Mich App 423, 431; 737 NW2d 818 (2007).

The parties agree that this case involves the second clause of § 29, which implicates the "franchise power." UPPCO maintains that the Village's decision not to renew UPPCO's franchise is reviewable for "reasonableness." UPPCO relies on the fact that, despite no "reasonableness" language pertaining to the second clause of § 29, our Supreme Court has read an implicit reasonableness requirement into the first clause of that sec-

tion. Specifically, our Supreme Court has stated that a local government's consent for a utility to use its highways, streets, alleys, or other public places for the placement of facilities cannot be refused "arbitrarily and unreasonably." *Union Twp v Mount Pleasant*, 381 Mich 82, 90; 158 NW2d 905 (1968);[4] see also *Lansing*, 275 Mich App at 432.

UPPCO suggests that this reasonableness requirement should also be read into Clause 2 because Clauses 1 and 2 "perform parallel functions in the world of local government." However, we find this argument to be unpersuasive. A utility's use of a portion of a local government's public rights-of-way is functionally different from the utility conducting business within the locale. The former has no direct involvement with the local populace, while the latter does. Further, the decisions involving how a utility may operate within the public rights-of-way appear to be much more nuanced and complicated. Will the electric lines be run overhead or underground? Where will they be placed? How far above ground or how deep below ground will they be? How will they be contained? Where will any poles be placed? Undoubtedly, there are even more considerations.[5] And with so many consid-

[4] Somewhat notably, the *Union Twp* Court cited *People ex rel Maybury v Mut Gas-Light Co*, 38 Mich 154, 155 (1878), in support of its ruling. *Union Twp*, 381 Mich at 89 n 8. But *Maybury* involved a statute, not a constitutional provision. And that statute expressly stated that a gas company was permitted to lay gas pipes through the streets, lanes, and squares of any city, town, or village " 'with the consent of the municipal authorities of said city, town, or village, under such *reasonable* regulations as they may prescribe.' " *Maybury*, 38 Mich at 155, quoting 1871 CL 2908 (emphasis added). UPPCO has not identified any equivalent statute governing a local government's decision to grant a franchise under Clause 2.

[5] In *Traverse City v Citizens' Tel Co*, 195 Mich 373, 382-383; 161 NW 983 (1917), the Supreme Court recognized that a municipality's respon-

erations, there is ample opportunity for a local government to possibly impose some unreasonable requirement, which the Supreme Court seemingly wanted to safeguard against. Cf. *Union Twp*, 381 Mich at 89-90 (stating that local governments retain their right of reasonable control over utility use of public roads because of the inconvenience to residents and businesses that generally results from construction within the rights-of-way).

Further, we conclude that to the extent that UPPCO relies on the fact that Clause 3 of § 29 contains a "reasonableness" requirement, that reliance is misplaced. This Court has already dismissed that suggestion: "We reject [the] contention that the limitations placed on the general reservation of authority found in the second sentence of § 29 [i.e., Clause 3] apply to the first two clauses of the first sentence." *Lansing*, 275 Mich App at 431 n 3.

Therefore, because the subject matter is vastly different, we conclude that merely because a village's decision related to a utility's use of the village's right-of-way is subject to a reasonableness standard, that does not mean that the same standard should apply to the village's decision related to whether the utility is authorized to conduct business within the village. And importantly, as UPPCO concedes, there is no case imposing a reasonableness requirement onto a municipality's decision to grant or deny a franchise under Clause 2 of § 29.[6]

---

sibilties involve deciding on which streets and in what manner utility lines were to be installed, which includes prohibiting the constructing of poles in locations that will injure or inconvenience the public.

[6] UPPCO contends that if a reasonableness standard was applicable, the Village's decision to not grant it a franchise would be unreasonable. We cannot agree. First, UPPCO primarily asserts that to be reasonable, a decision must promote the health, safety, or some other similar reason.

UPPCO also avers that to not permit judicial review of the Village's decision not to renew a franchise would lead to absurd and indefensible results, such as allowing a municipality to grant or deny a franchise on the impermissible basis of race or gender. However, no such possibilities are present in this case. The question here is whether decisions to renew a franchise are subject to review for reasonableness, and we have concluded that they are not. Whether those decisions are subject to review on *constitutional* grounds is another matter; but because that question is not presently before this Court, we decline to evaluate the argument.

UPPCO also claims to have argued in the trial court that it was denied due process. However, this is a mischaracterization of the lower-court proceedings. UPPCO did not argue that the Village's decision was reviewable because UPPCO had been denied due process, but rather that if the Village's actions were deemed permissible, then UPPCO should be compensated for the Village's taking of UPPCO's property, i.e., its customers or its right to serve those customers. Further, UPPCO never alleged that it was denied due process; at most, it stated that in *Delmarva Power & Light Co v City of Seaford*, 575 A2d 1089 (Del, 1990), the Delaware Supreme Court held that a municipal

---

UPPCO cites no authority showing that reasonableness can only be defined in this manner. Moreover, the fact that the Village thought it could supply electricity to its residents at less cost to them easily meets any reasonableness requirement. Governments act on behalf of the people. If they can act to benefit those people, which would include any financial benefit, then that would qualify as "reasonable" under any rubric and is not "whimsical and principle-free" as UPPCO claims. The fact that the Village did not *have* to deny a franchise to UPPCO does not make its decision any less reasonable. Reasonableness must be viewed from the perspective of the Village or its citizens—*not* from the perspective of UPPCO.

utility violated due-process requirements when it took a public utility's customers without just compensation. Notably, UPPCO never raised an inverse-condemnation claim in its second amended complaint. See *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277; 792 NW2d 798 (2010) (" 'An inverse or reverse condemnation suit is one instituted by a [property owner] whose property has been taken for public use without the commencement of condemnation proceedings.' ") (citation omitted).

Regardless, UPPCO has failed to allege facts to show that it was denied due process. The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law . . . ." US Const, Am XIV.[7] Although the Due Process Clause offers "two separate types of protections—substantive and procedural," procedural due process is at issue in this case. *Bonner v City of Brighton*, 495 Mich 209, 226; 848 NW2d 380 (2014). Procedural due process requires notice, an opportunity to be heard, and an impartial decision-maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

However, "procedural due process requirements apply only if there is a liberty or property interest at stake." *Galien Twp Sch Dist v Dep't of Ed (On Remand)*, 310 Mich App 238, 241; 871 NW2d 382 (2015). As UPPCO has done throughout these proceedings, it simply presumes that it has an entitlement or a property interest. But "[t]o have a property interest . . . , a person

[7] The Michigan Constitution similarly provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. The Michigan "provision is coextensive with its federal counterpart." *Cummins v Robinson Twp*, 283 Mich App 677, 700-701; 770 NW2d 421 (2009).

clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a *legitimate claim of entitlement to it*." *Bd of Regents of State Colleges v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (emphasis added). While having the right to serve customers (and receive revenue from them) under a valid franchise is a property interest, no such property interest could exist after the expiration of said franchise. That is because after the franchise expired, UPPCO had no legitimate claim or entitlement to provide service within the Village. In other words, although UPPCO may have had a unilateral expectation that it would be issued another franchise, that is all it had. A franchise is a contractual agreement. *City of Niles v Mich Gas & Electric Co*, 273 Mich 255, 262; 262 NW 900 (1935). And the plain and unambiguous terms of the franchise said it would expire 30 years after the July 25, 1988 effective date. There is no mention that the franchise would be reissued or that it was even likely that a new one would be issued.

In *Detroit v Detroit United R*, 172 Mich 136; 137 NW 645 (1912), aff'd 229 US 39 (1913), a railway company's franchises to operate in the city had expired. *Id*. at 149-150. The Court stated that when those franchises expired, the "rights" of the company expired as well. *Id*.; see also *Consumers Power Co v Mich Consol Gas Co*, 213 Mich App 82, 88; 539 NW2d 550 (1995). The Court further explained, "[T]he contractual relations between these parties ended upon the expiration of the franchises, and *all rights in the defendant company to occupy the city streets, and maintain and operate a street railway thereon, then terminated*, and defendant thereafter became a trespasser[.]" *Detroit United R*, 172 Mich at 158 (emphasis added). Indeed, the Court went on to state that the city had "the absolute and

unquestioned right at any time to compel the defendant company to vacate the streets upon which these franchises have expired, and to require it to remove its property therefrom within a reasonable time . . . ." *Id*.

Therefore, when UPPCO's franchise with the Village expired, it had no "right" to continue serving customers within the Village. And without this right, it had no legitimate claim to serve those customers, which is fatal to any claim of a protected property interest. In short, there is no authority to support UPPCO's view that a reasonableness requirement should also be read into a municipality's decision to grant or deny a franchise under Const 1963, art 7, § 29, cl 2, and thus we decline UPPCO's invitation to impose one.

IV. UNFAIR COMPETITION

Next, UPPCO challenges the trial court decision to grant defendants' motion for summary disposition on UPPCO's claims of unfair competition. Again, we disagree with UPPCO's position.

"[T]he common-law doctrine of unfair competition was ordinarily limited to acts of fraud, bad-faith misrepresentation, misappropriation, or product confusion." *In re MCI Telecom Corp Complaint*, 240 Mich App 292, 312 n 8; 612 NW2d 826 (2000). While it is not necessary to show that any particular person has actually been deceived by a defendant's actions, one could alternatively "show that such deception will be the natural and probable result of [a] defendant's acts." *Burns v Schotz*, 343 Mich 153, 156; 72 NW2d 149 (1955) (quotation marks and citation omitted). Put another way, "if there is no probability of deception, there is no unfair competition." *Id*. at 156-157 (quotation marks and citation omitted).

In its second amended complaint, UPPCO premised its claim of unfair competition on the following acts: (1) defendants told UPPCO's customers that once the franchise expired, UPPCO would no longer be able to serve them, (2) defendants told customers that the Village could use its governmental authority to eliminate competition, and (3) the Village "impugned [UPPCO's] reputation and maligned UPPCO's cost competitiveness . . . ."

Notably, UPPCO does not argue on appeal that these acts constitute unfair competition, and likewise we conclude that they do not where no deception was involved. The franchise granted to UPPCO in 1988 was a *nonexclusive* franchise, which meant that UPPCO was not given the right to be the sole provider of electric service in the Village. See 36 Am Jur 2d, Franchises from Public Entities, § 31, p 692 ("[U]nder a nonexclusive franchise the grantor is not precluded from granting a similar franchise to another . . . .").[8] In fact, UPPCO's franchise was even *more* limited. The franchise further provided:

> [S]ervice under this franchise shall be restricted to the Celotex Corporation and other firms, persons or corporations, who are unable to obtain electric service from the municipally owned utility . . . .

Thus, not only was UPPCO not given an exclusive right to serve the Village, UPPCO was only permitted to serve customers *who were unable to obtain electric service from the Village*. This fact is notable because it pertains to UPPCO's allegation in its complaint that it was unfair or deceitful for defendants to inform cus-

[8] Compare with an "exclusive" franchise, in which the grantor promises "not to grant any similar franchises to anyone else[.]" 36 Am Jur 2d, Franchises from Public Entities, § 30, p 691.

tomers that UPPCO would no longer be able to serve them after the franchise expired. UPPCO cannot show that this was deceitful or untrue because once the franchise expired, UPPCO had no right to provide service. Likewise, once the Village became capable of supplying electric service to any customer—even before the franchise expired—UPPCO's right to serve that customer ceased. Further, UPPCO never alleged that the cost comparisons and estimates defendants supplied to the customers were not based on the truth. The test is not whether *UPPCO* was deceived by not being aware of what the Village was planning; the test is whether there was any probability that any *customers* were deceived. *Burns*, 343 Mich at 156. And UPPCO has failed to allege in its complaint any facts to show that there was any probability that any customers were deceived about any material fact. Therefore, any claim of unfair competition based on these cost comparisons cannot be sustained.

We note that UPPCO repeatedly asserts that the Village only wanted to serve the most profitable customers, yet the pleadings in this case do not support such an assertion. Indeed, in a 2017 letter from the Village to UPPCO more than a year before the franchise was set to expire, the Village stated that it had determined that it will be able "to provide service to *all* customers located in the Village." UPPCO's view that this is immaterial because the actions started in late 2015 is perplexing. The documents attached to UPPCO's second amended complaint clearly show that the Village in 2015 had decided to reach out to UPPCO's existing customers to gauge their interest. Thus, if there was little or no interest, then the Village would not proceed. In any event, in communications from December 2015, the Village informed USE that the direction was to "try[] to get the Dynamite Hill area put onto Village power." The

communication did not say that the plan or direction was to only provide service to a portion of the Dynamite Hill area or only to the most profitable customers. Moreover, assuming arguendo that it was the Village's plan to only "poach" the most profitable customers, UPPCO does not fully explain how this constitutes unfair competition. The only way it could constitute unfair competition would be if the Village had offered to supply service to certain customers but later reneged and declined to offer service because the customers were not deemed profitable enough. But in that case, UPPCO would retain them as customers, i.e., any "fraud" or "deceit" would inure to UPPCO's benefit.

On the basis of the foregoing, we conclude that the trial court properly dismissed UPPCO's claims of unfair competition.

V. TORTIOUS INTERFERENCE WITH A BUSINESS RELATIONSHIP AND EXPECTANCY

Next, UPPCO argues that the trial court erred by granting defendants' motions for summary disposition with respect to its claim of tortious interference with a business expectation. We disagree.

In order to prove a claim of tortious interference with a business relationship or expectancy, a plaintiff must prove "the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff." *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 45; 821 NW2d 1 (2012) (quotation marks and citations omitted). However, the

business expectancy "must be a reasonable likelihood or probability, not mere wishful thinking." *Id*. (quotation marks and citation omitted).

The trial court correctly determined that UPPCO had no valid business expectation. As UPPCO acknowledged in its second amended complaint, its franchise with the Village had an expiration date of July 26, 2018. UPPCO has completely failed to show that it had anything but a unilateral hope or belief that it would continue to serve its customers after this date. After July 2018, UPPCO had no right to serve any customers. *Detroit United R*, 172 Mich at 158; *Consumers Power Co*, 213 Mich App at 88. Without this right, there was no reasonable expectation to continue to supply electric service. Indeed, once a municipality requests that utility to cease operations, then that utility must do so. See *Detroit United R*, 172 Mich at 158 (stating that after a franchise expires, the municipality has "the absolute and unquestioned right" to oust the utility). Accordingly, the only reasonable expectation UPPCO had after July 2018 was that it *might* be able to continue to provide electric service, but that ability was wholly dependent upon the Village acquiescing to the continued service. Because any expectation after the franchise expired was dependent on the Village, any expectation on UPPCO's part can best be described as "hopeful" or "wishful." This is inadequate to maintain a claim of tortious interference with a business relationship or expectancy, and the trial court properly dismissed this claim.

Moreover, UPPCO's 1988 franchise was expressly limited to those customers that could not obtain electric service from the Village. Thus, UPPCO had no reasonable expectation that it could continue to provide electric service to customers that later could obtain service

from the Village. There was nothing in the franchise that indicated that the Village would never plan on extending its area of electric coverage. UPPCO has further failed to plead any facts to show that any of defendants' acts were "improper." UPPCO has not articulated how it was illegal, improper, or even unfair for the Village to expand the geographic boundaries of its service area. Meeting with UPPCO's customers without notifying UPPCO beforehand is not improper. Further, supplying those customers with cost estimates indicating that the customers could save money by having the Village provide service also is not improper. The fact that these events took place before the expiration of the 1988 franchise is irrelevant, and UPPCO cites no authority showing otherwise. Simply put, as the trial court recognized, there was nothing improper about the Village starting to plan for life without UPPCO before the franchise was set to expire. Thus, UPPCO could not sustain a claim for tortious interference with a business relationship or expectancy.

VI. CONSTITUTIONAL TAKINGS CLAIM

Finally, UPPCO argues that because the trial court ruled in favor of defendants, it should have also ruled that the Village's acquisition of UPPCO's customers constituted an unconstitutional taking, requiring UPPCO to be compensated. Again, we disagree.

UPPCO's argument implicates the Fifth Amendment of the United States Constitution, which provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." US Const, Am V.[9] " 'An inverse or reverse con-

[9] This provision applies to the states through the Fourteenth Amendment. *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 656; 581

demnation suit is one instituted by a [property owner] whose property has been taken for public use without the commencement of condemnation proceedings.' " *Blue Harvest*, 288 Mich App at 277 (citation omitted).

Exactly what error UPPCO wants this Court to "correct" on appeal is unclear. See *Apex Laboratories Int'l Inc v Detroit (On Remand)*, 331 Mich App 1, 10; 951 NW2d 45 (2020) (stating that this Court is "an error-correcting Court"). The trial court simply granted defendants' motions for summary disposition. Presumably, UPPCO is arguing on appeal that this was erroneous. But there are two issues with UPPCO's position.

First, although UPPCO raised the issue of a takings claim in its response to defendants' motions for summary disposition, UPPCO never alleged a takings or an inverse-condemnation claim in its second amended complaint. Therefore, because the trial court—via the motions for summary disposition—was tasked with deciding the viability of the claims UPPCO *actually* alleged in its second amended complaint, there was no need for the court to address other claims that were not raised in that complaint. Consequently, because UPPCO never asserted a takings claim in its complaint, it was not erroneous for the trial court to fail to declare that such a claim indeed existed and survived after the dismissal of UPPCO's 11 other, enumerated claims; the trial court was not under an obligation to write this new claim into the complaint and analyze the merits of it.

Second, UPPCO's complaint makes it clear that it had no vested property right. "One who asserts an uncompensated taking claim must first establish that

---

NW2d 670 (1998), citing *Webb's Fabulous Pharmacies, Inc v Beckwith*, 449 US 155, 160; 101 S Ct 446; 66 L Ed 2d 358 (1980). Additionally, Michigan's Constitution contains a substantially similar provision. *Sommerdyke*, 458 Mich at 657, citing Const 1963, art 10, § 2.

a vested property right is affected." *In re Certified Question*, 447 Mich 765, 787-788; 527 NW2d 468 (1994).

> To constitute a vested right, the interest must be something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws; it must have become a title, legal or equitable, to the present or future enjoyment of property[.] [*Id*. at 788 (quotation marks and citations omitted).]

UPPCO cannot establish the necessary property right because after the franchise expired, which is when UPPCO's property purportedly was taken, it had no "right" to provide electric service to any customers in the Village. See *Detroit United R*, 172 Mich at 158; *Consumers Power Co*, 213 Mich App at 88. This is an important characteristic that distinguishes this case from the Delaware case UPPCO heavily relies on. In *Delmarva Power*, 575 A2d at 1102-1103, the Delaware Supreme Court ruled that a utility company was entitled to be compensated for the taking of its customers by the municipal utility. However, that utility company was "the holder of a non-exclusive franchise . . . ." *Id*. at 1103. In this case, when the "property" was purportedly taken, the franchise had expired, and UPPCO no longer was a holder of a nonexclusive franchise. Accordingly, it is abundantly clear that UPPCO had no vested property right in continuing to serve its customers.[10] As noted before,

[10] We note that UPPCO does refer to the cost of its investment into infrastructure and the specter of utilities potentially being disincentivized to make such investments. We think the latter is a public-policy argument better directed to the Legislature. The former might conceivably support a takings claim if, say, a municipality made use of infrastructure installed by a utility company, or possibly even if the municipality's acts rendered such infrastructure worthless or a costly liability to remove. However, UPPCO does not make that argument, and

UPPCO merely had a hope or a wish that it would be allowed to continue to serve its customers, but this falls well short of a vested property right. See *Town of Castle Rock v Gonzales*, 545 US 748, 756; 125 S Ct 2796; 162 L Ed 2d 658 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.").

Affirmed.

FORT HOOD and RONAYNE KRAUSE, JJ., concurred with JANSEN, P.J.

---

in any event, UPPCO neither included a takings claim in its amended complaint nor does it appear to have sought leave to file a further amended complaint adding such a claim.

DROB v SEK 15, INC

Docket No. 351198. Submitted November 9, 2020, at Detroit. Decided November 19, 2020, at 9:00 a.m.

Jennifer Drob brought a premises-liability action in the Macomb Circuit Court against SEK 15, Inc., doing business as J. J. Knapp's Tavern, alleging that she was a business invitee who was injured while working for defendant. Plaintiff injured her ankle while tending the bar, and she requested that defendant investigate whether she was entitled to workers' disability compensation (WDC) or whether defendant could file a claim under its liability insurance policy. Eleanor Knapp, the owner of J. J. Knapp's, advised plaintiff that she did not qualify for WDC. Knapp promised to look into liability insurance coverage but never followed through. Plaintiff ended her part-time employment and filed suit, alleging that defendant violated the Worker's Disability Compensation Act (the WDCA), MCL 418.101 *et seq*., by failing to maintain required WDC insurance for all its employees. She sought recompense for her medical bills, lost wages, and pain and suffering. Defendant moved for summary disposition, arguing that plaintiff was an employee injured on the job whose sole remedy was to file a claim under the WDCA. Plaintiff argued that the court must determine whether she was an employee by looking to the definition of "employee" under MCL 418.161(1)(*l*) and (n). The court denied defendant's motion without prejudice, determining that discovery was required before any decision could be made. Following discovery, plaintiff moved for partial summary disposition on the issue of her employment status, arguing that unlike defendant's other employees, plaintiff was paid under the table, never filled out a W-2 form, was working full-time at other jobs, and was otherwise acting as an independent contractor. Plaintiff argued that the three-factor test in the first sentence of MCL 418.161(1)(n) applied—as opposed to the 20-factor test outlined in the second sentence—and that under this three-factor test, she was not an employee because she was the only worker at the tavern paid in cash, defendant did not pay employment taxes for her, and she held herself out to the world as a bartender for hire. Defendant also moved for summary disposition, continuing to argue that plaintiff's claim was barred by the

exclusive-remedy provision of the WDCA. The court, Edward A. Servitto, J., concluded that plaintiff was an independent contractor who was not limited by the exclusive-remedy provision of the WDCA and could file a tort action. The court asserted that it considered both the three-factor and 20-factor tests in making its ruling, although the court had thrown away its notes and could not go into detail. Accordingly, the court granted partial summary disposition in plaintiff's favor, determining as a matter of law that she was an independent contractor. Defendant filed an interlocutory application for leave to appeal, which the Court of Appeals granted in a split decision.

The Court of Appeals *held*:

The first sentence of MCL 418.161(1)(n) provides that an "employee" is every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. The second sentence of MCL 418.161(1)(n) provides that on and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan Administrative Hearing System (the MAHS) determines to be in an employer-employee relationship using the 20-factor test announced by the Internal Revenue Service of the United States Department of Treasury in revenue ruling 87-41, 1 C.B. 296. Based on the plain language of MCL 418.161(1)(n), circuit courts do not apply the 20-factor test; rather, that test is left to decisions made by the MAHS. The Legislature's addition of the second sentence to MCL 418.161(1)(n) did not replace the three-factor test of the first sentence. The plain language of the statute limits the use of the 20-factor test to determinations of employment status made in administrative proceedings before the MAHS. Accordingly, given the plain language of MCL 418.161(1)(n), a court must apply the three-factor test. To be an employee subject to the exclusive-remedy provision of the WDCA, the court must find that a person (1) does not maintain a separate business, (2) does not hold himself or herself out to and render service to the public, and (3) is not an employer subject to this act. However, there is one prerequisite to consideration under MCL 418.161(1)(n): the court must first determine whether plaintiff was an employee under MCL 418.161(1)(*l*). MCL 418.161(1)(*l*) defines an "employee," in relevant part, as a person "in the service of another, under any contract of hire, express or implied." In this case, while plaintiff did not have a written contract with defen-

dant, she did have an implied contract of hire; plaintiff had performed services for defendant for approximately 17 years and expected regular compensation from defendant. Turning to MCL 418.161(1)(n), the question was whether plaintiff maintained a separate business or held herself out to the public for hire; it was undisputed that plaintiff was not an employer. Plaintiff worked as a part-time bartender for defendant. The other small tasks that plaintiff sometimes performed—taking an order from a table or preparing something from the menu—did not change the nature of plaintiff's employment. And plaintiff held herself out to the public to perform the same service, advertising her services as a bartender to other establishments or for special events. Accordingly, the trial court did not err by determining that plaintiff was an independent contractor who could file a premises-liability action against defendant.

Trial court's grant of partial summary disposition in plaintiff's favor affirmed.

WORKERS' COMPENSATION — WORDS AND PHRASES — "EMPLOYEE" — THREE-FACTOR TEST.

The first sentence of MCL 418.161(1)(n) provides that an "employee" is every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act; the second sentence of MCL 418.161(1)(n) provides that on and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan Administrative Hearing System (the MAHS) determines to be in an employer-employee relationship using the 20-factor test announced by the Internal Revenue Service of the United States Department of Treasury in Revenue Ruling 87-41, 1 C.B. 296; circuit courts apply the three-factor test of the first sentence rather than the 20-factor test of the second sentence; the 20-factor test is limited to determinations of employment status made in administrative proceedings before the MAHS.

Bone Bourbeau Law, PLLC (by *Brian J. Bourbeau* and *Jason M. Berger*) for plaintiff.

Secrest Wardle (by *Sidney A. Klingler* and *Justin A. Grimske*) for defendant.

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

PER CURIAM. Jennifer Drob was injured while tending bar at a tavern. The circuit court determined that Drob was not an "employee" but rather an "independent contractor" who could file a premises-liability action against the tavern. Although Drob served under a contract of hire, she held herself out to the public to perform the same services she performed for the tavern, excluding her from the definition of "employee" and the exclusive-remedy provision of the Worker's Disability Compensation Act. We affirm.

I. BACKGROUND

On December 12, 2017, Jennifer Drob injured her ankle on an uneven drain cover while working as a bartender at a J. J. Knapp's Tavern. Her injury required surgery, and she requested that defendant investigate whether she was entitled to workers' disability compensation (WDC) or could file a claim under the bar's liability insurance policy. However, Drob worked part-time for cash under the table at J. J. Knapp's. Eleanor Knapp, the owner of J. J. Knapp's, advised Drob that she did not qualify for WDC. Knapp promised to look into liability insurance coverage but never followed through. Drob ended her employment and filed suit.

In her premises-liability complaint, Drob described herself as a "business invitee" who was injured while employed by defendant. Drob further alleged that defendant violated the Worker's Disability Compensation Act (the WDCA), MCL 418.101 *et seq*., by failing to maintain required WDC insurance for all its employees. She sought recompense for her medical bills, lost wages, and pain and suffering.

Defendant quickly countered with a motion for summary disposition under MCR 2.116(C)(10), contending that Drob was an employee injured on the job whose sole remedy was to file a claim under the WDCA. Specifically, MCL 418.131(1) provides, "The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease." "The only exception to this exclusive remedy is an intentional tort," meaning that the "employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury." *Id*. Defendant further noted that a WDC claim had been made on Drob's behalf with its insurer under claim number WCC000004863. We note, however, that Eleanor Knapp later denied making such a claim in her deposition. And most of the boxes on the claim form provided to the court were left blank.

Drob contended that summary disposition would be premature as discovery had yet to begin and there remained questions of fact whether she fell within the definition of an "employee" under the WDCA and, if so, whether defendant committed an intentional tort. Discovery was required to consider whether Drob was an employee, whose remedy was limited by the WDCA, or an independent contractor, who could file a tort action. To make this determination, Drob asserted, the court must look to the definition of employee in MCL 418.161(1)(*l*) and (n). As stated in Subdivision (*l*), an "employee" includes "[e]very person in the service of another, under any contract of hire, express or implied . . . ." MCL 418.161(1)(n) further defines "employee" as:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer

> at the time of the injury, *if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. On and after January 1, 2013, services are employment if the services are performed by an individual whom the Michigan administrative hearing system determines to be in an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1 C.B. 296*. An individual for whom an employer is required to withhold federal income tax is prima facie considered to perform service in employment under this act. If a business entity requests the Michigan administrative hearing system to determine whether 1 or more individuals performing service for the entity in this state are in covered employment, the Michigan administrative hearing system shall issue a determination of coverage of service performed by those individuals and any other individuals performing similar services under similar circumstances. [Emphasis added.]

The second sentence of this provision was added by amendment in 2011 PA 266. Drob contended that the statute's reference to "the 20-factor test announced by the internal revenue service" (the 20-factor IRS test) applies only to cases submitted for decision to the Michigan administrative hearing system. Accordingly, the court could rely only on the "three-factor" employment test: whether "the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." The circuit court denied the motion without prejudice, determining that discovery was required before any decision could be made.

During discovery, Drob and Knapp submitted to depositions. Drob described her informal relationship with defendant. Drob had been working part-time at

the tavern since 2000. At that time, Drob's friend was the manager and needed additional help. Drob served as a bartender, earning $5.00 an hour cash. Although hired as a bartender, Drob did "whatever was needed to be done at the time." Drob always maintained other full-time employment. She testified that she also advertised her bartending services for other establishments and events by word of mouth. Drob further asserted that when she asked Knapp to file a WDC claim on her behalf, Knapp indicated that Drob was "not an employee."

Knapp asserted that Drob had always been a cash-paid "employee." Knapp described that Drob was subject to the rules applicable to all other employees, such as required training, mandatory employee meetings, and uniform requirements. Drob was subject to discipline and had been given verbal warnings in the past. However, Knapp admitted that she had never asked Drob to fill out a W-2, and Knapp did not pay any employment-related taxes for Drob. Knapp denied telling Drob that she was not an employee and therefore not entitled to WDC. Rather, Knapp insisted that Drob "didn't ask for a Workers' Comp claim," and so Knapp never filed one.

Following discovery, Drob sought partial summary disposition on the issue of her employment status. Drob contended that "[u]nlike [defendant's] other workers," Drob "was paid under the table, working other jobs, and otherwise acting as an independent contractor." Indeed, Drob contended, Knapp told her "flat out . . . that she was not an employee." Drob accused defendant of now trying to shift its liability to avoid the law that defined her as an independent contractor.

Legally, Drob asserted that the court had the power to determine her employee status; such authority was not limited to the Workers' Disability Compensation Agency. Drob then pointed to the definition of "employee" in MCL 418.161(1)(*l*) and (n) as including a person working under a contract for hire who "does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act." Drob continued to argue that only the Michigan Administrative Hearing System (MAHS) could consider the 20-factor IRS test referenced in the second sentence of MCL 418.161(1)(n). In this regard, Drob cited *Max Trucking, LLC v Liberty Mut Ins Corp*, 802 F3d 793 (CA 6, 2015). And under the three-part test, Drob contended that she was not an employee because she was the only worker at the tavern paid in cash, defendant did not pay employment taxes for her, and she held herself out to the world as a bartender for hire.

Defendant countered with its own motion for summary disposition under MCR 2.116(I)(2). Defendant continued to argue that Drob's claim was barred by the exclusive-remedy provision of the WDCA. In asserting that Drob was an employee for purposes of the WDCA, defendant analyzed both the three-factor test and the 20-factor IRS test. Defendant emphasized that no caselaw supported that a person paid in cash could not be an employee. Defendant also found it irrelevant that Knapp told Drob that she was not an "employee" under the act: "In fact, there is a currently pending workers' compensation proceeding in this matter . . . ." Defendant disagreed with Drob's contention that she held herself out to the public as available to hire as a bartender. To meet this element of the independent contractor definition, defendant asserted that a person must hold himself or herself out for the same service

performed for the purported employer. Here, Drob worked as a bartender, waitress, and cook for J. J. Knapp's and yet only promoted herself as a bartender to others. Rather, Drob was a long-term employee who did side jobs for extra money but did not own a separate bartending company.

Defendant contended that the 20-factor IRS test referenced in the second sentence of MCL 418.161(1)(n) did not supplant the original three-part test; rather, it was an additional test to consider whether a person is an employee or an independent contractor. Defendant then analyzed these factors and argued that nearly all supported that Drob was an employee under the WDCA.

The circuit court concluded that Drob was an independent contractor who was not limited by the exclusive-remedy provision of the WDCA and could file a tort action. The court asserted that it considered both the three-factor and 20-factor tests in making its ruling, although the court had thrown away its notes and could not go into detail. However, the court noted:

> [Drob] worked at different banquets outside this establishment, the defendant's establishment. She worked for other bars on occasions. And she had no real employment arrangement with the defendant. She worked for cash at times that were inconsistent. She was not told that she was an employee. She was in fact told [that] she was not an employee.

The court acknowledged that a roofer employed by a roofing company but who takes personal side jobs is "a little different" than a "bartender who services multiple bars." And the court conceded that a person employed by "two different people at different times" can be an "employee" of both.

> However, here it appears [Drob] was an ad hoc contributor to the establishment as well as other businesses and events throughout her time serving as a bartender at this establishment. The Court has to consider her under these circumstances . . . .

The court determined under the multi-factor tests that Drob was an independent contractor, rather than an employee, of defendant. Accordingly, the court granted partial summary disposition in Drob's favor, determining as a matter of law that she was an independent contractor. Accordingly, Drob's premises-liability claim against defendant could move forward to trial.

Defendant filed an interlocutory application for leave to appeal, which this Court granted in a split decision. *Drob v SEK 15, Inc*, unpublished order of the Court of Appeals, entered January 23, 2020 (Docket No. 351198).

II. ANALYSIS

We review de novo a circuit court's ruling on a summary-disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the

> benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

We also review de novo underlying issues of statutory interpretation. *Id*. at 140. "Whether an individual is an employee as defined by the WDCA presents a question of law subject to review de novo." *McCaul v Modern Tile & Carpet, Inc*, 248 Mich App 610, 615; 640 NW2d 589 (2001).

We first address the parties' disagreement regarding whether the circuit court was required to consider the 20-factor IRS test in determining whether Drob was defendant's employee. Based on the plain language of MCL 418.161(1)(n), circuit courts do not apply that test; rather that test is left to decisions made by the MAHS. As noted, MCL 418.161(1)(n) provides, in relevant part, that an "employee" is:

> Every person performing service in the course of the trade, business, profession, or occupation of an employer at the time of the injury, if the person in relation to this service does not maintain a separate business, does not hold himself or herself out to and render service to the public, and is not an employer subject to this act. On and after January 1, 2013, services are employment if the services are performed by an individual whom the [MAHS] determines to be in an employer-employee relationship using the 20-factor test announced by the internal revenue service of the United States department of treasury in revenue ruling 87-41, 1 C.B. 296.

Neither this Court nor the Michigan Supreme Court has addressed this issue. The United States Court of Appeals for the Sixth Circuit, on the other hand, determined in *Max Trucking, LLC v Liberty Mut Ins Corp*, 802 F3d 793 (CA 6, 2015), that trial courts are not to consider the 20-factor IRS test in assessing a party's employment status under this statute. We find

the *Max Trucking* analysis persuasive and adopt it here. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

In *Max Trucking*, 802 F3d at 801, the Sixth Circuit determined that the Legislature's addition of the second sentence to this statutory provision "did not replace" the three-part test of the first sentence. Rather, the Legislature reenacted the first sentence "without change or limitation by the amendatory legislative act." *Id*. The Legislature "could have amended the first sentence to read that it only would apply until January 1, 2013, with the amendatory language to be applied exclusively thereafter, but it did not do so." *Id*. The Sixth Circuit continued that "the face of the amendatory language limits use of the [20-factor IRS test] to determinations of employment status made in administrative proceedings before the [MAHS]." *Id*. at 802. The court also looked to the amendment's legislative history, which asserted that the 20-factor IRS test "allow[ed] the [MAHS] to determine whether an employee/employer relationship exist[ed] . . . ." *Id*. (cleaned up).[1]

Given the plain language of MCL 418.161(1)(n), the circuit court and this Court must apply the three-factor test to determine whether Drob was an "employee" for purposes of the WDCA. The circuit court determined as a matter of law that Drob was an independent contractor but gave little detail for this Court's review. However, a de novo review of the record supports the circuit

[1] This opinion uses the parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Prac & Process 143 (2017).

court's conclusion. As provided in the plain language of the statute, and as made clear in *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13, 20; 857 NW2d 520 (2014), "[e]ach criterion of MCL 418.161(1)(n) must be satisfied for an individual to be considered an employee; conversely, failure to satisfy any one of the three criteria will *exclude* an individual from employee status." To be an employee subject to the exclusive-remedy provision of the WDCA, the court must find that a person (1) "does not maintain a separate business," (2) "does not hold himself or herself out to and render service to the public," and (3) "is not an employer subject to this act." MCL 418.161(1)(n).

But as noted by the Supreme Court in *Reed v Yackell*, 473 Mich 520, 530-531; 703 NW2d 1 (2005), there is one prerequisite to our consideration under MCL 418.161(1)(n): we must determine whether Drob was an employee under MCL 418.161(1)(*l*). As noted, Subdivision (*l*) defines an "employee," in relevant part, as a person "in the service of another, under any contract of hire, express or implied." Drob did not have a written contract with defendant. She did, however, serve defendant under an implied contract of hire. "A contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor." *Reed*, 473 Mich at 531 (quotation marks and citation omitted). Drob had performed services for defendant for approximately 17 years, and she expected regular compensation from defendant. Indeed, defendant understood its duty to compensate Drob at an hourly rate for her work.

Looking to Subdivision (n), we must consider if Drob, as "the person in relation to this service," maintained a separate business or held herself out to the

public for hire.[2] As stated in *Reed*, 473 Mich at 536, "the service held out and provided by the separate business [must] be 'this service,' i.e., the same service that he performed for the employer. It is not enough under the statute that he has any business and holds it out." "[T]he 'service' performed by the person cannot be placed in such broad and undefined classifications as general labor. Rather, it must be classified according to the most relevant aspects identifiable to the duties performed in the course of the employer's trade, business, profession, or occupation." *Id*. at 537.

In *Reed*, the injured person worked as a delivery person for the subject employer but held himself out to others as a house painter. *Id*. at 523. The types of work were so dissimilar that the injured person could not be deemed to maintain a separate business or to hold himself out to the public for hire "in relation to this service." He therefore remained an "employee" under the WDCA. *Id*. at 538.

Here, Drob worked mainly as a bartender for defendant. Drob indicated that as J. J. Knapp's was a small establishment, she sometimes was required to fill more than one role. For example, if the waitress was busy, Drob would take an order from a table or bring customers their food. If the cook left early and a customer ordered something from the menu, Drob might prepare the order in the kitchen. These small tasks, however, did not change the nature of Drob's employment. And she held herself out to the public to perform the same service. By word of mouth, Drob advertised her services to other establishments or for special events as a bartender. Accordingly, Drob was an independent contractor, not an employee for purposes of the WDCA.

---

[2] All agree that Drob is not an employer subject to the act.

Reviewing the record in the light most favorable to defendant, the circuit court did not err by determining that Drob was an independent contractor who could file a premises-liability action against defendant.

We affirm the grant of partial summary disposition in Drob's favor.

GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ., concurred.

MICHIGAN AMBULATORY SURGICAL CENTER v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 349706. Submitted September 9, 2020, at Detroit. Decided November 19, 2020, at 9:05 a.m.

The Michigan Ambulatory Surgical Center filed an action against Farm Bureau General Insurance Company of Michigan in the Oakland Circuit Court to collect personal protection insurance (PIP) benefits assigned to it by defendant's insured, Terry Tracy. Tracy was injured in a motor vehicle crash and sued defendant for unpaid PIP benefits. Tracy and defendant executed a settlement agreement in which defendant agreed to pay Tracy $7,500 in exchange for the release of her rights to PIP benefits accrued through the date of the case evaluation. The settlement agreement did not prevent Tracy from seeking additional PIP benefits in the future, but it provided that she was not to assign any of her rights to medical benefits to medical providers without defendant's express written consent. Tracy received medical services from plaintiff and assigned her right to reimbursement under the insurance policy to plaintiff, contrary to the settlement agreement. After plaintiff sued to recover payment for the assigned, newly accrued PIP benefits, defendant moved for summary disposition, arguing that the antiassignment clause in the settlement agreement invalidated Tracy's assignment to plaintiff. The court, Nanci J. Grant, J., denied defendant's motion. Defendant appealed.

The Court of Appeals *held*:

Under MCL 500.3143 of the no-fault act, MCL 500.3101 *et seq*., an agreement for assignment of a right to benefits payable in the future is void. However, the statute neither mentions nor prohibits agreements *not* to assign benefits, and an agreement not to assign future rights is distinguishable from an agreement for assignment of a right to benefits payable in the future. In *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 200 (2018), the Court held that an antiassignment clause contained within a no-fault insurance policy was unenforceable to prohibit the assignment of an accrued claim because enforcement would be contrary to public policy. In *Shah*, public

policy compelled a judicial redrafting of the terms of the insurance policy given that the redrafting did not increase the insurer's liability. This case, however, was distinguishable from *Shah*. While a judicial redrafting of the settlement agreement would not have increased defendant's liability *under the terms of the insurance contract*, it could have increased defendant's liability *under the settlement agreement*. Further, such a redrafting would have required a conclusion that a merger automatically occurred between the insurance policy and the settlement agreement and that a clause in the settlement agreement providing that it represented the entire agreement between the parties was void. Further, extending the holding in *Shah* would have impeded two goals favored by public policy: the freedom to contract and the encouragement of settlement between litigants. Because MCL 500.3143 prohibits the assignment of future benefits but is silent regarding agreements not to assign benefits and because the antiassignment provision here did not violate law or public policy, the trial court erred by denying defendant's motion for summary disposition.

Decision vacated and case remanded for further proceedings.

SWARTZLE, J., dissenting, had deep sympathy for the majority opinion, noting that the freedom to contract is one of the cornerstones of the rule of law, but he could not join the majority opinion because *Shah* was not factually distinguishable and *Shah* and the Supreme Court's decision in *Roger Williams Ins Co v Carrington*, 43 Mich 252 (1880), were controlling. Although the antiassignment clause in this case was included in a separate settlement agreement with a merger clause rather than in the insurance policy itself as in *Shah*, this distinction was not important in light of the fact that the key feature was the same in both cases: the insured had an accrued claim against the insurer for payment of healthcare services that were provided before the insured executed the assignment. Although the holding in *Roger Williams* was not clearly supported by law or logic, *Roger Williams* was controlling precedent and required the result that, as in *Shah*, the antiassignment clause should not have precluded plaintiff's cause of action.

INSURANCE — NO-FAULT ACT — ASSIGNMENT OF BENEFITS — ANTIASSIGNMENT CLAUSES.

MCL 500.3143 of the no-fault act, MCL 500.3101 *et seq*., prohibits agreements for the assignment of rights to future benefits, but it does not address or prohibit agreements not to assign benefits; while an antiassignment clause contained in a no-fault insurance

policy is unenforceable to prohibit an assignment of an accrued claim because such a prohibition violates Michigan public policy, there is no public policy that prohibits enforcement of an antiassignment provision in a separate settlement agreement with a merger clause between a no-fault insurer and its insured.

Anthony, Paulovich & Worrall, PLLC (by *Gerald K. Paulovich*) for the Michigan Ambulatory Surgical Center.

Kopka Pinkus Dolin PC (by *Rana D. Lange* and *Mark L. Dolin*) for Farm Bureau General Insurance Company of Michigan.

Before: RIORDAN, P.J., and O'BRIEN and SWARTZLE, JJ.

RIORDAN, P.J. Defendant appeals by leave granted[1] the trial court's order denying defendant's motion for summary disposition in this action to collect personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. We vacate the order and remand this case to the trial court.

I. FACTS & PROCEDURAL HISTORY

On October 19, 2015, defendant's insured, Terry Tracy, was injured in a motor vehicle accident in Orion Township and filed suit against defendant to collect unpaid PIP benefits. Tracy and defendant executed a settlement agreement on November 10, 2017, in which defendant agreed to pay Tracy $7,500, and Tracy agreed to release her rights to PIP benefits accrued through the date of the case evaluation, September 25, 2017. The settlement agreement was a separate contract with a

[1] *Mich Ambulatory Surgical Ctr v Farm Bureau Gen Ins Co of Mich*, unpublished order of the Court of Appeals, entered September 6, 2019 (Docket No. 349706).

merger clause—not an addendum to the no-fault policy, and it did not in any way limit coverage under the policy or prohibit Tracy from seeking additional PIP benefits in the future. Rather, the settlement agreement anticipated that Tracy would accrue additional claims to PIP benefits in the future. The settlement agreement specifically provided that she would "not assign any of her rights to medical benefits to medical providers in the future without the express written consent of [defendant]" with respect to any claim for benefits arising from the motor vehicle accident that occurred on October 19, 2015, in Orion Township.

Thereafter, Tracy sought and received plaintiff's medical services, creating a newly accrued claim for PIP benefits. Contrary to her agreement with defendant, Tracy then assigned to plaintiff her right to reimbursement for plaintiff's billings. Plaintiff sued defendant to recover payment for the assigned, newly accrued PIP benefits. Defendant then moved for summary disposition, arguing that the antiassignment clause in the settlement agreement invalidated Tracy's later assignment to plaintiff. Plaintiff responded that contractual provisions barring the postloss assignment of an accrued claim to payment of insurance benefits are unenforceable as against public policy under *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 200; 920 NW2d 148 (2018). In turn, defendant argued that *Shah* only applied to antiassignment clauses in no-fault insurance policies, not to similar clauses in settlement agreements. The trial court denied defendant's motion and this appeal followed.

II. ANALYSIS

At the outset, we clarify that the issue in this case is whether the trial court committed error requiring

reversal when it concluded that the antiassignment provision in the settlement agreement was invalid pursuant to our holding in *Shah*, 324 Mich App at 200. Specifically, we must determine whether there is a factual distinction between the antiassignment provision in the no-fault policy at issue in *Shah* and a similar provision in the settlement agreement between defendant and its insured. See *In re Houghten's Estate*, 310 Mich 613, 617-618; 17 NW2d 774 (1945) (noting that principles of stare decisis apply unless the facts of the subsequent case are distinguishable). For the reasons stated below, we find that *Shah* is inapplicable to the facts of this case. The antiassignment provision in the settlement agreement does not contravene any portion of the no-fault act, and unlike in *Shah*, we cannot find that it violates any public policy identified by our jurisprudence.

We review de novo matters of statutory interpretation and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(8). *City of Fraser v Almeda Univ*, 314 Mich App 79, 92; 886 NW2d 730 (2016); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We enforce unambiguous contracts as written, and we uphold the validity of an antiassignment provision that is clear and unambiguous unless it violates law or public policy. *Westfield Ins Co v Ken's Serv*, 295 Mich App 610, 615; 815 NW2d 786 (2012); *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 24; 800 NW2d 93 (2010); *Shah*, 324 Mich App at 198, citing *Detroit Greyhound Employees Fed Credit Union v Aetna Life Ins Co*, 381 Mich 683, 689-690; 167 NW2d 274 (1969); *Employers Mut Liability Ins Co of Wisconsin v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980); *Rory v Continental Ins Co*, 473 Mich 457, 468-469; 703 NW2d 23 (2005).

We begin with the relevant language of the no-fault act. MCL 500.3143 states that "[a]n agreement for assignment of a right to benefits payable in the future is void." By enacting MCL 500.3143, the Legislature codified the public-policy concerns that arise when an insurer's risk is increased by an insured's assignment of a contractual relationship.[2] However, MCL 500.3143 neither mentions nor prohibits agreements *not* to assign benefits—such as the antiassignment provision

[2] See 2 Couch, Insurance, 3d, § 34:2, p 34-8 ("[A] provision in a policy of insurance which prohibits its assignment except with the consent of the insurer does not apply to prevent assignment of claim or interest in the insurance money then due after loss."); 3 Couch, Insurance, 3d, § 35:8, pp 35-15–35-17 ("[T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.") (citations omitted); 17 Williston, Contracts (4th ed), § 49:126, pp 130-132 ("Antiassignment clauses in insurance policies are strictly enforced against attempted transfers of the policy itself before a loss has occurred, because this type of assignment involves a transfer of the contractual relationship and, in most cases, would materially increase the risk to the insurer. Policy provisions that require the company's consent for an assignment of rights are generally enforceable only before a loss occurs, however. As a general principle, a clause restricting assignment does not in any way limit the policyholder's power to make an assignment of the rights under the policy—consisting of the right to receive the proceeds of the policy—after a loss has occurred. The reasoning here is that once a loss occurs, an assignment of the policyholder's rights regarding that loss in no way materially increases the risk to the insurer. After a loss occurs, the indemnity policy is no longer an executory contract of insurance. It is now a vested claim against the insurer and can be freely assigned or sold like any other chose in action or piece of property.").

contained in the settlement agreement in this case. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013) (stating that a court may not "read into the statute a requirement that the Legislature has seen fit to omit"). " '[A] right to benefits payable in the future' is distinguishable from a right to past due or presently due benefits." *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998) (quotation marks omitted). Similarly, an agreement *not* to assign future rights is distinguishable from "[a]n agreement for assignment of a right to benefits payable in the future." MCL 500.3143.

Perhaps, when enacting MCL 500.3143, the Legislature intended to invalidate a preloss assignment of an insurance policy to prevent an insured from substituting in a different party and consequently assigning to an insurer a risk that it had not agreed to cover. But that is not for us to discern or decide here, as we are charged with the responsibility of following the language of the statute as written, not with making policy. *Prof Rehab Assoc*, 228 Mich App at 172. MCL 500.3143 pertains to "benefits payable in the future," and it does not distinguish between a preloss transfer of an insurance policy or a postloss transfer of benefits for a claim that has not accrued under the policy. Presumably, in either scenario, the assignment would be invalid, but neither factual scenario is present in this case because Tracy did not transfer the policy itself, and the assignment was executed after her claim had accrued as part of an agreement that is separate and distinguishable from the no-fault policy that was in effect. See generally *Allard v State Farm Ins Co*, 271 Mich App 394, 400; 722 NW2d 268 (2006) ("Until the expense is incurred, the insured's entitlement to benefits does not accrue and the insurer's liability to pay the claim does not attach.").

In *Shah*, we held that an antiassignment clause contained within an insurance policy was unenforceable to prohibit an assignment of an accrued claim because such a prohibition violates Michigan public policy. *Shah*, 324 Mich App at 200. Our analysis relied entirely on our Supreme Court's holding in *Roger Williams Ins Co v Carrington*, 43 Mich 252, 254; 5 NW 303 (1880), which states as follows:

> The assignment having been made after the loss, did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—*secured in this State by statute*—to assign such claims, and such a right cannot be thus prevented. It cannot concern the debtor, and it is against public policy. [Emphasis added.]

Notably, the statute referenced in *Roger Williams* was not cited or otherwise identified, and *Roger Williams* was decided nearly 100 years before the enactment of the no-fault scheme[3] and more than 75 years before the adoption of the Insurance Code.[4] Nonetheless, this Court found that *Roger Williams* was binding precedent that precluded the insurer from enforcing the antiassignment provision in the insurance policy. *Shah*, 324 Mich App at 200.

This case does not present the same public-policy concerns regarding insurance policies as were implicated in *Shah* and *Roger Williams*. In those cases, the courts concluded that public policy compelled a judicial

---

[3] The Michigan No-Fault Insurance Act became law on October 1, 1973. See 1972 PA 294; *Shavers v Attorney General*, 402 Mich 554, 578; 267 NW2d 72 (1978).

[4] Michigan adopted the Insurance Code in 1956 by enacting Public Act 218.

redrafting of the terms of the respective insurance policies because doing so would not increase an insurer's liability, but we cannot conclude that the same is true in this case. Here, defendant does not dispute coverage of the newly accrued claims, and like in *Shah*, a judicial redrafting of the settlement agreement would not increase defendant's liability under the terms of the insurance policy with respect to the newly accrued claims. However, doing so may increase defendant's liability under the settlement agreement. The dissent concludes this distinction is unimportant because the antiassignment provision has the same effect regardless of whether it is drafted into an insurance policy or a separate settlement agreement, and therefore, this case lacks any meaningful factual distinction from *Shah*. In effect, the dissent finds no practical distinction between the insurance policy and the settlement agreement. We cannot reach the same conclusion without declaring, for policy reasons, that a merger automatically occurred between the two documents and invalidating the clause in the settlement agreement which states that it represents the "ENTIRE AGREEMENT" between the parties. Such policy judgments are the province of the Legislature and are not for us to make. See *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501-502; 638 NW2d 396 (2002) ("[I]t is not the province of [the court] to make policy judgments or to protect against anomalous results"). Accordingly, we conclude that the issues relating to the settlement agreement here are factually distinct from the facts presented in *Shah*, and therefore, stare decisis does not compel any particular outcome in this case. See *First of Mich Corp v Trudeau*, 237 Mich App 445, 450; 603 NW2d 116 (1999) (noting that a court is not required to apply the precedential effect required by MCR 7.215(C)(2) to a case that is factually distinguishable).

We decline to extend *Shah* to the facts before us because, here, public policy favors freedom to contract and encourages settlement between litigants—two goals that would be impeded by rendering the antiassignment provision in this case unenforceable. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003) ("The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable."); *Empire Indus, Inc v Northern Assurance Co, Ltd*, 342 Mich 425, 429; 70 NW2d 769 (1955) ("Compromise settlements are favored by the law."). Moreover, under general contract law, although contractual restrictions against assignability are strictly construed, an assignment may be precluded by agreement. *Stenke v Masland Dev Co, Inc*, 152 Mich App 562, 575; 394 NW2d 418 (1986), citing *Miller v Pond*, 214 Mich 186, 190; 183 NW 24 (1921). See also *Kaczmarck v La Perriere*, 337 Mich 500, 504-506; 60 NW2d 327 (1953) (providing that there is no prohibition against requiring consent to effectuate an assignment); Restatement Contracts, 2d, § 317(2)(c), p 15 ("A contractual right can be assigned unless . . . assignment is validly precluded by contract.").

The majority opinion in *Shah* did not analyze MCL 500.3143, but it was briefly discussed in *Shah*'s partial concurring opinion:

> The no-fault act itself speaks to the issue of assignment. It provides, "An agreement for assignment of a right to benefits *payable in the future* is void." MCL 500.3143 (emphasis added). Notably, the Legislature elected not to void assignment of past-due benefits. By not including past-due benefits in this statutory prohibition, the Legislature, under the doctrine of *expressio unius est exclusio alterius*, made clear its intent to adhere to the fundamen-

> tal principle that assignments of past-due benefits are effective and proper. [*Shah*, 324 Mich App at 216 (SHAPIRO, J., concurring in part and dissenting in part).]

It is a misapplication of the *expressio unius* maxim to conclude that the Legislature must have intended by implication to render invalid all antiassignment provisions. The maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another)[5] "has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, 330 Mich App 584, 591; 950 NW2d 528 (2019), rev'd on other grounds 507 Mich 498 (2021), quoting *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003) (quotation marks omitted). Rather, the more appropriate canon of construction is *casus omissus pro omisso habendus est* (nothing is to be added to what the text states or reasonably implies), which prohibits courts from supplying provisions omitted by the Legislature. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 93. Thus, although MCL 500.3143 prohibits the assignment of future benefits, it is silent regarding agreements *not* to assign benefits. The reasonable implication of the Legislature's omission regarding agreements *not* to assign benefits—as in the case before us—is that parties are free to contract according to their wishes.

Because the antiassignment provision at issue here does not violate law or public policy identified in our

---

[5] See *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 456; 770 NW2d 117 (2009).

jurisprudence, and because *Shah* does not apply to the facts of this case, the trial court erred when it concluded that *Shah* required denial of defendant's motion for summary disposition.

III. CONCLUSION

The trial court erred when it concluded that the antiassignment provision in the settlement agreement was invalid pursuant to our holding in *Shah*, 324 Mich App at 200. Accordingly, we vacate the trial court's order denying defendant's motion for summary disposition and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

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

SWARTZLE, J. (*dissenting*). Philosophically, I have deep sympathy for the majority opinion. The freedom to contract is one of the cornerstones of the rule of law, along with due process, equal protection, private property, and the First Amendment. There is nothing in this record to suggest that, when entering into the settlement agreement with the antiassignment clause, Tracy was incompetent or somehow coerced into agreeing to the clause. Tracy received valuable consideration in exchange for the clause and the settlement agreement's other provisions, and ordinarily, that would be the end of the story—enforce the antiassignment clause and grant summary disposition in favor of defendant.

Jurisprudentially, however, I cannot sign onto the majority opinion, as this case does not come to us *tabula rasa*. Rather, we are bound by another cornerstone of the rule of law—the principle of stare decisis, especially in the context of binding precedent from both a prior panel and a higher court. See MCR 7.215(C)(2). Because

I can find no legitimate basis for distinguishing this case from this Court's earlier published decision in *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 200; 920 NW2d 148 (2018), I must dissent.

From my reading of *Shah*, the material factual points are these: (1) the insured had coverage for no-fault benefits with the insurer; (2) the insured was injured in a motor-vehicle accident; (3) the insured and the insurer had a contract with an antiassignment clause; (4) after executing the contract with the antiassignment clause, the insured received medical services, and, in exchange for the services, the medical provider was owed payment; (5) the insured had an accrued claim against the insurer for payment of the medical services; (6) the insured assigned the accrued claim to the medical provider in satisfaction of the insured's liability to the medical provider; and (7) the medical provider sought payment from the insurer, but based on the antiassignment clause, the insurer refused to pay. *Id*. at 186-190. Despite the general freedom to contract, the Court in *Shah* held that the antiassignment clause was unenforceable as against public policy, and as a result, the medical provider could pursue an action against the insurer for the unpaid claim. See *id*. at 200.

Each one of the material factual points in *Shah* exists in the current case. Why it matters that the antiassignment clause was found in the original insurance contract (*Shah*) or in a subsequent settlement agreement (here) is lost on me, given that the key feature—the insured "had an accrued claim against his [or her] insurer for payment of healthcare services that had already been provided . . . before [the insured] executed the assignment"—is the same in both situations. *Id*.

The majority places great weight on the rather thin reed that the antiassignment clause in this case is found in a settlement agreement with a merger clause, whereas the antiassignment clause in *Shah* was found in an insurance contract. But while asserting that the distinction matters, the majority does not explain *why* it matters, except to say that setting aside the antiassignment clause in the settlement agreement may increase the liability of the insurer under the terms of that separate agreement.

As all rather thin reeds must do, this one collapses upon inspection. In *Shah*, while setting aside the antiassignment clause did not increase the insurer's liability under the insurance policy, it certainly did increase the risk that the insurer would be exposed to future litigation by unanticipated assignees. Thus, in *Shah*, the insurer did not get the full benefit of its bargain with the insured, as the insurer presumably put some value on the antiassignment clause in the insurance policy and factored that value into the price of the policy. Similarly, were the majority to follow *Shah* here, setting aside the antiassignment clause would not increase defendant's liability under the insurance policy (as the majority recognizes), but it certainly would increase the risk that defendant would be exposed to future litigation by unanticipated assignees—as this lawsuit aptly demonstrates. Thus, here (and tracking *Shah*), defendant would not get the full benefit of its bargain with Tracy, as defendant presumably put some value on the antiassignment clause in the settlement agreement and factored that value into the consideration paid. From both a contractual and an economic perspective, the two scenarios are identical with respect to the risk of increased liability to the insurer. Simply put, the majority's argument makes a distinction without a difference.

Likewise with the merger clause. Whether found in a single insurance policy or in an insurance policy and a subsequent separate agreement, the fact remains that the relevant contractual provisions and factual scenarios are materially indistinguishable between the two cases. If the existence of a merger clause is actually *the* material distinction, then the majority has pointed future parties to a simple way to get around *Shah* at the outset—(1) enter into an insurance policy that (a) has no antiassignment clause but (b) does have a merger clause; and, immediately following execution of that policy, (2) enter into a separate agreement that (a) has an antiassignment clause and (b) also has a merger clause. The substance of the contractual relationship will be no different than in *Shah*, though the legal import will now be 180 degrees different.

With respect to MCL 500.3143, I have no truck with the majority's analysis, as the statute is silent with respect to antiassignment clauses. Rather, the fundamental problem in *Shah* and in this case is the weak foundation underlying our Supreme Court's decision from over 125 years ago, *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880). In that case, the Court referred to a purported "statute" that granted "the absolute right [to] every person . . . to assign such claims, and such a right cannot be thus prevented." *Id*. at 254. The Court did not actually cite a statute, however, and my research has not yet unearthed that statute. The Court seems to have announced the absolute right to assign such a claim as a matter of public policy. Maybe there are good reasons to have this policy, but it does fly against the bedrock principle of freedom to contract. In my opinion, exceptions to the freedom to contract should be few and far between, and certainly should be better supported with law and logic than what is found in *Roger Williams*.

With that said, the holding in *Roger Williams* is clear, as is the holding in *Shah*, and I do not believe that we have a sound basis for distinguishing either one. Until (hopefully) our Supreme Court revisits *Roger Williams*, we are bound by the holding in that decision, as *Shah* recognized. Accordingly, contrary to the majority's holding, I conclude that *Shah* controls here and the antiassignment clause in the parties' settlement agreement should not preclude the medical provider's cause of action.

For these reasons, I respectfully dissent.

CONSUMERS ENERGY COMPANY v STORM

Docket No. 350617. Submitted November 3, 2020, at Detroit. Decided November 19, 2020, at 9:10 a.m. Reversed in part, vacated in part, and remanded 509 Mich ___ (2022).

Consumers Energy Company filed an action in the Kalamazoo Circuit Court against Brian Storm, Erin Storm, and Lake Michigan Credit Union, seeking to condemn a portion of the Storms' property for a power-line easement after the Storms rejected Consumers' offer to purchase the easement. In response, the Storms filed a motion under MCL 213.56(1) of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*., challenging the necessity of the easement. Initially, the court clerk entered a default judgment against Lake Michigan Credit Union for failure to appear. Thereafter, following a hearing on the Storms' motion, the court, Alexander C. Lipsey, J., held that Consumers had failed to establish the public necessity of acquiring an easement on the Storms' property and dismissed Consumers' action. The Storms then moved for attorney fees under MCL 213.66(2). Consumers opposed the motion, arguing that attorney fees were not awardable under that statute because the court had not found that the proposed acquisition was improper. The trial court disagreed, reasoning that its finding of no public necessity necessarily included a finding that the proposed acquisition was improper. The Storms appealed.

The Court of Appeals *held*:

1. Under MCL 486.252, an electric power company has the authority to condemn land for an easement on private property if necessary to provide electric power for public use. MCL 213.56(1) grants the owner of property sought to be condemned the right to challenge in a court hearing the necessity of the acquisition. Acquisitions by public agencies and private agencies are treated differently in the statute. With respect to an acquisition by a *public* agency, MCL 213.56(2) provides that the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion; thus, the court in that instance does not "determine" public necessity but, rather "upholds" a prior determination of public necessity. In contrast,

MCL 213.56(3) provides, in part, that with respect to an acquisition by a *private* agency, the court at the hearing must determine the public necessity of the acquisition of the particular parcel; given the provision's use of the word "determine," the court has discretion to decide that no public necessity justified the proposed acquisition. While final judgments are normally appealable as a matter of right under MCL 600.309, with regard to condemnation proceedings, MCL 213.56(6) provides that an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable in the Court of Appeals only by leave of the Court of Appeals pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation. Given this language, the Court of Appeals does not have discretion to consider such an appeal as on leave granted. The MCL 213.56(6) language referring to "an order of the court upholding . . . public necessity" refers to acquisitions by *public* agencies in which a prior determination of public necessity is binding on the court under MCL 213.56(2) and the court is asked whether to uphold that determination. Similarly, the MCL 213.56(6) language referring to "an order of the court . . . determining public necessity" refers to acquisitions by *private* agencies in which the court must determine public necessity of the acquisition of the property under MCL 213.56(3); the MCL 213.56(6) language "an order determining public necessity" encompasses both an order determining that the public necessity was established and an order determining that it was not. Thus, the MCL 213.56(6) prohibition limiting appeals to leave granted applies both to trial court orders concerning proposed acquisitions by public agencies under MCL 213.56(2) and to proposed acquisitions by private agencies under MCL 213.56(3). In this case, Consumers was a private agency for purposes of the UCPA, and the trial court's public-necessity determination proceeded under MCL 213.56(3). The trial court's determination that there was no public necessity for plaintiff's proposed acquisition was "an order of the court . . . determining public necessity" under MCL 213.56(6), and the trial court's public-necessity determination was therefore only appealable by leave granted. Because Consumers did not file an application for leave to appeal, the Court of Appeals did not have jurisdiction over the court's public-necessity determination and that portion of Consumers' appeal was dismissed. The Court of Appeals did not have discretion to treat Consumers' application as a granted application for leave to appeal because MCL 213.56(6) expressly states that an appeal may only be by leave granted.

2. MCL 213.66(2) states that if a 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. Thus, to recover attorney fees under MCL 213.66(2), a property owner must successfully challenge the agency's right to acquire the property or the legal sufficiency of the proceedings and the court must find the proposed acquisition improper. A finding by the trial court that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper; therefore, in that situation, the trial court does not have to separately state on the record that it finds the acquisition improper. However, when a property owner successfully challenges the agency's right to acquire the property, the court must separately find the proposed acquisition improper; a trial court's determination that there was no public necessity for the proposed acquisition is *not* a per se finding that the proposed acquisition was improper; to hold otherwise would render the MCL 213.66(2) requirement that "the court finds the proposed acquisition improper" nugatory. In this case, the Storms did not establish that the proposed acquisition was not a necessity; rather, Consumers failed to carry its burden of establishing the necessity of the acquisition. Accordingly, because the trial court's ruling in the Storms' favor was a finding that Consumers failed to carry its burden of establishing the necessity of its proposed acquisition, it was not a per se finding that the proposed acquisition was improper, and the trial court erred by awarding attorney fees to the Storms.

Appeal dismissed in part; award of attorney fees vacated.

1. PUBLIC UTILITIES — CONDEMNATION — ORDERS DETERMINING PUBLIC NECESSITY — APPEALS.

MCL 213.56(6) of the Uniform Condemnation Procedures Act provides that an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding is appealable in the Court of Appeals only by leave of that Court pursuant to the general court rules; in the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation; the Court of Appeals does not have discretion to consider such an appeal as on leave granted; the MCL 213.56(6) prohibition limiting appeals to leave granted applies both to trial court orders concerning proposed acquisi-

tions by public agencies under MCL 213.56(2) and to proposed acquisitions by private agencies under MCL 213.56(3).

2. PUBLIC UTILITIES — CONDEMNATION — RECOVERY OF ATTORNEY FEES.

To recover attorney fees under MCL 213.66(2), a property owner must successfully challenge the agency's right to acquire the property or the legal sufficiency of the proceedings and the court must find the proposed acquisition improper; a trial court's finding that the property owner successfully challenged the agency's right to acquire the property is not a per se finding that the proposed acquisition was improper; the trial court must make the separate determinations on the record for a property owner to recover attorney fees.

Mika Meyers PLC (by *Richard M. Wilson, Jr.*) and *Aaron L. Vorce* for Consumers Energy Company.

Miller Johnson (by *Craig H. Lubben* and *Stephen J. van Stempvoort*) for Brian Storm and Erin Storm.

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

O'BRIEN, P.J. In this takings case, plaintiff, Consumers Energy Company, appeals as of right the trial court's order dismissing the case and awarding attorney fees to defendants.[1] For the reasons explained in this opinion, we dismiss plaintiff's appeal in part and vacate that portion of the trial court's order awarding attorney fees to defendants.

I. BACKGROUND

Plaintiff, a provider of electric power in Michigan, owns a power line running through property in front of defendants' property. There is about 10 feet between

[1] For purposes of this opinion, "defendants" only refers to Brian and Erin Storm. The other defendant, Lake Michigan Credit Union, had a default judgment entered against it in the trial court, and it and has taken no part in this appeal.

plaintiff's power line and defendants' property. Plaintiff sought an easement on defendants' property that would stretch 80 feet from plaintiff's power line onto defendants' property and would allow plaintiff to enter defendants' property as necessary to maintain the power line and to manage vegetation on the property that could threaten the line.

Under MCL 486.252, plaintiff has authority "[t]o condemn all lands and any and all interests therein," including "easements," that "may be necessary to generate, transmit, and transform electric energy for public use in, upon, or across private property." After defendants rejected plaintiff's good-faith offer to purchase the easement, plaintiff, proceeding under MCL 486.252, filed in the trial court a complaint to condemn an easement interest in defendants' property. In response to plaintiff's complaint, defendants filed a motion challenging the necessity of the easement under MCL 213.56(1) of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. The trial court set the matter for a hearing, see MCL 213.56(1), and because plaintiff is a "private agency" under MCL 213.51(h), the hearing proceeded under MCL 213.56(3). That statute provides, in relevant part, "Except as otherwise provided in this section, with respect to an acquisition by a private agency, the court at the hearing shall determine the public necessity of the acquisition of the particular parcel." MCL 213.56(3). At the ensuing hearing, the trial court determined that plaintiff had failed to establish the public necessity of acquiring an easement on defendants' property and ruled in favor of defendants.

Defendants thereafter moved for attorney fees under MCL 213.66(2). Plaintiff contested the motion, arguing that attorney fees are appropriate under MCL 213.66(2)

only if the court finds the proposed acquisition improper, which the court did not do in this case. The trial court disagreed, holding that by ruling for defendants in their challenge to plaintiff's acquisition, the court had necessarily found the proposed acquisition improper.

In accordance with its rulings, the trial court entered an order dismissing the case and awarding attorney fees to defendants. Plaintiff appeals that order as of right.

II. JURISDICTION

After plaintiff filed its appeal, defendants moved to dismiss the appeal for lack of jurisdiction, arguing that under MCL 213.56(6) plaintiff could only appeal the trial court's public-necessity determination by leave granted. A panel of this Court denied the motion without prejudice for consideration by the case-call panel.[2] After reviewing the issue, we agree with defendants and therefore dismiss for lack of jurisdiction plaintiff's appellate challenge to the trial court's public-necessity determination.

A challenge to this Court's jurisdiction is a question of law that we review de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009). Likewise, this Court reviews de novo the interpretation of the UCPA. *Washtenaw Co Bd of Co Rd Comm'rs v Shankle*, 327 Mich App 407, 412; 934 NW2d 279 (2019).

As stated, after defendants challenged the necessity of plaintiff's proposed acquisition under MCL 213.56(1), the trial court proceeded under MCL 213.56(3) and determined that plaintiff's acquisition of easement

[2] *Consumers Energy Co v Storm*, unpublished order of the Court of Appeals, entered July 23, 2020 (Docket No. 350617).

rights to defendants' property was unnecessary. That determination constituted a final judgment. MCL 213.56(5) ("The court's determination of a motion to review necessity is a final judgment."). While final judgments are generally appealable in this Court as a matter of right under MCL 600.309, MCL 213.56(6) states:

> Notwithstanding [MCL 600.309], *an order of the court* upholding or *determining public necessity* or upholding the validity of the condemnation proceeding *is appealable to the court of appeals only by leave of that court* pursuant to the general court rules. In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation. [Emphasis added.]

The question now before us is whether the trial court's determination that no public necessity justified plaintiff's acquisition of easement rights to defendant's property was "an order of the court upholding or determining public necessity" under MCL 213.56(6) such that the determination was only appealable by leave granted.

To properly interpret a statute, we must discern and give effect to the Legislature's intent. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). The most reliable evidence of the Legislature's intent is the language used in the statute itself. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). "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*. When interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "When consider-

ing the correct interpretation, the statute must be read as a whole." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

We conclude that it is clear from the statutory text that the trial court's public-necessity determination in this case was only appealable by leave granted under MCL 213.56(6). To reach this conclusion, we begin by addressing the difference between an order "determining" public necessity and one "upholding" public necessity under MCL 213.56(6).

When a *private* agency such as plaintiff seeks to acquire property under MCL 213.56 and an owner contests the acquisition, the case proceeds under MCL 213.56(3). Absent exceptions not present here, the case goes to a hearing at which the court must "determine the public necessity of the acquisition . . . ." MCL 213.56(3). The use of "determine" in MCL 213.56(3) clearly leaves a court discretion to decide that no public necessity justified the proposed acquisition. In contrast, when a *public* agency seeks to acquire property under MCL 213.56 and an owner contests the acquisition, the case proceeds under MCL 213.56(2), and at the ensuing hearing, "the [public agency's] determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion." In other words, the trial court at the ensuing hearing does not have discretion to determine the public necessity of the acquisition, and it is instead bound to uphold the public agency's determination of public necessity absent "a showing of fraud, error of law, or abuse of discretion." MCL 213.56(2). The court in those instances would not be "determining" public necessity like it would under MCL 213.56(3) but would, instead, be "upholding" a prior determination of public necessity.

With this in mind, it is clear that MCL 213.56(6)'s language referring to "an order of the court upholding . . . public necessity" is referring to situations in which a prior determination of public necessity is binding on the court and the court is asked whether to uphold that determination.[3] And MCL 213.56(6)'s language referring to "an order of the court . . . determining public necessity" is referring to situations in which the court is asked to determine public necessity, namely "with respect to an acquisition by a private agency" when the court must "determine the public necessity of the acquisition of the particular parcel" under MCL 213.56(3).

It follows that an order "determining" public necessity under MCL 213.56(6) refers to both an order determining that public necessity justified an acquisition *and* an order determining that no public necessity justified the acquisition. Again, an order "determining" public necessity under MCL 213.56(6) refers to the

[3] Our interpretation of the interaction between MCL 213.56(2) and MCL 213.56(6) is consistent with prior cases involving rulings against a public agency's proposed acquisition—a ruling *against* a public agency would not be an order "upholding" the agency's determination of public necessity and therefore would be an appealable final order, MCL 213.56(5), not subject to MCL 213.56(6). See, e.g., *Oxford v Nathan Grove Family, LLC*, 270 Mich App 685, 686-687; 717 NW2d 400 (2006) (explaining that the plaintiff, a public agency for purposes of MCL 213.56(2), had appealed as of right an order of the circuit court granting a property owner's challenge to the necessity of the plaintiff's proposed taking), rev'd on other grounds 477 Mich 894 (2006). We further note that an order "upholding" a determination of public necessity is not necessarily limited to cases in which a public agency seeks to make the acquisition and the court proceeds under MCL 213.56(2). See, e.g., MCL 213.56(3) (stating that, "with respect to an acquisition by a private agency," . . . . "[t]he granting of a certificate of public convenience and necessity by the public service commission pursuant to the electric transmission line certification act, [MCL 460.561 to 460.575], is binding on the court").

order that results after a trial court "determine[s] the public necessity of the acquisition" under MCL 213.56(3). As stated earlier, "determine" as used in MCL 213.56(3) clearly leaves a court discretion to decide that no public necessity justified the proposed acquisition. Under the consistent-usage canon, it is presumed that the Legislature intends for a word to bear the same meaning throughout a text. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) ("If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word."); *Szydelko v Smith's Estate*, 259 Mich 519, 521; 244 NW 148 (1932) ("In arriving at the legislative intent, it is helpful to refer to other probate statutes where the same words are used ; for, if in other statutes they are used in relation to general administration only, it is fair to assume that they were intended to have the same meaning in this statute."). Applying this canon to MCL 213.56, it is presumed that the Legislature intended for "determine" as used in MCL 213.56(3) to have the same meaning when used in Subsection (6). That is, an order "determining public necessity" under MCL 213.56(6) encompasses both an order determining that public necessity was established and an order determining that it was not, similar to how a trial court under MCL 213.56(3) can determine public necessity was established or determine that it was not.

Plaintiff contends that MCL 213.56(6) "applies *only* to trial court orders that *reject* a property owner's motion to review necessity and confirm that necessity exists, thereby allowing the condemnation to proceed." Plaintiff contends that this is supported by the plain language of MCL 213.56(6) because, looking to a dictionary, "determine," when used as a verb, is defined as

"to fix conclusively or authoritatively." *Merriam-Webster's Collegiate Dictionary* (11th ed). That definition, however, is clearly not an appropriate definition of "determine" as used in MCL 213.56. The example the dictionary gives for plaintiff's proposed definition of "determine" as a verb is "**determine** national policy." *Merriam-Webster's Collegiate Dictionary* (11th ed). When a trial court determines the public necessity of an acquisition, it is not determining public necessity the way a leader of a country determines national policy.

The better definition of "determine" when used as a verb in MCL 213.56 is "to find out or come to a decision about by investigation, reasoning, or calculation," for example, "**determine** the answer to the problem." *Merriam-Webster's Collegiate Dictionary* (11th ed). This fits in the statute far better; when a trial court determines the public necessity of an acquisition, it is coming to a decision about the public necessity of the acquisition by reasoning, the way courts often do when rendering decisions. See *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 163 n 10; 596 NW2d 126 (1999) (observing that dictionaries "often contain multiple definitions," and using dictionaries as "interpretive aids" requires selecting the definition that gives the word the most appropriate meaning based on its "context or setting"). This definition of "determine" as a verb encompasses both a decision that the public necessity of the acquisition was established, and a decision that it was not, and therefore cuts against plaintiff's argument.

Plaintiff contends that this definition of "determine"—which is similar to the one cited by defendants in their motion to dismiss—cannot be correct because it undermines "the UCPA's 'overall statutory scheme' of allowing agencies to quickly acquire property for proj-

ects . . . ." This is incorrect for two reasons. First, the "overall statutory scheme" is not a reason to rewrite the Legislature's clear intent as evidenced by the language used in the statute itself. See *Perkovic v Zurich American Ins Co*, 500 Mich 44, 53; 893 NW2d 322 (2017) ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language."). Second, there is no reason to conclude that requiring a private agency to appeal an adverse determination of public necessity by leave granted would delay the agency any more than allowing it to appeal the determination by right. In fact, it appears that requiring an agency to appeal by leave granted will allow the agency to know sooner whether their appeal may have merit—if leave is denied, the agency knows that it must proceed without the property it sought to acquire.

Plaintiff also contends that the language used in the last sentence of MCL 213.56(6) makes clear that the subsection only applies to property owners when it states, "In the absence of a timely filed appeal of the order, an appeal shall not be granted and the order is not appealable as part of an appeal from a judgment as to just compensation." Plaintiff points out that if a trial court determines that there is no public necessity for a proposed acquisition, the case is dismissed and does not proceed to a ruling on just compensation. While plaintiff is correct in this respect, we read this sentence as providing guidance on what happens when leave to appeal is not timely filed. We do not read the sentence as limiting the application of MCL 213.56(6) to property owners.

In sum, the trial court's order determining that there was no public necessity for plaintiff's proposed

acquisition was "an order of the court . . . determining public necessity" under MCL 213.56(6), and it was therefore only appealable by leave granted.

Plaintiff contends that even if it was required to file an application for leave to appeal, this Court can exercise its discretion to treat this appeal of right as a granted application for leave to appeal. See, e.g., *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 61; 807 NW2d 354 (2011) (holding that, although the case was only appealable by leave granted and the defendant appealed by right, this Court would "exercise [its] discretion to treat [the defendant's] claim of appeal as a granted application for leave to appeal" for the sake of judicial economy). While generally true, this Court has no discretion to treat *this* appeal as on leave granted. MCL 213.56(6) states, in relevant part, "In the absence of a timely filed appeal of the order, an appeal *shall not be granted* . . . ." (Emphasis added.) "The phrases 'shall' and 'shall not' are unambiguous and denote a mandatory, rather than discretionary action." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). Thus, unlike the normal course of an appeal, this Court does not have discretion to treat this appeal as on leave granted. Instead, the appeal "shall not be granted," MCL 213.56(6), and must therefore be dismissed.

This is supported by *Detroit v Lucas*, 180 Mich App 47; 446 NW2d 596 (1989). There, the appellants appealed by right an order determining public necessity instead of by leave granted, as required by MCL 213.56(6). *Id*. at 49-50. This Court held that it was "without jurisdiction to review the circuit court order . . . because the application for leave to appeal was not timely filed." *Id*. at 51. While we are not strictly bound by *Lucas* because it was decided before

November 1, 1990, see MCR 7.215(J)(1), we nonetheless find it persuasive and agree with its application of the clear and unequivocal language used by the Legislature in MCL 213.56(6). See also *Mich Dep't of Transp v Benson*, 443 Mich 870, 870 (1993) ("Leave to appeal from the Court of Appeals order dismissing the appellants' claim of appeal is DENIED, because the circuit court order 'upholding the validity of the condemnation is appealable to the Court of Appeals only by leave of that court pursuant to the general court rules.' MCL 213.56(6)."). Therefore, like in *Lucas*, we conclude that plaintiff's failure to properly appeal the trial court's order determining public necessity requires dismissal of that portion of its appeal.

III. ATTORNEY FEES

Plaintiff also challenges the trial court's award of attorney fees to defendants. MCL 213.56(6) says nothing about a trial court's awarding attorney fees, and we interpret that statute as being limited to "an order of the court upholding or determining public necessity or upholding the validity of the condemnation proceeding . . . ." MCL 213.56(6). Thus, despite dismissing that portion of plaintiff's appeal challenging the trial court's determination of public necessity, we address plaintiff's challenge to the portion of the trial court's order awarding attorney fees to defendants.

Plaintiff does not contest the reasonableness of the awarded attorney fees but, instead, argues that the trial court incorrectly applied MCL 213.66(2) to the facts of this case. We agree. While attorney fees are generally reviewed for an abuse of discretion, whether the trial court properly interpreted and applied the UCPA to an award of attorney fees is reviewed de novo. *Indiana*

Mich Power Co v Community Mills, Inc, 333 Mich App 313, 318; 963 NW2d 648 (2020).

After successfully challenging plaintiff's proposed acquisition of their property, defendants sought—and the trial court awarded defendants—attorney fees under MCL 213.66(2), which states:

> 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.

In *Escanaba & Lake Superior R Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 812; 402 NW2d 505 (1986), this Court acknowledged that a property owner requesting attorney fees under MCL 213.66(2) must satisfy two prongs: (1) the property owner must successfully challenge the agency's right to acquire the property or the legal sufficiency of the proceedings and (2) the court must find the proposed acquisition improper.

In *Escanaba*, the property-owner defendants successfully challenged the legal sufficiency of the proceedings—satisfying the first prong of MCL 213.66(2)—but the trial court did not explicitly find that the proposed acquisition was improper. *Id*. at 807. On appeal, the plaintiff argued that absent such a finding by the trial court, the second prong necessary to recover attorney fees under MCL 213.66(2) was not satisfied. *Id*. at 812. This Court disagreed, holding "that a finding that the condemnation proceedings are procedurally defective is per se a finding that the proposed acquisition is improper, and that the trial

court does not have to separately state on the record that it finds the acquisition 'improper.' " *Id*. at 812-813.

There is no question that defendants successfully challenged plaintiff's acquisition in this case, thereby satisfying the first prong of MCL 213.66(2). The dispute on appeal is whether the second prong was satisfied. *Escanaba* is not applicable because its holding was limited to instances in which the property owner prevails because of the legal insufficiency of the proceedings; it says nothing about cases like this one where the property owner successfully challenges the agency's right to acquire the property.

Nonetheless, the trial court concluded that, similar to this Court's ruling in *Escanaba*, a trial court's ruling in favor of a property owner challenging an agency's right to acquire the property is necessarily a finding by the court that the proposed acquisition was improper. We disagree and conclude that, in this case, the trial court's ruling against plaintiff on defendants' challenge to the necessity of plaintiff's proposed acquisition was not a per se finding that the proposed acquisition was improper.

When interpreting a statute, courts "must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). If we were to conclude that every property owner's successful challenge to the legal sufficiency of condemnation proceedings is per se a finding by the court that the acquisition was improper (as this Court held in *Escanaba*) *and* that every property owner's successful challenge to the agency's right to acquire the property is a per se finding by the court that the acquisition was improper (as defendants

argue and the trial court held), then MCL 213.66(2)'s requirement that "the court finds the proposed acquisition improper" would be rendered completely nugatory. If such an interpretation were the Legislature's intent, then it would have simply left out MCL 213.66(2)'s requirement that "the court finds the proposed acquisition improper[.]"

The circumstances of this case illustrate why granting a property owner's challenge to an acquisition is not a per se finding that the proposed acquisition was improper. At the hearing to determine the public necessity of the acquisition, the trial court placed the burden of proving the necessity of the acquisition on plaintiff,[4] stating that it did "not believe that plaintiff has established a basis on which a taking of this particular property for the easements that are being proposed has established a necessity." At the hearing on defendants' request for attorney fees, the court reiterated that at the necessity hearing, plaintiff had the burden of proving that its proposed acquisition was necessary, stating that "plaintiff had failed" to demonstrate that "there was a necessity to condemn" defen-

[4] The parties contest who should have borne the burden of proving public necessity at the necessity hearing—defendants contend that the burden was always on plaintiff, while plaintiff contends that its declaration of taking established a prima facie case that its proposed taking was necessary. We do not resolve that dispute in this case because we do not have jurisdiction to review the trial court's determination of public necessity. Moreover, even if we did have jurisdiction, the issue was not properly presented for our review, having been first raised by plaintiff in its reply brief on appeal. See *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2007) (declining to address issues first raised in a reply brief because "[r]eply briefs must be confined to rebuttal, and a party may not raise new or additional arguments in its reply brief"). Because the issue is not properly before us, we merely observe that the trial court placed the burden of proving necessity on plaintiff at all times, and we offer no opinion whether it was proper for the court to do so.

dants' property. Because the trial court placed the burden of proving the public necessity of the acquisition on plaintiff, its ruling in defendants' favor was a finding that plaintiff failed to carry its burden. That is, the trial court's ruling was not akin to a finding that *defendants proved* that plaintiff's proposed acquisition was not necessary, and thus the ruling could not be a per se finding that the acquisition was improper. The trial court's ruling in defendants' favor was a finding that plaintiff failed to carry its burden, nothing more.

This highlights the fundamental flaw in defendants' argument. Defendants contend that by successfully challenging plaintiff's attempted acquisition, "the trial court found that there was no necessity for the condemnation." As explained, this is inaccurate; what the trial court found was that plaintiff failed to establish that its acquisition of defendants' property was necessary. That finding is distinct from a finding that the acquisition was improper.[5]

This is not to say that *Escanaba* was wrongly decided. To the contrary, *Escanaba*'s holding comports with our reasoning. In *Escanaba*, the defendants moved for summary disposition challenging the legal sufficiency of the proceedings on grounds that the plaintiff failed to make a good-faith offer to purchase the property as required by the UCPA. *Escanaba*, 156 Mich App at 809. In granting the motion, the trial court held that there was no question of fact that the plaintiff failed to make a good-faith offer to purchase

[5] We offer no opinion on whether a property owner's successful challenge to a public agency's right to acquire the property is a per se finding that the proposed acquisition was improper. In such a case, the agency's determination of public necessity is binding on the court absent a showing of fraud, error of law, or abuse of discretion, MCL 213.56(2), which appears to place the burden on property owners to show that the taking was improper.

the property, so the proceedings were legally insufficient and the defendants were entitled to judgment as a matter of law. *Id*. Thus, the trial court in *Escanaba* held that the defendants established that the proceedings were legally insufficient, thereby affirmatively establishing that the proposed acquisition was improper. *Id*. at 812. Here, in contrast, defendants did not establish that acquisition of their property was *not* a necessity; rather, plaintiff failed to carry its burden of establishing the necessity of its proposed acquisition.

Defendants argue that our interpretation is "entirely inconsistent with the purpose for fee-shifting in the first place." This Court recently reiterated that "[t]he 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." *Indiana Mich Power*, 333 Mich App at 319 (quotation marks and citation omitted). And in *Escanaba*, this Court stated that "[t]he legislative intent behind the [UCPA] is to place the owner of the property in as good a position as was occupied before the taking." *Escanaba*, 156 Mich App at 815 (quotation marks and citation omitted). Thus, defendants are correct to the extent that not awarding them attorney fees seems to run contrary to the purpose behind the statute. Yet MCL 213.66(2) clearly requires that "the court find[] the proposed acquisition improper" before awarding attorney fees. So while our interpretation of MCL 213.66(2) may be "inconsistent with the purpose for fee-shifting" as defendants suggest, it is nonetheless consistent with the plain statutory language. The plain language of a statute is not trumped by "the perceived purpose of the statute . . . ." *Perkovic*, 500 Mich at 53 ("The Court of Appeals' reliance on the perceived purpose of the statute runs counter to the

rule of statutory construction directing us to discern legislative intent from plain statutory language.").

IV. CONCLUSION

For the reasons explained in this opinion, we dismiss plaintiff's appeal in part and vacate that portion of the trial court's order awarding attorney fees to defendants.

Dismissed in part and vacated in part. No taxable costs, neither party having prevailed in full.

BECKERING and CAMERON, JJ., concurred with O'BRIEN, P.J.

EMAGINE ENTERTAINMENT, INC v DEPARTMENT OF TREASURY

Docket Nos. 350376 and 350881. Submitted November 10, 2020, at Lansing. Decided November 19, 2020, at 9:15 a.m.

Emagine Entertainment, Inc.; CH Royal Oak, LLC; Northstar Theater Partners, LLC; Cinema Hollywood, LLC; CH Canton, LLC; and CH Novi, LLC (collectively, Emagine) petitioned the Michigan Tax Tribunal (the MTT), alleging that respondent, the Department of Treasury, should have refunded Emagine for the sales tax Emagine paid on prepackaged candy from January 2013 to December 2013 because the sales on those items were exempt. Respondent maintained that the sales of prepackaged candy were not exempt because they were not "unprepared food" pursuant to Mich Admin Code, R 205.136(5) (Rule 86(5)). Emagine and respondent filed cross-motions for summary disposition. The administrative law judge (the ALJ) issued a proposed opinion and judgment granting in part Emagine's motion for summary disposition and denying respondent's motion for summary disposition. The ALJ ruled that the sale of the prepackaged candy was exempt from the General Sales Tax Act (the GSTA), MCL 205.51 *et seq*., and that Rule 86(5) was invalid because it conflicted with the plain language of the statute. The ALJ then concluded that there was an issue of fact regarding whether Emagine was entitled to a refund. The MTT agreed with the ALJ's conclusions, and following an additional hearing to resolve the remaining factual issue, the MTT concluded that Emagine was not entitled to a refund. In Docket No. 350376, respondent appealed the MTT's order granting summary disposition to Emagine. In Docket No. 350881, Emagine appealed the same order, arguing that it was entitled to a refund.

The Court of Appeals *held*:

1. When a statute and an administrative rule conflict, the statute necessarily controls. MCL 205.54g(1)(a) exempts from sales tax all food except prepared food intended for immediate human consumption. MCL 205.54g(4) defines "prepared food," in pertinent part, as food sold with eating utensils provided by the seller, including napkins. Rule 86(4) provides that "prepared

food" means, in pertinent part, food sold with eating utensils provided by the seller, and Rule 86(5)(b) includes a "75% test" providing that if a seller's prepared food sales percentage was 75% or less, eating utensils would be deemed "provided by the seller" if the seller's practice was to physically give or hand utensils to the purchasers, whereas if the percentage was greater than 75%, the utensils would be deemed provided if made available. Respondent in this case argued that the sales of prepackaged candy were not exempt under this test because more than 75% of Emagine's sales were devoted to prepared food and Emagine made eating utensils, such as napkins, available to their customers. However, respondent promulgated a rule that went beyond the statutory language. The 75% test—and the distinction it drew depending on the taxpayer's percentage of sales—was not found in the statute; MCL 205.54g(4)(c) provides that food will not be exempt if it is sold with eating utensils provided by the seller. Accordingly, MCL 205.54g(4)(c) contemplates that the eating utensils must specifically accompany the food or be added to it. Moreover, respondent's interpretation of MCL 205.54g(4)(c) rendered the other definitions in MCL 205.54g(4)(a) and (b) meaningless: the presence of *any* eating utensils *anywhere* in the establishment would cause *all* food sold in the establishment, regardless of the food's characteristics, to be excluded from exemption. Thus, Rule 86(5) went beyond merely defining statutory terms and swallowed the remainder of the definitions in MCL 205.54g(4). Accordingly, because it conflicted with the plain language of the statute, Rule 86(5) was invalid and the MTT correctly analyzed the disputed food items only under the statute and not under the rule. Respondent did not have the authority to circumvent the legislative process and administratively amend MCL 205.54g(4)—regardless of whether or not it felt that Michigan was in compliance with the Streamlined Sales and Use Tax Agreement. Accordingly, the MTT did not err in its conclusion that Rule 86(5) was invalid because it conflicted with MCL 205.54g. The MTT's factual finding—that the mere availability of napkins did not cause the prepackaged candy to become "prepared food" under MCL 205.54g—was supported by competent, material, and substantial evidence.

2. MCL 205.30(1) provides that the Department of Treasury will issue a refund for overpaid taxes. However, MCL 205.73(4) prohibits a person from enriching himself or herself or gaining any benefit from the collection or payment of the tax. In this case, the MTT's findings were well supported by the record. Emagine did not demonstrate that it was entitled to a refund for

the sales tax paid for the prepackaged candy. The cofounder and chair of Emagine acknowledged that Emagine's financial records did not support his belief that the sales tax had been a mere operating expense, and he could not point to any financial records to support his view. Finally, the facts in this case were distinguishable from the facts in *MJR Group, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 329119). There was an absence of documentary evidence in *MJR*, whereas in this case, none of the financial records supported the viewpoint that sales tax was an operating expense and not paid by the customers. Accordingly, the MTT's conclusion that Emagine's customers paid the sales tax was supported by competent, material, and substantial evidence from the record.

Affirmed.

TAXATION — GENERAL SALES TAX ACT — ADMINISTRATIVE LAW — FOOD EXEMPT FROM SALES TAX — EATING UTENSILS PROVIDED BY THE SELLER.

MCL 205.54g(4)(c) of the General Sales Tax Act, MCL 205.51 *et seq*., provides that food will not be exempt from sales tax if it is sold with eating utensils provided by the seller; Mich Admin Code, R 205.136(5)(b) includes a "75% test" providing that if a seller's prepared food sales percentage was 75% or less, eating utensils would be deemed "provided by the seller" if the seller's practice was to physically give or hand utensils to the purchasers, whereas if the percentage was greater than 75%, the utensils would be deemed provided if made available; Mich Admin Code, R 205.136(5)(b) impermissibly created a test that went beyond the statutory language; accordingly, Mich Admin Code, R 205.136(5)(b) is invalid.

Miller, Canfield, Paddock and Stone, PLC (by *Gregory A. Nowak* and *Katherine R. Hopkins*) for petitioners.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Justin R. Call*, *David W. Thompson*, and *Genevieve T. Fischre*, Assistant Attorneys General, for respondent.

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

PER CURIAM. In these consolidated appeals,[1] respondent, the Department of Treasury, appeals by right in Docket No. 350376 the order of the Michigan Tax Tribunal (the MTT) granting summary disposition to petitioners (collectively referred to as Emagine)[2] under MCR 2.116(C)(10) (no genuine issue of material fact). In Docket No. 350881, Emagine appeals as of right the same order, following the MTT's order denying Emagine's motion for reconsideration. We affirm.

I. FACTS & PROCEDURAL HISTORY

Emagine owns and operates several movie theaters in Michigan and sells food and beverage items at concession stands. From February 2010 to February 2014, Emagine paid tax on sales of bottled water and prepackaged candy but subsequently came to believe that paying this sales tax was unnecessary because the sales on those items were exempt. Emagine sought a refund for the sales tax paid during the four-year period. Respondent granted a refund for taxes related to the sales of bottled water but maintained that the sales of prepackaged candy were not exempt because they were not "unprepared food" pursuant to Mich Admin Code, R 205.136(5) (Rule 86(5)).

Emagine filed a complaint in the MTT alleging that sales of the other food items were exempt from sales tax and that Emagine had not collected sales tax from its customers, thereby entitling Emagine to a refund. Emagine and respondent were subsequently able to "narrow the dispute" and to narrow the relevant time

---

[1] *Emagine Entertainment, Inc v Dep't of Treasury*, unpublished order of the Court of Appeals, entered October 9, 2019 (Docket Nos. 350376 and 350881).

[2] Emagine is the parent corporation, and it owns and operates the various subsidiary limited-liability companies, which are theaters.

period to January 2013 to December 2013; the parties agreed that the refund amount for this period totals $79,026.27. Emagine and respondent filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue of material fact). The administrative law judge (the ALJ) issued a proposed opinion and judgment granting in part Emagine's motion for summary disposition and denying respondent's motion for summary disposition. The ALJ ruled that the sale of the prepackaged candy was exempt from the General Sales Tax Act (the GSTA), MCL 205.51 *et seq*., and that Rule 86(5) was invalid because it conflicted with the plain language of the statute. The ALJ then concluded that there was an issue of fact regarding whether Emagine was entitled to a refund. The MTT agreed with the ALJ's conclusions, and following an additional hearing to resolve the remaining factual issue, the MTT concluded that Emagine was not entitled to a refund. This appeal followed.

II. STANDARDS OF REVIEW

Our review of the MTT's decision is limited. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527; 817 NW2d 548 (2012). The MTT's factual findings are final if they are supported by competent, material, and substantial evidence on the whole record, but when the facts are not disputed and fraud is not alleged, our review is limited to whether the MTT made an error of law or adopted a wrong principle. *Id*. at 527-528. The scope of an administrative agency's statutory rulemaking authority and whether an agency has exceeded that authority, whether an administrative rule is arbitrary and capricious, and whether a rule comports with the intent of the Legislature are all questions of law that are

reviewed de novo. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 127; 807 NW2d 866 (2011).

Issues of statutory interpretation are reviewed de novo. *Mich Props, LLC*, 491 Mich at 528. When interpreting statutes, we must ascertain and give effect to the intent of the Legislature and avoid a construction that would render any part of the statute surplusage or nugatory. *Id*. Moreover, "the statute must be read as a whole," and "[i]ndividual words and phrases, while important, should be read in the context of the entire legislative scheme." *Id*.

Additionally, we review de novo a decision on summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). A motion is properly granted pursuant to MCR 2.116(C)(10) when "there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law." *Dextrom*, 287 Mich App at 415. We "must examine the documentary evidence presented and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence." *Id*. at 415-416.

III. ANALYSIS

Respondent argues that the MTT erroneously held that Emagine was exempt from paying tax for the sale of prepackaged candy. Specifically, respondent argues that the MTT committed error requiring reversal when it concluded that Rule 86(5) was invalid because it conflicted with the plain language of MCL 205.54g(4). We disagree.

An administrative agency has power "to interpret the statutes they are bound to administer and enforce." *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993). "[W]hen a statute and an administrative rule conflict, the statute necessarily controls." *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 366; 891 NW2d 884 (2016). "While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 98; 754 NW2d 259 (2008). Although the agency's interpretation is entitled to respectful consideration, it is not binding on Michigan courts and cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. *Id*. at 103.

MCL 205.54g(1)(a) exempts from sales tax all food "except prepared food intended for immediate human consumption." Prepared food is defined by MCL 205.54g(4):

> (4) "Prepared food" means the following:
>
> (a) Food sold in a heated state or that is heated by the seller.
>
> (b) Two or more food ingredients mixed or combined by the seller for sale as a single item.
>
> (c) *Food sold with eating utensils provided by the seller*, including knives, forks, spoons, glasses, cups, *napkins*, *straws*, or plates, but not including a container or packaging used to transport the food. [Emphasis added.]

The statute excludes the following items from this definition of "prepared food":

> (a) Food that is only cut, repackaged, or pasteurized by the seller.

(b) Raw eggs, fish, meat, poultry, and foods containing those raw items requiring cooking by the consumer in recommendations contained in section 3-401.11 of part 3-4 of chapter 3 of the 2001 food code published by the Food and Drug Administration of the Public Health Service of the Department of Health and Human Services, to prevent foodborne illness.

(c) Food sold in an unheated state by weight or volume as a single item, without eating utensils.

(d) Bakery items, including bread, rolls, buns, biscuits, bagels, croissants, pastries, doughnuts, danish, cakes, tortes, pies, tarts, muffins, bars, cookies, and tortillas, sold without eating utensils. [MCL 205.54g(5).]

Rule 86(4) parrots MCL 205.54g(1)(a):

(a) "Prepared food" means any of the following:

(i) Food sold in a heated state or that is heated by the seller.

(ii) Two or more food ingredients mixed or combined by the seller for sale as a single item.

(iii) Food sold with eating utensils *provided by the seller*. [Emphasis added.]

Rule 86(5) elaborates on eating utensils and defines the phrase "provided by the seller":

(5) An eating utensil is considered a tool, instrument, or item used or intended to be used to facilitate the eating of food. Examples of eating utensils include, but are not limited to, knives, forks, spoons, ice cream/popsicle sticks, skewers, glasses, cups, napkins, straws, and plates. The following apply:

(a) An eating utensil does not include a container or packaging used to transport food, such as a plastic carton in which take-out soup or salad is sold. A waxed paper sheet used to select an item, such as a donut or cookie, and then placed in a box or bag for transport with the baked good, is not considered an eating utensil.

(b) *Eating utensils are "provided by the seller"* under all of the following conditions:

(i) For a seller with a prepared food sales percentage *greater than 75%*, eating utensils are "provided by the seller" when the *utensils are made available to purchasers*.

(ii) For a seller with a prepared food sales percentage *of 75% or less*, eating utensils are "provided by the seller" if the seller's practice, as represented by the seller, *is to physically give or hand the utensils to purchasers*. Plates, bowls, glasses, or cups necessary for the purchaser to receive the food, for example, a glass for a dispensed soft drink or milk, or a plate for salad from a salad bar, need only be made available. [Emphasis added.]

Thus, Rule 86(5)(b) includes a "75% test" providing that if a seller's prepared food sales percentage was 75% or less, eating utensils would be deemed "provided by the seller" if the seller's practice was to physically give or hand utensils to the purchasers, whereas if the percentage was greater than 75%, the utensils would be deemed provided if made available. According to respondent, the sales of prepackaged candy are not exempt under this test because more than 75% of Emagine's sales were devoted to prepared food and Emagine made eating utensils, such as napkins, available to their customers.

Respondent argues that Rule 86(5)(b) does not conflict with the statute because it merely defines the statutory terms more precisely. The statute provides that food is not exempt if it is food that is sold with eating utensils that are provided by the seller; such utensils include napkins. MCL 205.54g(4)(c). The statute does not define or explain the phrase "provided by the seller." Rather than provide a simple definition, respondent promulgated a rule that goes beyond the statutory language and establishes the 75% test whereby the definition of "provided by the seller"

changes depending on the taxpayer's percentage of sales. This 75% test, and the distinction it draws, is not found in the statute, either explicitly or by implication. The statute clearly states that food sold with eating utensils provided by the seller would not be exempt—full stop. It makes no attempt to distinguish between food that is above or below a particular sales percentage.

The statute provides that food will not be exempt if it is "sold *with* eating utensils provided by the seller . . . ." MCL 205.54g(4)(c) (emphasis added). The statute does not define the word "with," and we apply the dictionary definition to give "undefined statutory terms their plain and ordinary meanings." *Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 102; 767 NW2d 668 (2009). *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "with" as "used as a function word to indicate combination, accompaniment, presence, or addition," or "inclusive of." Using this definition, we conclude that the statute contemplates that the eating utensils must specifically *accompany* the food or be *added* to it. This fits more in line with physically handing or providing the utensils to customers while selling the food; merely making the utensils available in other parts of an establishment is insufficient and does not fit within the ordinary definition of "with."

Moreover, respondent's interpretation of MCL 205.54g(4)(c), which excludes from exemption all food when there happens to be utensils available *somewhere* in the establishment, renders the other definitions in MCL 205.54g(4)(a) and (b) meaningless. The presence of *any* eating utensils *anywhere* in the establishment would cause *all* food sold in the establishment, regardless of the food's characteristics, to be

excluded from exemption. Each word must be given meaning, and no interpretation may be used that would render parts of a statute surplusage or nugatory. See *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 544; 942 NW2d 696 (2019). In application, the 75% test means that, so long as the 75% threshold is met, all food sold by the taxpayer becomes "prepared food" simply because of the *presence* of eating utensils, like napkins, within the establishment when they are made available to customers, and it is irrelevant whether the food items are heated or mixed with two or more ingredients, etc. Thus, Rule 86(5) goes beyond merely defining statutory terms and swallows the remainder of the definitions in MCL 205.54g(4). Accordingly, because it conflicts with the plain language of the statute, Rule 86(5) is invalid and the MTT correctly analyzed the disputed food items only under the statute and not under the rule.

Respondent unpersuasively argues that the rule is valid because respondent had authority to administer the Streamlined Sales and Use Tax Agreement (the SSUTA) and that the SSUTA allows for this test. Respondent contends that, in order for Michigan to remain in compliance with the SSUTA, it "had" to pass this rule because, seemingly, the 75% test is *not* mandated by statute. However, respondent defeats its own argument by conceding that Michigan has not adopted the 75% test by statute and that respondent, accordingly, attempted to remedy this "defect" by writing a rule to alleviate what it considers to be a statutory gap.

Michigan is a member of the 23-state SSUTA, which "is a multistate compact designed to reduce the burden on out-of-state businesses of complying with state sales and use taxation." *Ally Fin Inc v State Treasurer*, 502 Mich 484, 499 & n 32; 918 NW2d 662 (2018). However,

any parts of the SSUTA that "are inconsistent with our law do not have effect and *may not be read as invalidating or amending any provision of our law* . . . ." *Id*. at 499 n 33 (emphasis added). The GSTA, of which MCL 205.54g is a part, was passed by the Michigan Legislature and is therefore binding law. Respondent does not argue that the GSTA, or MCL 205.54g, is invalid or should not be followed. MCL 205.54g(4) gives an explicit definition of what constitutes "prepared food," and respondent's rule swallows this definition. In a nutshell, respondent did not have the authority to circumvent the legislative process and administratively amend MCL 205.54g(4)—regardless of whether or not it feels that Michigan is in compliance with the SSUTA.

Emagine argues that the MTT incorrectly concluded that a refund was not required for the erroneously paid taxes related to the prepackaged candy sales. We disagree.

MCL 205.30(1) provides that the Department of Treasury will issue a refund for overpaid taxes. However, MCL 205.73(4) prohibits a person from "enrich-[ing] himself or herself or gain[ing] any benefit from the collection or payment of the tax." This is in response to MCL 205.73(1), which permits a business to reimburse itself by adding the sales tax onto the price of the item and passing this cost onto its customers. "[T]he legal responsibility for the sales tax falls on the retail seller, with the tax being levied for the privilege of making sales at retail," but the retailer may choose to "pass the economic burden of the sales tax by collecting the tax at the point of sale from the consumer." *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 169; 853 NW2d 310 (2014). Regardless of "whether the consumer remits sales tax to the retail seller or the seller pays the sales tax from another source, the seller

is responsible for remitting the sales tax to the department, which tax is calculated as a percentage of the seller's gross proceeds in a taxable period." *Id*.

In the present case, the MTT's findings were well supported by the record. Paul Glantz, cofounder and chair of Emagine, testified that Emagine's financial records included *both* the price of the item and the sales tax for that item. However, he acknowledged that these financial records did not support his belief that the sales tax had been a mere operating expense, and he could not point to any financial records to support his "operating expense" view. Glantz testified about the sales tax and item price being "fungible," but he acknowledged that the financial records did not support this. In fact, Glantz acknowledged that the total tax for the year, which amounted to $206,337.80, came from Emagine's customers and that this was reflected in the financial records. Glantz was shown various financial documents also reflecting that the tax was paid by the customers. Additionally, Emagine's chief financial officer, Dirk Kjolhede, testified that the sales tax had been collected from the customers in order to pay sales tax to the Michigan government.

Emagine highlights that the financial records were incorrect or inaccurate, but this was merely what Glantz believed. These beliefs were based on his personal knowledge, and he was unable to point to any authority in support of his contention. Furthermore, his perceived belief stemmed solely from the lack of signage letting customers know that sales tax was included in the price. In fact, he testified that, at the time of the trial, Emagine used the same customer payment method except for the additional presence of signage. The only difference, therefore, between the old—supposedly incorrect—method and the present—

supposedly correct—method is the presence of signage. The financial records for both methods are the same. Therefore, Emagine's argument concerning the accuracy of the financial records is based on Glantz's personal views on how signage supposedly affects sales tax.

Emagine points to *MJR Group, LLC v Dep't of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 329119) (*MJR II*),[3] for support, but that case is factually distinguishable from the instant case, and the rationale applied in that case does not support Emagine's argument. MJR owned a chain of movie theaters, and the issue involved sales tax on bottled water and prepackaged candy. *Id*. at 1. Just like Emagine, MJR had mistakenly paid sales tax on exempt items, and it accordingly sought a refund. *Id*. The Department of Treasury denied the refund because it believed that MJR had collected the sales tax from its customers. *Id*. The MTT determined that MJR had not collected sales tax from its customers. *Id*. at 2. We affirmed the MTT's determination. *Id*. at 3. However, several facts distinguish *MJR II* from the present case.

There was an absence of documentary evidence in *MJR II*. *Id*. at 2-3. The software used for setting prices did not contain "transactional details," and there was no way to discern whether the sales tax was included in the item price. *Id*. at 2. The case turned on the testimony of two witnesses, one of whom had testified that he did not consider sales tax when setting the prices, and another who, in certain statements, had

[3] Unpublished decisions are not precedentially binding. MCR 7.215(C)(1). However, they may provide persuasive value. See *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 356 n 50; 871 NW2d 136 (2015).

stated that sales tax was included in the item price. *Id*. This other witness, however, gave inconsistent testimony. *Id*. at 3. Given the deferential standard of review, we merely examined the evidence and held that the MTT's decision was supported because a "reasonable mind" could accept the consistent witness's testimony over that of the inconsistent witness. *Id*. at 3. Furthermore, some of the inconsistent witness's statements supported the MTT's conclusions. *Id*.

Here, as previously discussed, none of the financial records shown to Glantz supported his viewpoint that sales tax was an operating expense and not paid by the customers. Moreover, in contrast to *MJR II*, Glantz himself testified that the records showed that customers paid the sales tax. Kjolhede testified similarly. This factual scenario was not present in *MJR II*. Additionally, unlike *MJR II*, the MTT in the present case ruled *against* petitioner and found that sales tax *was* paid by customers. In *MJR II*, we determined that there was evidence supporting the MTT's decision, and the same holds true of the MTT's decision in this case.

Emagine next cites principles of contract law and argues that, in the absence of notice to the customers that they were paying sales tax, no sales tax was paid. The cited authority does not support this position. *Andrie* merely stated that there was no presumption that the sales tax was *always* included in the purchase price and that it must be proven. *Andrie*, 496 Mich at 171-172. Additionally, MCL 205.73(1) provides that a business "shall not advertise or hold out to the public in any manner, directly or indirectly, that the tax imposed under this act *is not considered as an element in the price* to the consumer." (Emphasis added.) In other words, the statute does not require that, in order for sales tax to be collected from a customer for

purposes of a sales tax refund, the customer must be explicitly notified of the payment of sales tax. The statute merely prevents a business from inaccurately informing the public that such tax is not considered as part of the price. There is no allegation that Emagine did this in the present case.

Accordingly, the MTT's conclusion that Emagine's customers paid the sales tax was supported by competent, material, and substantial evidence from the record.

IV. CONCLUSION

The MTT did not err in its conclusion that Rule 86(5) was invalid because it conflicted with MCL 205.54g. The MTT's factual finding—that the mere availability of napkins did not cause the prepackaged candy to become "prepared food" under MCL 205.54g—was supported by competent, material, and substantial evidence. Further, the MTT did not err in its application of MCL 205.54g or by granting Emagine's motion for summary disposition under MCR 2.116(C)(10). Emagine has not demonstrated that it is entitled to a refund for the sales tax paid for the prepackaged candy. Accordingly, we affirm.

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

ASSOCIATION OF HOME HELP CARE AGENCIES v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 349405. Submitted November 9, 2020, at Lansing. Decided November 19, 2020, at 9:20 a.m.

The Association of Home Help Care Agencies (AHHCA) filed a complaint against the Department of Health and Human Services (DHHS) and the state of Michigan in the Court of Claims challenging the validity of policies issued by DHHS in two publications, Medical Services Administration Bulletin No. 17-32 (MSA 17-32) and MSA 18-09. DHHS administered the Home Help Program, a Medicaid program that provided personal care services to individuals who required assistance with the functions of daily living. DHHS monitored home help care agencies that provided care under the program, and agencies approved by DHHS were eligible to join the AHHCA. Home help care agencies were subject to certain requirements under federal and state law. Under the Social Security Act, 42 USC 301 *et seq*., home health aides who have been convicted of certain criminal offenses are excluded from participation in federal healthcare programs. These convictions include program-related crimes, patient abuse, healthcare fraud, and controlled substance offenses. Federal law also lists convictions that "may" exclude persons from participating in a federal healthcare program. The AHHCA referred to these as "mandatory convictions" and "permissive convictions," respectively. In 2017, DHHS issued MSA 17-32, which replaced all prior policies governing agency rates and setting new rates. In 2018, the department issued MSA 18-09, which, *inter alia*, required home help care agencies to directly employ workers and suspended the ability of a beneficiary to consent to allowing an agency employee with a criminal history to provide services. In its complaint, the AHHCA challenged MSA 17-32 and MSA 18-09 on constitutional and statutory grounds and also sought a temporary restraining order and a preliminary injunction. The Court of Claims, CHRISTOPHER M. MURRAY, J., denied all injunctive relief to the AHHCA. The parties subsequently moved for summary disposition, and the court granted defendants' motion and denied

the AHHCA's motion. The AHHCA later filed a motion for reconsideration, which the Court of Claims denied. The AHHCA appealed.

The Court of Appeals *held*:

1. States that participate in Medicaid must follow federal requirements, including adhering to a state plan, submitted by the state agency describing the nature and scope of its Medicaid program, and approved by the federal government. The AHHCA argued that the direct-employment mandate of MSA 18-09 violated the state plan and also that MCL 400.111a(1)(c) of the Social Welfare Act, MCL 400.1 *et seq*., required DHHS to be in conformance with the state plan. The state plan stated that providers must be qualified individuals or individuals who contracted with or were employed by an agency. The AHHCA construed this provision to mean that DHHS had to allow provider agencies to employ or contract with workers, but this interpretation added a requirement that was not part of the state plan. Rather, the state plan stipulated only that qualified individuals, individuals who contracted with an agency, or individuals employed by an agency were the only individuals who were permitted to act as providers to home help services; it did not stipulate that DHHS had to allow agencies to contract with workers. Therefore, the AHHCA did not show that the employment mandate violated the state plan and MCL 400.111a. Similarly, the AAHCA did not show that DHHS's exclusion of agency workers with permissive convictions under MSA 18-09 violated 42 USC 1320a-7(b) and MCL 333.20173a, which allow providers with permissive convictions to provide home help services. According to the AHHCA, 42 USC 1320a-7(b) requires state agencies to allow providers to participate in the program, but the plain language of the statute states that individuals "may" be excluded from participating in a federal healthcare program on the basis of the enumerated convictions. Because "may" is permissive, the AHHCA's interpretation of the statute was inconsistent with its plain language. MCL 333.20173a also did not support the AHHCA's argument. Under the statute, a provider may not employ an individual convicted of the "mandatory" convictions listed in 42 USC 1320a-7(a), but MCL 333.20173a does not have a provision that parallels 42 USC 1320a-7(b) pertaining to permissive convictions. MCL 333.20173a does not mandate that individuals with permissive convictions are entitled to act as providers or that DHHS is not permitted to preclude the participation of such individuals as providers.

2. The Court of Claims ruled, and defendants did not contest, that the notice for MSA 18-09 failed to include a reference to a specific statutory provision about which MSA 18-09 stated a policy.

Such a reference was necessary to conform with a requirement in MCL 400.111a that policies and procedures be established in "consultation" with affected providers to assure that the implementation and enforcement of state and federal laws are reasonable, fair, and in conformance with law and the state plan. The Court of Claims ruled that defendants had substantially complied with the notice requirements in MCL 24.224(2), citing the substantial-compliance provision in MCL 24.227(1). To the extent that the AHHCA argued that the omission of a statutory reference reflected the lack of statutory authority for the contested policies, this argument lacked support. The Legislature delegated broad authority to DHHS to enable it to accomplish its statutory responsibilities, including administration of the Home Help Program, and the AHHCA did not establish that MSA 18-09 was invalid because DHHS had failed to comply with MCL 24.224(2)(d).

3. A procedural due-process claim must identify a property or liberty interest that was interfered with by the challenged state action and must show that the procedures that led to the deprivation of that interest were constitutionally inadequate. The AHHCA argued that MSA 18-09 did not give providers constitutionally adequate notice of violations of the policy it announced and an opportunity to correct or challenge a violation before disenrollment. This claim is refuted by MSA 18-09 itself, which included the enrollment and disenrollment process for existing agencies, described the information and documents that a provider must submit to DHHS in order to be enrolled, and stipulated that a care agency might be disenrolled if it failed to meet any of the requirements in MSA 18-09. MSA 18-09 further provided that DHHS would inform an agency of a disenrollment decision within 10 days, and that agencies had the right to appeal any adverse action taken by DHHS. Given the framework of MSA 18-09, procedural due process did not require notice before disenrollment or an opportunity to take corrective action.

4. The AHHCA argued that the direct-employment requirement and removing a beneficiary's ability to consent to a provider with a permissive conviction violated the Equal Protection Clauses of the United States and Michigan Constitutions. The equal-protection analysis required a comparison of similarly situated entities that had experienced differential treatment. Although the AHHCA correctly noted that MSA 18-09 only applied to home help care agencies, a policy bulletin that set standards regarding these agencies did not establish differential treatment, nor did the AHHCA provide documentation of policies governing other types of providers. Additionally, the AHHCA did not show that MSA 18-09 failed the rational-basis test, which involved an examination of the

purpose of the policy. DHHS explained in response to comments submitted before it issued MSA 18-09 regarding the proposed policy to preclude beneficiary consent to a provider with a criminal record that it lacked sufficient capacity to monitor agency assignments to ensure the safety of beneficiaries who used a provider with a criminal history. Regarding the proposed direct-employment requirement, DHHS explained that it was designed to equalize the treatment of workers. The AHHCA did not show that DHHS lacked a rational basis for implementing these policies or that the policies violated equal protection.

5. Although the AHHCA challenged the denial of injunctive relief by the Court of Claims, this issue was rendered moot when summary disposition was affirmed regarding the claims underlying the AHHCA's request for injunctive relief.

Affirmed.

Darwyn P. Fair & Associates (by *Darwyn P. Fair*) for the Association of Home Help Care Agencies.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kristin M. Heyse*, *Leah J. Brooks*, and *Stephanie M. Service*, Assistant Attorneys General, for the Department of Health and Human Services and the state of Michigan.

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM. Plaintiff, the Association of Home Help Care Agencies (AHHCA), appeals by right the order of the Court of Claims granting summary disposition in favor of defendants the state of Michigan and the Department of Health and Human Services (DHHS) under MCR 2.116(C)(8) and (10). We affirm.

I. BACKGROUND

This dispute concerns DHHS's administration of the Home Help Program, which is a Medicaid program that provides personal care services to individuals who require hands-on assistance with the functions of daily

living.[1] DHHS is tasked with monitoring, regulating, and policing home health or help agencies[2] in Michigan that provide care under the program. DHHS-approved home help care agencies are eligible to join AHHCA.

A. STATUTORY FRAMEWORK FOR IMPLEMENTING STATE MEDICAID POLICIES AND THE APPROVED STATE PLAN

As part of the Social Welfare Act, MCL 400.1 *et seq*., MCL 400.111a authorizes the director of DHHS to implement policies governing the provision of services:

> (1) The director of the department of community health, after appropriate consultation with affected pro-

---

[1] In *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245-246; 931 NW2d 571 (2019), our Supreme Court summarized the general mechanics of Medicaid, observing:

> The Medicaid program is governed by a complex web of interlocking statutes, as well as regulations and interpretive documents published by state and federal agencies. The program was created by Title XIX of the Social Security Act of 1965, PL 89-97; 79 Stat 343, codified at 42 USC 1396 *et seq*. Medicaid is generally a need-based assistance program for medical care that is funded and administered jointly by the federal government and individual states. At the federal level, the program is administered by the Secretary of Health and Human Services through the Centers for Medicare & Medicaid Services (CMS). The State Medicaid Manual is published by CMS to help guide states in their administration of the program, including how to determine an applicant's eligibility for benefits. Each participating State develops a plan containing reasonable standards for determining eligibility for and the extent of medical assistance within boundaries set by the Medicaid statute and Secretary of Health and Human Services. In formulating those standards, States must provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant. [Citations, quotation marks, emphasis, and ellipses omitted.]

[2] Federal law refers to home "health" care agencies and state law refers to home "help" care agencies; we shall use whichever term is appropriate in the context of a particular discussion, although for purposes of our analysis and holding, the terms are effectively interchangeable.

> viders and the medical care advisory council established according to federal regulations, may establish policies and procedures that he or she considers appropriate, relating to the conditions of participation and requirements for providers established by section 111b and to applicable federal law and regulations, to assure that the implementation and enforcement of state and federal laws are all of the following:
>
> (a) Reasonable, fair, effective, and efficient.
>
> (b) In conformance with law.
>
> (c) In conformance with the state plan for medical assistance adopted under section 10 and approved by the United States department of health and human services.
>
> (2) The consultation required by this section shall be conducted in accordance with guidelines adopted by the state department of community health according to section 24 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.224.

In May 1997, "[a]ll the statutory authority, powers, duties, functions and responsibilities of the Home Help Program" stated in MCL 400.106, MCL 400.109, and MCL 400.109c were transferred to the Department of Community Health (see Executive Order No. 1997-5(III)(1); MCL 400.224), which subsequently became DHHS in 2015 under Executive Order No. 2015-4.

The "consultation" requirement referred to in MCL 400.111a(1) and (2) incorporates the procedure for adopting guidelines outlined in MCL 24.224 of the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*. MCL 24.224 provides:

> (1) Before the adoption of a guideline, an agency shall give electronic notice of the proposed guideline to the committee, the office of regulatory reform, and each person who requested the agency in writing or electronically for advance notice of proposed action that may

> affect the person. . . . The notice shall be given by mail, in writing, or electronically transmitted to the last address specified by the person requesting the agency for advanced notice of proposed action that may affect that person. . . .
>
> (2) The notice required by subsection (1) shall include all of the following:
>
> (a) A statement of the terms or substance of the proposed guideline, a description of the subjects and issues involved, and the proposed effective date of the guideline.
>
> (b) A statement that the addressee may express any views or arguments regarding the proposed guideline or the guideline's effect on a person.
>
> (c) The address to which written comments may be sent and the date by which comments shall be mailed or electronically transmitted, which date shall not be less than 35 days from the date of the mailing or electronic transmittal of the notice.
>
> (d) A reference to the specific statutory provision about which the proposed guideline states a policy.[3]

The Social Security Act, 42 USC 301 *et seq*., sets forth conditions for home health agencies' participation in Medicaid. 42 USC 1395bbb. Home health agencies must "use" home health aides who have completed certain training requirements and who are "competent to provide" home healthcare, in addition to conducting regular performance reviews and pro-

[3] We note that the policies or bulletins at issue in this case are not APA guidelines. An APA "guideline" is defined as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). Rather, MCL 400.111a authorizes the establishment of policies and procedures that home help providers are required to follow, and it merely incorporates the "guideline" procedure in the APA for purposes of explaining what must be done to satisfy the "consultation" requirement of MCL 400.111a.

viding "regular in-service education" to ensure the continued competence of home health aides. 42 USC 1395bbb(a)(3)(B)(ii). Federal law lists convictions that result in mandatory exclusion from participation in federal healthcare programs, which include convictions for program-related crimes, patient abuse, healthcare fraud, and controlled substance offenses. 42 USC 1320a-7(a). Federal law also lists convictions that "may exclude" individuals from participation in a federal healthcare program, and those offenses, among many others, include misdemeanor convictions for fraud and financial misuse related to a healthcare program. 42 USC 1320a-7(b). AHHCA refers to the former category as "mandatory convictions" and to the latter category as "permissive convictions."

The federal government approved a State Plan for Michigan in August 2007. "The State plan is a comprehensive written statement submitted by the agency describing the nature and scope of its Medicaid program and giving assurance that it will be administered in conformity with [federal law]." 42 CFR 430.10 (2021). The approved State Plan described the services available through the Home Help Program, which—for one calendar month—are a maximum of five hours for shopping, six hours for light housekeeping, seven hours for laundry, and 25 hours for meal preparation. According to the State Plan, providers of home help services "shall be qualified individuals or individuals who contract with or are employed by an agency."

B. DHHS POLICIES GOVERNING HOME HELP AGENCIES IN MICHIGAN

In 2008, DHHS issued Medical Services Administration (MSA) Bulletin No. 08-28, setting forth the wage

rate for agency providers of home help services and indicating that future wage increases for both individual and agency providers would occur concurrently and be based on minimum-wage-law changes and legislative appropriations. An agency was eligible for approval by DHHS if it had a federal tax identification number and if it employed or subcontracted with two or more persons to provide home help care. In 2015, DHHS issued MSA 15-13, which required home help agencies to employ workers directly, although DHHS held this requirement in abeyance until further notice for agencies approved before June 1, 2015. DHHS further allowed home help agency workers who had permissive or nonmandatory convictions to provide services with the consent of the beneficiary. In 2017, DHHS issued MSA 17-32, replacing all prior policies governing agency rates and setting new rates.

DHHS subsequently provided notice of a proposed policy draft that became MSA 18-09, updating the standards governing home help agencies. DHHS required agencies to employ workers directly, and it suspended the ability of a beneficiary to consent to allowing an agency employee with a criminal history to provide services. Agencies that did not comply with the requirements of the policy could be removed from DHHS's Approved Agency List or disenrolled. Agencies removed from the approved list would still be eligible for reimbursement, but at the individual provider rate. If an agency was disenrolled, DHHS would notify the agency of the disenrollment determination within 10 days, and this decision could be appealed. An agency could provide services while an appeal was pending if the agency accepted responsibility to repay funds disbursed by DHHS during the appeal if the disenrollment determination was upheld.

In response to DHHS's solicitation of comments, one commenter disagreed with the proposal to suspend a beneficiary's ability to consent to receive services from an agency provider with a criminal record, claiming that it would result in a shortage of eligible providers. DHHS indicated that it did not have the capacity to monitor all the consent arrangements in order to ensure the safety of beneficiaries, although DHHS would still permit beneficiaries who knew and trusted their provider to employ that person as an individual provider rather than through an agency despite their criminal history. Another commenter disagreed with the direct-employment requirement because it would create a financial hardship for agencies. DHHS responded that it was covering some of the taxes and costs for agencies and that agencies would also be paid a higher rate of compensation in light of the added costs so that agencies could continue to confer the same level of benefits on their employees. When DHHS issued MSA 18-09, it notified agencies that the direct-employment requirement would apply to all agencies.

AHHCA filed a complaint in the Court of Claims challenging the validity of MSA 17-32 and MSA 18-09 on constitutional and statutory grounds. AHHCA also sought a temporary restraining order and a preliminary injunction. The Court of Claims denied all injunctive relief and denied AHHCA's motion for reconsideration regarding injunctive relief. The parties subsequently moved for summary disposition. The court granted defendants' motion for summary disposition, but denied AHHCA's competing motion for summary disposition. The court subsequently denied AHHCA's motion for reconsideration of the order summarily dismissing its complaint.

II. ANALYSIS

A. SUMMARY DISPOSITION

1. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012).[4] We also review de novo matters of statutory interpretation.

[4] MCR 2.116(C)(8), which provides for summary disposition when a "party has failed to state a claim on which relief can be granted," tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision under MCR 2.116(C)(8). *Id*. All factual allegations in the complaint are accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, 465 Mich at 130. In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court set forth the framework regarding analysis of a motion for summary disposition brought under MCR 2.116(C)(10), explaining:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

Estes v Titus, 481 Mich 573, 578-579; 751 NW2d 493 (2008).[5] This Court likewise reviews de novo questions of constitutional law. *Adair v Michigan*, 497 Mich 89, 101; 860 NW2d 93 (2014).

2. ALLEGED STATUTORY VIOLATIONS

States that choose to participate in Medicaid must follow federal requirements. *In re Rasmer Estate* , 501 Mich 18, 25; 903 NW2d 800 (2017). "Medicaid is a program that uses a form of cooperative federalism under which coordinated state and federal efforts coexist within a complementary framework in regard to administration." *People v Kanaan*, 278 Mich App 594, 612; 751 NW2d 57 (2008). Federal requirements for state participation in Medicaid do not deprive a state of its "authority to set parameters and controls relative to Medicaid." *Id*. This Court has described DHHS's authority to implement and administer a Medicaid program as follows:

> Pursuant to the Social Welfare Act . . . , [DHHS] is responsible for establishing and administering medical assistance programs in the state, including the Medicaid

[5] In *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court recited the rules of statutory construction:

> The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the language of the statute, which constitutes the most reliable evidence of legislative intent. When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed, requiring enforcement of the statute as written, without any additional judicial construction. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. We must give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage. [Citations omitted.]

> program. See MCL 330.3101. Consistently with separation of powers principles and in light of the complex nature of the endeavor, the Legislature has delegated broad authority to [DHHS] to enable it to accomplish its statutory responsibilities. . . . However, consonant with the delegation doctrine, such authority is circumscribed by the addition of substantive standards, including, for example, eligibility requirements, types of services provided, and the directive to develop policies and procedures regarding the participation of, and reimbursement to, health care service providers. See MCL 400.106, 400.109, 400.111a. . . . Generally, then, [DHHS] has been delegated the responsibility of establishing and administering health care programs . . . that most effectively meet the needs of those persons eligible for Medicaid and state-funded services, using the state's limited resources in the most efficient manner possible. In the absence of a specific legislative directive that modifies its authority, [DHHS] is obligated to fulfill its statutory duties to establish, administer, and maintain the integrity of such programs. [*Pharm Research & Mfrs of America v Dep't of Community Health*, 254 Mich App 397, 404-405; 657 NW2d 162 (2002).]

AHHCA argues that the direct-employment mandate under MSA 18-09 violates the federally approved State Plan and that MCL 400.111a(1)(c) requires DHHS's policies and procedures to be in conformance with the State Plan. The State Plan declares that "[p]roviders shall be qualified individuals or individuals who contract with or are employed by an agency." AHHCA construes this provision to mean that DHHS must allow provider agencies to employ *or* contract with workers, but this interpretation adds a requirement that is not present in the State Plan. The plain language of the State Plan simply dictates that qualified individuals, individuals who contract with an agency, or individuals who are employed by an agency are the only individuals permitted to act as providers

relative to home help services; it does not mean that DHHS *must* allow agencies to contract with workers. Therefore, AHHCA has not shown a violation of the State Plan and MCL 400.111a.

AHHCA next argues that DHHS's exclusion of agency workers with permissive convictions under MSA 18-09 violates 42 USC 1320a-7(b) and MCL 333.20173a, which allow providers with permissive convictions to provide home help services. As indicated earlier, 42 USC 1320a-7(b) provides that individuals "may" be excluded from participating in a federal healthcare program on the basis of enumerated convictions. "[T]he word 'may' typically reflects a permissive condition, entrusting a particular choice to a party's discretion." *In re Complaint of Mich Cable Telecom Ass'n*, 241 Mich App 344, 361; 615 NW2d 255 (2000). AHHCA's interpretation that 42 USC 1320a-7(b) *requires* state agencies to allow these providers to participate in the program is inconsistent with the plain language of the federal statute. Accordingly, we reject this argument.

Furthermore, MCL 333.20173a does not support AHHCA's position. MCL 333.20173a(1) provides that "a covered facility shall not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the covered facility if the individual" has been convicted of certain crimes, including those listed in 42 USC 1320a-7(a) (mandatory convictions). MCL 333.20173a does not contain a provision that parallels 42 USC 1320a-7(b), which pertains to permissive convictions. AHHCA's citation of MCL 333.20173a, without any additional argument or explanation, does not support its stance that defendants were not permitted to exclude workers with permissive convictions. MCL 333.20173a does not mandate that indi-

viduals with permissive convictions or convictions not enumerated in the statute are entitled to act as providers or that DHHS is not permitted to preclude their participation as providers.

AHHCA next argues that the notice for proposed MSA 18-09—a draft of the policy—did not satisfy the requirement in MCL 24.224(2)(d) to include a reference to a specific statutory provision about which MSA 18-09 stated a policy, which was necessary to establish the "consultation" requirement in MCL 400.111a. The Court of Claims ruled, and defendants do not contest, that the notice for MSA 18-09 did not contain a citation of the statutory provision implemented by the bulletin. The court, however, citing the substantial-compliance provision in MCL 24.227(1), further ruled that defendants had substantially complied with the notice requirements of MCL 24.224(2). AHHCA maintains that defendants were "required to comply with all of the requirements in issuing bulletins, not just some." (Emphasis omitted.) But AHHCA's argument does not account for MCL 24.227(1), which provides, in relevant part, that "[a] guideline adopted after the effective date of this section is not valid unless processed in *substantial compliance* with sections *24*, 25, and 26." (Emphasis added.) To the extent that AHHCA argues that the omission of a statutory reference reflected the lack of statutory authority underlying the policies affecting the direct-employment requirement and providers with convictions, we reject the contention. As this Court acknowledged in *Pharm Research*, 254 Mich App at 404-405, "the Legislature has delegated broad authority to [DHHS] to enable it to accomplish its statutory responsibilities," including administration of the Home Help Program, which is amply supported by state and federal statutes. AHHCA has not established that the Court of

Claims erred by rejecting its argument that MSA 18-09 was invalid because DHHS did not comply with MCL 24.224(2)(d).

3. PROCEDURAL DUE PROCESS

The United States and Michigan Constitutions prohibit the deprivation "of life, liberty, or property, without due process of law." US Const, Am XIV; Const 1963, art 1, § 17. A procedural due-process claim must identify a property or liberty interest interfered with by the challenged state action and must show that the procedures leading to the deprivation of that interest were constitutionally inadequate. *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 606; 683 NW2d 759 (2004). In *Mathews v Eldridge*, 424 US 319, 334-335; 96 S Ct 893; 47 L Ed 2d 18 (1976), the United States Supreme Court observed:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

"[P]rocedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213-214; 761 NW2d 293 (2008).

AHHCA argues that MSA 18-09 does not give providers constitutionally adequate notice of violations of the policy and an opportunity to correct the violations or challenge them before disenrollment. This claim is refuted by an examination of the enrollment and disenrollment process for existing agencies, such as AHHCA's member agencies, described in MSA 18-09. MSA 18-09 requires "[a] current Medicare certified home health agency . . . to provide a letter of intent and a copy of the current Medicare certification." Among other information, a letter of intent must state that the agency owner and managing employee "will ensure that the agency and the agency's caregivers and employees have read all current [DHHS] Home Help policies and procedures and will provide services in compliance with those requirements." Agencies must "pass a criminal history screening." MSA 18-09 provides that DHHS will notify a provider of approval, denial, or the need for additional information. MSA 18-09 further states that "[t]he [DHHS] Home Help Unit will audit employment documents for a sample of agencies each year." "An agency may be disenrolled if it fails to meet any of the requirements in" MSA 18-09. DHHS will inform an agency of a disenrollment determination within 10 days of the decision. An agency that does not meet the requirements of MSA 18-09 may also be removed from the Approved Agency List, but such agencies "will be eligible to provide services at the individual rate for Home Help." Agencies that are removed from the Approved Agency List may seek reinstatement. The bulletin provides that agencies "have the right to appeal *any* adverse action taken by [DHHS]." (Emphasis added.)

For enrolled agencies, removal from the approved list and disenrollment are both options that DHHS may take against an agency that does not meet the

requirements of the bulletin, so it does not follow that disenrollment is immediate and automatic for all agencies that do not comply with the policies of MSA 18-09. Additionally, again, the removal of an agency from the approved list does not require its complete shutdown because such agencies are eligible to receive the individual provider rate. Therefore, AHHCA's argument that agencies will be disenrolled without the opportunity to take corrective action, although possible, is not the only procedure contemplated by the bulletin.

AHHCA states that "pending payments will be lost resulting in a retroactive effect as payments are made in arrears." AHHCA cites no support for this assertion, nor does the bulletin support this statement. MSA 18-09 states, as noted earlier, that a provider appealing a disenrollment decision "may continue to provide services during the appeal period if the agency provider accepts responsibility for the repayment of funds should the [DHHS] decision be upheld." This provision contemplates continued, or at least retroactive, payment.

Moreover, AHHCA's focus on the adequacy of the opportunity to challenge a disenrollment determination fails to fully analyze the issue because it does not address the *Mathews* balancing test. AHHCA emphasizes the disruption of services and payment without addressing the risk of error resulting from the current procedure, the value added by providing an opportunity for a hearing or to take corrective action before disenrollment, and defendants' interests, including the administrative burden of providing agencies with an opportunity to be heard or overseeing agencies' efforts to take corrective action. The United States Court of Appeals for the Second Circuit concluded that balancing a beneficiary's interest in receiving home health

benefits with the "fiscal and administrative burden" to the state did not require the state to provide a beneficiary with "a pre-deprivation review procedure" before reducing or terminating continued home health services. *Lutwin v Thompson*, 361 F3d 146, 148, 158 (CA 2, 2004). Although nonbinding, see *Jaqua v Canadian Nat'l R, Inc*, 274 Mich App 540, 546; 734 NW2d 228 (2007), the Second Circuit's ruling highlights the insufficiency of AHHCA's procedural due-process claim in this case. Given the overall framework of MSA 18-09, we do not accept AHHCA's claim that procedural due process requires notice before disenrollment and an opportunity to take corrective action. If, for example, an agency commits fraud or violates a policy requirement, DHHS can disenroll the agency, but timely notice of the disenrollment determination must then be given to the agency, which determination would constitute an "adverse action," thereby triggering a right to an appeal before any permanent deprivation of an interest. And AHHCA has not persuaded us of any due-process right to take corrective action. In short, AHHCA fails to show that the existing procedure under MSA 18-09 is constitutionally inadequate.[6]

4. EQUAL PROTECTION

AHHCA argues that MSA 18-09 violated equal protection by singling out home help care agencies in imposing the direct-employment requirement and in removing an agency's ability to obtain a beneficiary's agreement to receive services from a worker with a permissive conviction. "The Equal Protection Clauses of the United States and Michigan Constitutions pro-

[6] AHHCA emphasizes the hardship resulting from the restructuring required to comply with MSA 18-09, but it has provided no facts to support its claim and has not conducted the necessary legal analysis.

vide that no person shall be denied the equal protection of the law." *Wysocki v Felt*, 248 Mich App 346, 350; 639 NW2d 572 (2001). "This constitutional guarantee requires that persons similarly situated be treated alike." *Rose v Stokely*, 258 Mich App 283, 295-296; 673 NW2d 413 (2003). Different levels of review apply depending on the basis of the classification scheme. *Phillips v Mirac, Inc*, 470 Mich 415, 432-433; 685 NW2d 174 (2004). "In Michigan, courts have applied the rational basis test principally to economic and social legislation." *Wysocki*, 248 Mich App at 354. "Where the proponent of an equal protection argument is not a member of a protected class, or does not allege violation of a fundamental right, the equal protection claim is reviewed using the rational basis test." *Houdek v Centerville Twp*, 276 Mich App 568, 585-586; 741 NW2d 587 (2007). "Under this test, a statute is constitutional if it furthers a legitimate governmental interest and if the challenged statute is rationally related to achieving that interest." *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 419-420; 836 NW2d 498 (2013). The party asserting an equal-protection violation must show that the policy "is arbitrary and wholly unrelated in a rational way to the objective of the" policy. *Wysocki*, 248 Mich App at 354 (quotation marks and citation omitted).

Like AHHCA's procedural due-process claim, its equal-protection argument is devoid of factual support and proper legal analysis. Central to an equal-protection analysis is a comparison of similarly situated entities experiencing differential treatment. See *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 328; 783 NW2d 695 (2010). That type of comparison is absent from AHHCA's equal-protection argument. AHHCA is correct that MSA 18-09 applies to home help care agencies only, but

introducing a policy bulletin that sets the standards governing home help care agencies does not establish differential treatment in the absence of documentation of policies governing other types of providers. AHHCA states that "[a]ll other providers of home help care services, from all other Medicaid funded provider groups, are allowed to continue the prior practices of contracting home help care workers including, for example, hospice providers, community mental health providers, and state direct home help workers." AHHCA also claims that defendants "do not employ their home help care workers." AHHCA offers no factual support for these statements. Additionally, AHHCA does not describe the types of services offered by the other providers it identified or how they compare to home help, and it is unclear whether the other types of providers also provide home help care services or other types of Medicaid-funded services more broadly. And AHHCA fails to describe the circumstances of defendants' use of home help care workers. In sum, AHHCA has not set forth a foundation for its equal-protection claim showing that home help care agencies are treated differently from other similarly situated groups.

Even assuming differential treatment, AHHCA has not shown that MSA 18-09 fails the rational-basis test, which entails an examination of the purpose of the policy. See *Phillips*, 470 Mich at 434-435. "A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Harvey v Michigan*, 469 Mich 1, 7; 664 NW2d 767 (2003) (quotation marks and citation omitted). A policy is presumed valid, and the party asserting an equal-protection violation has the burden of proving other-

wise. See *Shepherd Montessori*, 486 Mich at 318-319. DHHS produced its responses to the comments it received before it issued MSA 18-09, addressing the proposed policies regarding direct employment and permissive convictions. As to precluding beneficiary consent to a provider with a criminal record, DHHS stated that it did "not have the capacity to sufficiently monitor agency assignments to ensure the safety of beneficiaries who use a provider with a criminal history." In addition, DHHS acknowledged that beneficiaries could still agree to receive services from a known and trusted *individual* provider with a criminal history. AHHCA has not countered DHHS's stated safety concern. In response to a commenter's disagreement with the direct-employment requirement, DHHS stated that it paid "the employer's share of federal taxes and unemployment" and that "[a]gencies are paid at a higher rate . . . so that all personal care staff who work for the agency receive the same benefit." That is, the direct-employment requirement served to equalize treatment of workers. AHHCA has not shown that DHHS lacked a rational basis for implementing these policies; rather, AHHCA asserts that the policies are arbitrary because they did not exist before. This argument fails to identify a shortcoming in DHHS's explanations. AHHCA has not met its burden of establishing that the policy had no rational basis and violated equal protection.

B. RECONSIDERATION

AHHCA argues that the Court of Claims erred by denying its motion for reconsideration, raising issues that the court had addressed and rejected in the motion for summary disposition, and that we have now addressed and rejected in this opinion as part of our ruling

affirming the Court of Claims. Accordingly, there was no abuse of discretion in denying the motion for reconsideration, and we affirm that ruling by the Court of Claims. MCR 2.119(F)(3); *Sanders v Perfecting Church*, 303 Mich App 1, 8; 840 NW2d 401 (2013).

C. PRELIMINARY INJUNCTION

Finally, AHHCA challenges the denial of injunctive relief. This issue is now moot. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). Because we have affirmed summary dismissal of the claims in this lawsuit that provided the support for AHHCA's request for injunctive relief, the issue of injunctive relief has been rendered moot.

We affirm. Having fully prevailed on appeal, defendants may tax costs under MCR 7.219.

MARKEY, P.J., and METER and GADOLA, JJ., concurred.

RANDALL v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION

Docket Nos. 346135 and 346476. Submitted June 2, 2020, at Grand Rapids. Decided November 19, 2020, at 9:25 a.m. Leave to appeal denied 507 Mich 932 (2021) (Docket No. 346135); 507 Mich 933 (2021) (Docket No. 346476).

Samuel J. Randall filed an action in the Kent Circuit Court against the Michigan High School Athletic Association (MHSAA), Grand Rapids Christian High School, Grand Rapids Christian Schools, St. Francis High School, Grand Traverse Area Catholic Schools, Bay Hockey Association, Ryan Fedorinchik, Anthony Polazzo, and Metropolitan Health Corporation, alleging that they were responsible under various theories of liability for failing to remove him from a youth hockey game after he allegedly showed obvious signs of a concussion. Plaintiff, who was the goalie of a youth hockey team run by St. Francis High School and the Bay Hockey Association, was injured during a game against a team operated by the Grand Rapids Christian Schools; Polazzo, an employee of Metropolitan Health Corporation, was the athletic trainer for both teams during the game. Plaintiff was involved in two separate collisions during the game. The parties disputed the length of time, if any, plaintiff laid on the ice after the first collision. Polazzo checked on plaintiff on the ice after the first collision, plaintiff stated the he was okay to continue playing, and Polazzo told plaintiff to alert him if he had certain symptoms and to notify him if plaintiff did not think he could continue playing; Polazzo later filled out a form regarding his contact with plaintiff on the ice. Plaintiff left the game five or six minutes later with a suspected concussion after a second collision. Along with various claims against the other defendants, plaintiff asserted that Polazzo was negligent in his interactions with plaintiff and that Polazzo's actions constituted negligence per se under MCL 333.9156(3) of the concussion-protection statutes, MCL 333.9155 and MCL 333.9156. Polazzo moved for summary disposition, arguing that plaintiff's claims sounded in medical malpractice, not negligence, and that dismissal was appropriate because plaintiff failed to follow the procedural requirements in MCL 600.2912b and MCL 600.2192d for filing medical malpractice

actions. Plaintiff opposed the motion. The court, Mark A. Trusock, J., denied Polazzo's motion, concluding that (1) although Polazzo was a licensed health professional, plaintiff's claims did not sound in medical malpractice and (2) summary disposition was inappropriate because discovery was not complete. After additional discovery, Polazzo and Metropolitan Health Corporation moved for summary disposition, asserting the same arguments as in Polazzo's first motion but adding references to plaintiff's own deposition testimony that allegedly supported that his claims sounded in medical malpractice. In turn, St. Francis High School, Grand Traverse Area Catholic Schools, Bay Hockey Association, and Fedorinchik (collectively, the association defendants) also moved for summary disposition, arguing that Fedorinchik, who was not a medical professional, had justifiably relied on Polazzo's assessment of plaintiff after the first collision. In one opinion, the trial court denied Polazzo and Metropolitan Health Corporation's motion for summary disposition, reasoning (1) that plaintiff's claim against Polazzo did not sound in medical malpractice because the allegations did not require a higher level of medical expertise and (2) that the question was not whether Polazzo was negligent in his medical treatment but whether he was negligent in failing to provide medical treatment. In a second opinion, the court granted the association defendants summary disposition, reasoning that (1) there was no evidence that Fedorinchik had breached his ordinary duty of care to plaintiff and (2) there was no evidence that Fedorinchik was negligent per se given the lack of documentary evidence that he had reason to know that plaintiff had sustained a concussion. In a third opinion, the trial court dismissed Grand Rapids Christian High School and Grand Rapids Christian Schools from the case. Discovery then continued for the remaining claims. In Docket No. 346135, Polazzo and Metropolitan Health Corporation appealed the trial court's order denying their motion for summary disposition. In Docket No. 346476, plaintiff appealed the trial court's order granting the association defendants summary disposition. The Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 333.9156(3) provides two distinct duties with regard to addressing concussions in youth sports. The first sentence of the statute provides that a coach or other adult employed by, volunteering for, or otherwise acting on behalf of an organizing entity during an athletic event sponsored by or operated under the auspices of the organizing entity must immediately remove from physical participation in an athletic activity a youth athlete

who is suspected of sustaining a concussion during the athletic activity. The second sentence of the statute provides that a youth athlete who has been removed from physical participation in an athletic activity under this subsection cannot return to physical activity until he or she has been evaluated by an appropriate health professional and receives written clearance from that health professional authorizing the youth athlete's return to physical participation in the athletic activity. The first sentence imposes a legal duty on coaches and other covered adults to remove a youth athlete who is suspected of sustaining a concussion from further involvement in covered athletic activities. The duty imposed involves actions that can be taken by lay persons; it does not involve a professional relationship with a healthcare professional. The duty does not require medical judgment beyond the realm of common knowledge and experience, and the duty is consistent with caselaw holding coaches and other nonparticipating adults in recreational activities to an ordinary-negligence standard. In contrast, the second sentence of MCL 333.9156(3) imposes a medical malpractice duty on appropriate health professionals for actions taken *after* the youth athlete has been removed from physical participation in the athletic activity because of a suspected concussion. Under MCL 333.9155(4)(a), an "appropriate health professional" means a health professional who is licensed or otherwise authorized to engage in a health profession under MCL 333.16101 *et seq*., and whose scope of practice within that health profession includes the recognition, treatment, and management of concussions. Generally speaking, a plaintiff cannot make a viable claim for money damages based strictly on the violation of a statute unless the Legislature provides for a private cause of action. When the Legislature provides other means for enforcing a statute's provisions, a private statutory cause of action for money damages may not be inferred. With regard to the concussion-protection statutes, there is no language explicitly creating a right to a private cause of action and there is no language from which a necessary inference could be drawn that the Legislature intended there to be one. Thus, the concussion-protection statutes do not create, expressly or by implication, a private statutory cause of action, although common-law negligence remedies are available to private actors for any violation of the statutes.

2. To determine whether a statute creates a duty with respect to a particular party, courts consider: (1) whether the Legislature intended that the statute would prevent the type of injury and harm actually suffered by the party and (2) whether the Legislature intended that the party was within the class of persons

protected by the statute; a legal duty arises from the statutory enactment if the answer to each question is *yes*. Because Michigan does not subscribe to the doctrine of negligence per se, violation of the statutory duty is not conclusive proof of negligence. Instead, when a statute imposes a legal duty, violation of that statute creates a rebuttable presumption—i.e., the violation constitutes prima facie evidence—of negligence. Thus, whether the violation had a causal connection to the claimed injury remains a question of fact. It is often difficult to distinguish between an ordinary-negligence claim and a medical malpractice claim, but a court determines the gravamen of a claim by examining the underlying facts of the case rather than the label that the parties attach to the claim. In that regard, to determine whether a claim is properly brought as a medical malpractice claim, a court must determine whether the claim is being brought against someone who, or an entity that, is capable of malpractice. To that end, MCL 600.5838a(1) provides that a medical malpractice claim may be brought against a person or entity who is or who holds himself or herself out to be a licensed healthcare professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency. To determine whether a claim sounds in medical malpractice, a court must consider: (1) whether the claim pertains to an action that occurred within a professional relationship and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience.

3. In Docket No. 346135, it was irrelevant that Polazzo and Metropolitan Health Corporation were subject to medical malpractice liability under MCL 600.5838a(1) because plaintiff's claims against them were based on the duty arising from the first sentence of MCL 333.9156(3), not the second. It was undisputed that Polazzo was an adult acting on behalf of an organizing entity when he served as the athletic trainer at the hockey game, and his evaluation of plaintiff for concussion symptoms was therefore encompassed within his duties under the first sentence of MCL 333.9156(3) and it was irrelevant for purposes of the first sentence that Polazzo was a licensed health professional. Moreover, the determination of whether Polazzo complied with MCL 333.9156(3)'s mandate of removing a youth player from a game if it is suspected the player sustained a concussion did not raise questions of medical judgment. Instead, the claim sounded in ordinary negligence, and a jury could use its common knowledge and experience to determine whether Polazzo should have reasonably suspected that plaintiff had suffered a concussion. The second sentence of the statute was not implicated because there was no evidence that Polazzo evaluated plaintiff after he was

removed from participating in the hockey game. Accordingly, plaintiff's claim was not based on the duty created in the second sentence of MCL 333.9156(3), and the claim did not sound in medical malpractice. Therefore, the trial court correctly denied Polazzo and Metropolitan Health Corporation's motion for summary disposition, but did so for the wrong reason. In Docket No. 346476, the Court of Appeals did not consider evidence plaintiff submitted on appeal that was not before the trial court when it ruled on the association defendants' motion; however, that information could be relevant on remand. The trial court erred by granting the association defendants summary disposition before the close of discovery because there was a reasonable chance that further discovery would result in factual support for plaintiff's claim that he was unconscious on the ice for a period of four minutes after the first collision. Moreover, it was a question for the fact-finder whether Fedorinchik's actions were negligent under MCL 333.9156(3).

Denial of summary disposition affirmed in Docket No. 346145. Grant of summary disposition vacated in Docket No. 346476.

1. ACTIONS — CONCUSSION-PROTECTION STATUTES — REMEDIES.

The concussion-protection statutes do not create, expressly or by implication, a private statutory cause of action; common-law negligence remedies are available to private actors for any violation of the statutes (MCL 333.9155; MCL 333.9156).

2. ACTIONS — CONCUSSION-PROTECTION STATUTES — COMMON-LAW ACTIONS — ORDINARY NEGLIGENCE VERSUS MEDICAL MALPRACTICE.

Under the first sentence of MCL 333.9156(3), a coach or other adult employed by, volunteering for, or otherwise acting on behalf of an organizing entity during an athletic event sponsored by or operated under the auspices of the organizing entity must immediately remove from physical participation in an athletic activity a youth athlete who is suspected of sustaining a concussion during the athletic activity; this list of covered persons includes lay persons who are not capable of malpractice and against whom a medical malpractice claim cannot be brought; even if an action brought under the first sentence of MCL 333.9156(3) is brought against a licensed health professional, the determination whether that person complied with the mandate of MCL 333.9156(3) that a youth athlete who is suspected of sustaining a concussion be immediately removed from physical participation in an athletic activity does not raise questions involving medical judgment; using its common knowledge and experience, a jury can determine from the facts whether that person should have reasonably

suspected that the plaintiff suffered a concussion; accordingly, an action brought under the first sentence of MCL 333.9156(3) imposes an ordinary-negligence duty and does not sound in medical malpractice.

Law Office of Raoul Graham, PLC (by *Raoul V. Graham*).

Bodman PLC (by *Thomas Van Dusen* and *Donovan S. Asmar*) for St. Francis High School, Grand Traverse Area Catholic Schools, Bay Hockey Association, and Ryan Fedorinchik.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg* and *John C. O'Louglin*) for Anthony Polazzo and Metropolitan Health Corporation.

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

SWARTZLE, J. Youth sports offer extensive benefits to kids—comradery, discipline, exercise, and self-esteem, just to name a few. There can be a dark side to youth sports, however, and one of the darkest is the possibility of short- and long-term injury and harm from concussions. In 2012, our Legislature enacted the "concussion-protection statute," 2012 PA 342, to help protect our youth from this specific risk of harm. The statute imposes various duties on coaches and other covered adults, including training about concussions and the requirement to remove a youth from an athletic activity who is suspected of suffering a concussion.

Plaintiff sued his coach, trainer, and various institutional entities, alleging that they failed to remove him from a youth hockey game after he showed obvious signs of a concussion. Defendants have denied breach-

ing any duty. On appeal, we clarify the legal duties imposed by the Legislature on coaches and other covered adults and entities with respect to a youth who is suspected of suffering a concussion during an athletic activity, and we affirm in part and vacate in part the trial court's rulings on summary disposition and remand both appeals to the trial court for further proceedings.

I. BACKGROUND

Plaintiff, Samuel Randall, sued defendants, the Michigan High School Athletic Association (MHSAA), Grand Rapids Christian High School, Grand Rapids Christian Schools, St. Francis High School, Grand Traverse Area Catholic Schools, Anthony Polazzo, Metropolitan Health Corporation, Ryan Fedorinchik, and the Bay Hockey Association, over a concussion that he allegedly suffered while participating as a youth athlete in a hockey game. The orders on appeal do not concern his claims against the MHSAA, Grand Rapids Christian High School, or Grand Rapids Christian Schools, and those parties are not involved in these appeals. For clarity, this opinion will refer to St. Francis High School, Grand Traverse Area Catholic Schools, Bay Hockey Association, and Fedorinchik collectively as the "Association defendants."

A brief preliminary note about the appellate record. In support of and opposition to the motions for summary disposition, the parties relied on plaintiff's deposition testimony, the medical records completed by the athletic trainer, and video evidence. Plaintiff's briefs on appeal, however, are not restricted to this evidence, and they instead cite extensively from depositions of witnesses taken after the motions were decided. We decline to consider this evidence, as it was not pre-

sented to the trial court with respect to the rulings now on appeal. See *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003). With that said and as explained below, this additional evidence might be relevant to future proceedings in this case.

A. PLAINTIFF'S INJURY

Plaintiff played goalie for a youth hockey team run by St. Francis High School and the Bay Hockey Association. The events at issue in this lawsuit occurred during a hockey game between plaintiff's team and a team operated by the Grand Rapids Christian Schools. Polazzo, an employee of Metro Health, served as athletic trainer for both hockey teams during the game.

Plaintiff was involved in two separate collisions during the game. Plaintiff testified that, during the second period, a player from the opposing team struck him in the head with an elbow. Plaintiff claimed that, as a result of this blow to the head, he lost consciousness and fell to the ice. Plaintiff obtained a video of this first collision and posted it on social media. The video was approximately 30 seconds long, and while it showed the collision, it ended as soon as plaintiff was hit and therefore did not confirm that he lost consciousness on the ice. Plaintiff testified that he did not remember falling after the first collision, but when he regained consciousness, he found himself lying on the ice.

The length of time plaintiff was lying on the ice—if at all—is highly contested. In his complaint, plaintiff alleged that he "remained on the ice—unresponsive—for approximately four minutes." During his deposition, however, plaintiff denied any personal knowledge regarding how long he was unconscious. Instead, plaintiff stated that two spectators watching the game from the stands—specifically, Jonathan Ellis and Mark

Stevenson—told him that he was unconscious for four minutes. Plaintiff agreed during his deposition that any person watching the game, including the spectators in the stands (which included his parents), would have been able to see how long he was on the ice after the first hit. Yet plaintiff has not alleged in his pleadings, briefs, or deposition testimony that his parents saw the first hit or saw him on the ice for approximately four minutes.

After the first collision, Polazzo went on the ice to check on plaintiff. Plaintiff alleged in his complaint that Polazzo did not perform any test to ascertain his medical condition or, specifically, whether plaintiff exhibited any symptoms of a concussion. During his deposition, however, plaintiff admitted that Polazzo assessed him to determine whether plaintiff could continue to play.

Plaintiff testified that he felt dizzy after the first collision. He admitted, however, that he wanted to remain in the game and that he told Polazzo, "I think I'm good." He did not recall experiencing any sensitivity to light at that time, and he stated that he would not have stayed in the game if he had experienced such sensitivity, given the brightness of the lights and reflectivity of the ice. He remembered that Polazzo told him that if he started to get a headache or feel dizzy, or if he felt like he could not continue play, he should alert Polazzo immediately.

Polazzo later completed a three-page form that documented his visit to plaintiff on the ice. One page, labeled "Cognitive & Physical Evaluation," included an area for documenting the evaluation of an athlete's symptoms, as well as an area for documenting an athlete's cognitive and physical condition. According to the form, plaintiff reported a mild headache to Polazzo,

but this subsided as the evaluation progressed. Plaintiff also purportedly reported experiencing mild dizziness when his head hit the ice, but denied any dizziness during the on-ice evaluation. Plaintiff purportedly denied other symptoms of a concussion, including pressure in the head, neck pain, nausea or vomiting, blurred vision, balance problems, or sensitivity to light or noise. Polazzo recorded on the cognitive-assessment portion of the form that plaintiff "knew where he was [and] what happened" and that he was "[a]ble to comprehend" and "was not delayed in answering" Polazzo's questions.

Another page of the form, labeled "Sports Medicine Athletic Injury Evaluation," contained Polazzo's narrative description of plaintiff's injury: "Athlete was hit and taken down when he said his head hit the ice. He was wearing a helmet, goalie. He stayed down on ice until athletic trainer got to him." Regarding his evaluation of the injury, Polazzo wrote:

> Eval revealed pain where athlete's head made contact with ice, in helmet. He said he had a headache after hitting the ice, but it started to go away while talking to him. He denied any dizziness, feeling in a fog, not feeling right, or troubles with light sensitivity. He was asked if he thinks he can continue and he said he could. He was told if he starts to get a headache, feel dizzy, feel like he can't think straight to tell the ref or motion to athletic trainer immediately.

It is uncontested that, after he visited plaintiff on the ice, Polazzo returned to the bench, plaintiff remained in net, and the game resumed.

Plaintiff testified that, at some later point, he tried to signal Polazzo that he wanted to come out. "I just remember looking at him and like shaking my head because I was dizzy, like losing balance," plaintiff testified. He did not come off the ice on his own,

however, because he thought Polazzo was going to stop play. The opposing team scored a goal, play stopped, and yet plaintiff remained on the ice.

Shortly after the goal (and about five or six minutes after the first hit), plaintiff took a knee to the head. He alleged in his complaint that he remained conscious, but he removed himself from the game because his head hurt, and he had vision problems. During his deposition, however, plaintiff testified that it was his father who "pulled me off the ice" when he "opened the door during the whistle and yelled and told me" to come off the ice.

Polazzo's evaluation form confirmed that plaintiff signaled that he wanted to come off the ice and that plaintiff was involved in a second collision. Polazzo claimed, however, that plaintiff did not signal until after the opposing team scored a goal against him. Polazzo wrote on the form:

> After missing a shot that went passed [sic] him he motioned to the athletic trainer. [Athletic trainer] went to coach to instruct him the goalie was done. After the athlete came off the ice he went to the locker room. In the locker room Dad said he had trouble walking down the hallway. Talking to him he also said he started to get a headache and not feel right. Dad took him to the hotel and was instructed on home care and when to take to emergency room.

Polazzo further wrote on the form that he believed that plaintiff had suffered a concussion. He marked plaintiff's initial treatment as "removed from game" and recommended that plaintiff "[f]ollow up with physician."

B. THE LAWSUIT

Plaintiff sued the MHSAA, Grand Rapids Christian High School, Grand Rapids Christian Schools, Polazzo, St. Francis High School, Grand Traverse Area Catholic

Schools, and the Bay Hockey Association. Substantively, plaintiff alleged that Polazzo was negligent because he failed to "properly treat and evaluate" plaintiff for injuries, including "a concussion or concussive symptoms," and because Polazzo allowed plaintiff "to return to competition after the first collision." Plaintiff further alleged that Polazzo was negligent per se under MCL 333.9156(3) because he failed to remove plaintiff from the hockey game "notwithstanding his obvious signs and/or symptoms of sustaining a concussion—specifically the approximately four minutes he remained on the ice." He alleged claims against Polazzo for ordinary negligence and "negligence per se"; claims against Grand Rapids Christian High School and Grand Rapids Christian Schools under a theory of respondeat superior, as well as negligent hiring, retention, and supervision; claims against St. Francis High School (purportedly operated, managed, and controlled by Grand Traverse Area Catholic Schools) for negligence and respondeat superior; a claim against the MHSAA for respondeat superior; and claims against the Bay Hockey Association for ordinary negligence and respondeat superior, as well as negligent hiring, training, and supervision.

Polazzo moved for summary disposition in lieu of answering plaintiff's complaint. In his motion, Polazzo asserted that he was certified as an athletic trainer and qualified as a licensed health professional under the Michigan Public Health Code. Polazzo argued that, although plaintiff styled the claims against him as ordinary-negligence claims, his claims actually sounded in medical malpractice. He argued that plaintiff was required to follow the procedural requirements for filing medical-malpractice actions set forth in MCL 600.2912b and MCL 600.2912d, including serving a notice of intent to file claim, waiting 182 days, and

filing an affidavit of merit from a qualified expert along with his complaint. Polazzo argued that the appropriate remedy for plaintiff's failure to comply with these statutory requirements was dismissal of the claims against him.

In response to the motion, plaintiff insisted that he had filed an "ordinary negligence action," and argued that the concussion-protection statute "applies equally to medical experts and lay persons, such as coaches, volunteers, or referees." Plaintiff further argued that Polazzo "did not perform any medical tests to determine if Plaintiff had suffered a concussion," and that he did not, therefore, exercise any medical judgment with regard to plaintiff's injury.

Plaintiff subsequently filed his first-amended complaint, adding Metro Health as a party. He alleged that Polazzo was an employee or agent of Metro Health and that the latter was liable for Polazzo's negligence under a theory of respondeat superior. Plaintiff also added a claim against the MHSAA for negligent hiring, training, and supervision related to its game officials.

The trial court denied Polazzo's motion for summary disposition. The parties had not yet taken the deposition of either plaintiff or Polazzo, and the parties had not provided the trial court with the three-page form that documented Polazzo's visit to plaintiff on the ice. Given the paucity of the record and plaintiff's well-pleaded allegations, the trial court concluded that dismissal was not warranted:

> According to the First Amended Complaint, Randall was unconscious for "four minutes" after he suffered the first blow to the head. Polazzo entered the ice to talk to Randall, did not perform any medical tests, and did [not] stop Randall from returning to the ice. Based on the information provided, Polazzo did not perform a full evaluation and did not provide written clearance authorizing Randall's return

> to athletic activity. Although this claim is against a licensed medical professional, Randall alleges that the claim arises from a statutory violation of MCL 333.9156, which applies to coaches, volunteers, and other adults participating in an athletic event. The claim is not alleging inappropriate written clearance or judgment which required a higher level of medical expertise. Based on this statute, it is immaterial whether Polazzo is a medical expert.
>
> Accordingly, this claim does not sound in medical malpractice and was filed appropriately. Based upon the well-plead [sic] facts, a sufficient legal claim exists. Additionally, a genuine issue of material fact exists. Summary Disposition is inappropriate on this matter.

Plaintiff then filed his second-amended complaint. He alleged the same claims as recounted earlier, and he added Fedorinchik as a party, asserting claims against the coach for ordinary negligence and "negligence per se."

Discovery ensued under the trial court's scheduling order. Prior to the end of discovery, Polazzo and Metro Health moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). Relying primarily on plaintiff's deposition testimony, Polazzo again argued that plaintiff's claims against him sounded in medical malpractice, rather than ordinary negligence, and that plaintiff had failed to follow the procedures applicable to medical-malpractice claims. In turn, Metro Health argued that the trial court should dismiss plaintiff's respondeat-superior claim against it if the trial court dismissed plaintiff's claims against Polazzo. Metro Health and Polazzo attached a copy of plaintiff's deposition transcript to the brief supporting their motion. They argued that plaintiff's testimony confirmed that Polazzo evaluated plaintiff on the ice to determine whether plaintiff should be allowed to play or be removed for further medical assistance.

Plaintiff responded to the motion by again arguing that his claim against Polazzo sounded in ordinary negligence, not medical malpractice. Plaintiff conceded that Polazzo was a medical professional who could be sued for medical malpractice, but he argued that his claims against Polazzo did not sound in medical malpractice because they did not raise questions of medical judgment that were beyond the realm of common knowledge and experience.

Plaintiff also argued that, as a matter of logic, his claim against Polazzo could not sound in medical malpractice because "no medical examination took place." Plaintiff argued that the question was not whether Polazzo provided negligent medical care, but whether Polazzo committed ordinary negligence by failing to provide plaintiff with *any* medical care. Plaintiff conceded that Polazzo "entered the ice and talked to" him after the first collision. Yet, plaintiff continued to insist that Polazzo "did not perform any medical tests." Plaintiff argued that "Polazzo *never* treated Plaintiff" because he "simply went out onto the ice and asked Plaintiff if he wished to continue playing." Plaintiff further argued that any lay juror could understand the allegations of negligence, namely that Polazzo witnessed him sustain a violent collision causing his head to make forceful contact with the ice and that he lay on the ice, unresponsive, for approximately four minutes.

Plaintiff continued to argue that the duties set forth in the concussion-protection statute apply "equally to those with and without medical knowledge" and that corrective action is always required "if a concussion is suspected." According to plaintiff, medical judgment is only implicated under the statute *after* an athlete is removed from athletic activity. Finally, plaintiff argued

that Metro Health did not challenge that Polazzo was its agent and, accordingly, that if Polazzo was potentially liable, then Metro Health was also potentially liable under a theory of respondeat superior.

In reply, Polazzo and Metro Health pointed out that there was no evidence in the trial-court record that plaintiff had lain on the ice, unresponsive, for a period of four minutes. At this point in the case, plaintiff had not provided the trial court with any documentary evidence, video evidence, or testimony from any other individual regarding the duration of his loss of consciousness. Instead, plaintiff relied only on his hearsay testimony that Ellis and Stevenson had told him that he was unconscious for a period of four minutes.

For their part, the Association defendants also moved for summary disposition under MCR 2.116(C)(8) and (C)(10). These defendants argued that Polazzo evaluated plaintiff immediately after the first collision, observed no signs of a concussion during that evaluation, and cleared plaintiff to continue playing. The Association defendants further argued that Polazzo was an independent medical professional and that Fedorinchik, who was not a medical professional, justifiably relied on the on-ice evaluation that Polazzo conducted. The Association defendants attached to their supporting brief the entire transcript of plaintiff's deposition testimony, along with the three-page form completed by Polazzo that documented his visit to plaintiff on the ice.

Although several parties attached the entire transcript of plaintiff's deposition to their motions and supporting briefs, plaintiff did not offer an affidavit from either of his parents or the two witnesses he named, attesting that plaintiff had lain on the ice for approximately four minutes after the first collision.

Instead, plaintiff relied on his own lack of personal knowledge regarding how long he had lain on the ice and on the hearsay statements allegedly made to plaintiff by third parties.

C. TRIAL-COURT RULINGS AND INTERLOCUTORY APPEALS

The trial court granted summary disposition in favor of the Association defendants under MCR 2.116(C)(10). The trial court held:

> In the current case, on December 17, 2016, Randall was competing in a hockey game for the Bay Hockey Team. Bay Hockey is primarily staffed by [St. Francis] staff and is coached by Fedorinchik. In the second period, Randall was hit, fell to the ice, and struck the left side of his head. Randall contends that he was unconscious on the ice for four minutes. Polazzo, a certified medical trainer, evaluated Randall and cleared Randall to continue playing. Randall continued to play and was involved in a second collision which Randall alleges caused damage causing him to leave the game.
>
> No genuine issue of material fact exists. Randall has failed to provide documentary evidence that Fedorinchik breached his ordinary duty of care to Randall. Consequently, Randall has failed to provide documentary evidence that [St. Francis, Grand Traverse Area Catholic Schools, or the Bay Hockey Association] breached their duty of care or are liable through the doctrine of respondeat superior. Randall only provides his deposition testimony, a video of the two hits, and a copy of the consent form. These exhibits do not establish that Randall was laying on the ice for four minutes. Further, [the Association defendants] provide documentation that Polazzo cleared Randall to continue playing after Randall said, "I think I'm good."
>
> On the issue of negligence per se, Randall has failed to provide documentary evidence that Fedorinchik had reason to suspect that Randall sustained a concussion. Further, the evidence shows that Polazzo cleared Randall to

> continue playing. Accordingly, summary disposition is appropriate as to the claims against [the Association defendants].

In a second opinion issued the same day, the trial court denied Metro Health and Polazzo's motion for summary disposition, holding:

> As described in this Court's previous Opinion and Order, although the claim is against a medical professional, the allegations do not require a higher level of medical expertise "beyond the realm of common knowledge and expertise." The question is not whether Polazzo was negligent in his medical treatment, but whether he was negligent in failing to provide medical treatment. A question of material fact exists as to the remaining elements of the claim. Accordingly, summary disposition is not appropriate as to Counts I, II, or III against Polazzo and Metro Health.

In a third opinion issued the same day, the trial court granted summary disposition in favor of Grand Rapids Christian High School and Grand Rapids Christian Schools, and those parties were dismissed from the case. But because several claims survived summary disposition, discovery continued and the parties took additional depositions.

These interlocutory appeals followed. In Docket No. 346135, Polazzo and Metro Health appealed by leave granted the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7). See *Randall v MHSAA*, unpublished order of the Court of Appeals, entered March 26, 2019 (Docket No. 346135). In Docket No. 346476, plaintiff appealed by leave granted the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of the Association defendants. See *Randall v MHSAA*, unpublished order of the Court of Appeals, entered March 26, 2019 (Docket No. 346476). This Court consolidated the two

appeals and stayed the trial-court proceedings pending resolution of the appeals. See *Randall v MHSAA*, unpublished orders of the Court of Appeals, entered March 26, 2019 (Docket Nos. 346135 and 346476). This Court denied plaintiff's application for leave to appeal the trial court's decision granting summary disposition in favor of Grand Rapids Christian High School and Grand Rapids Christian Schools, and those defendants are not involved in these appeals.

II. ANALYSIS

A. STANDARD OF REVIEW

"This appeal involves various legal questions of statutory construction and the distinction between ordinary negligence and medical malpractice, all of which we review de novo." *LaFave v Alliance Healthcare Servs, Inc*, 331 Mich App 726, 731; 954 NW2d 566 (2020). With respect to whether the Legislature created a private statutory right of action under MCL 333.9156(3), our interpretation of the statute is likewise de novo. *Long v Chelsea Community Hosp*, 219 Mich App 578, 581-582; 557 NW2d 157 (1996); see also *Pitsch v ESE Mich, Inc*, 233 Mich App 578, 586; 593 NW2d 565 (1999). Moreover, "whether a defendant owes a plaintiff a duty of care is a question of law" that we review de novo. *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 348; 941 NW2d 685 (2019).

Similarly, we review de novo the trial court's summary-disposition rulings. *LaFave*, 331 Mich App at 730-731. Although Polazzo and Metro Health moved for summary disposition under MCR 2.116(C)(7) and (C)(8), "[i]n determining whether the nature of a claim is ordinary negligence or medical malpractice . . . a court

does so under MCR 2.116(C)(7)." *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). For their part, the Association defendants moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court granted the motion under MCR 2.116(C)(10). "Where a motion for summary disposition is brought under both MCR 2.116(C)(8) and (C)(10), but the parties and the trial court relied on matters outside the pleadings, as is the case here, MCR 2.116(C)(10) is the appropriate basis for review." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

B. THE CONCUSSION-PROTECTION STATUTE

In 2012, our Legislature addressed the problem of concussions in youth sports by enacting the concussion-protection statute. Relevant to this dispute, the first two sentences of MCL 333.9156(3) provide:

> A coach or other adult employed by, volunteering for, or otherwise acting on behalf of an organizing entity during an athletic event sponsored by or operated under the auspices of the organizing entity shall immediately remove from physical participation in an athletic activity a youth athlete who is suspected of sustaining a concussion during the athletic activity. A youth athlete who has been removed from physical participation in an athletic activity under this subsection shall not return to physical activity until he or she has been evaluated by an appropriate health professional and receives written clearance from that health professional authorizing the youth athlete's return to physical participation in the athletic activity.

The Legislature defined an "appropriate health professional" as "a health professional who is licensed or otherwise authorized to engage in a health profession under [MCL 333.16101 *et seq*.] and whose scope of

practice within that health profession includes the recognition, treatment, and management of concussions." MCL 333.9155(4)(a).

C. PRIVATE STATUTORY CAUSE OF ACTION FOR VIOLATING THE CONCUSSION-PROTECTION STATUTE?

The first question we consider on appeal is whether our Legislature "either expressly or by implication, intended to create" a private statutory cause of action for violation of the concussion-protection statute. *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 499; 697 NW2d 871 (2005) (quotation marks and citation omitted). This is important to clarify at the outset because, generally speaking, a plaintiff cannot make a viable claim for money damages based strictly on violation of a statute unless the Legislature provides for a private statutory cause of action. *Lash v Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007); see also *People v Anstey*, 476 Mich 436, 445 n 7; 719 NW2d 579 (2006) ("Because the Legislature did not provide a remedy in the statute, we may not create a remedy that only the Legislature has the power to create."). This question is distinct from the separate question of whether violation of a statute factors into a common-law negligence cause of action, a question that we consider in the next section.

Prior to oral argument on appeal, neither the parties nor the trial court addressed the question of whether our Legislature created a private statutory cause of action for violation of the concussion-protection statute. On its own motion following oral argument, this Court ordered the parties to file supplemental briefs addressing the following questions: "(1) is there a private cause of action for violation of MCL 333.9156(3); and (2) if there is not a private cause of action, how does this

impact plaintiff's claims for monetary damages?" *Randall v MHSAA*, unpublished order of the Court of Appeals, entered August 14, 2020 (Docket Nos. 346135 and 346476).

In their supplemental briefs, the parties acknowledge that there is no express private statutory cause of action, and our own review of the statute confirms this. The parties disagree, however, on whether the statute creates, by implication, a private cause of action. We conclude that it does not. First, in addition to there being no language in the statute explicitly creating a private statutory cause of action, there is likewise no language from which a necessary inference could be drawn that the Legislature nevertheless intended there to be one. There is simply no ambiguity in the statute on this question, and like all questions of statutory construction, where our Legislature has clearly spoken on a matter within its sole constitutional authority, it is outside our authority to provide otherwise. *Lash*, 479 Mich at 194; *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 560; 912 NW2d 593 (2018).

Second, even if we were to assume that there was some ambiguity in the concussion-protection statute on this score, there is not a sufficient basis to infer a private statutory cause of action. Courts have held that where the Legislature has provided other means for enforcing a statute's provisions, inferring a private statutory cause of action for money damages is not warranted. See, e.g., *Lash*, 479 Mich at 196; *Pitsch*, 233 Mich App at 586-587. As relevant here, the Legislature has provided that violations of the Public Health Code can be criminally prosecuted. See MCL 333.1299(1) ("A person who violates a provision of this code for which a penalty is not otherwise provided is guilty of a misde-

meanor."). Furthermore, the Public Health Code vests the Department of Health and Human Services with broad authority to enforce provisions of the code, including investigating, MCL 333.2241(1); ordering immediate corrective action, MCL 333.2251(1); seeking injunctive relief, MCL 333.2255; and assessing civil penalties, MCL 333.2262(1).

And third, the existence of a common-law remedy for an actor's alleged bad acts further counsels against inferring a statutory remedy here. In reconciling prior caselaw, our Supreme Court explained in *Lash* that "where no common-law remedy existed" for an actor's conduct, "the remedy provided by statute was the sole remedy." *Lash*, 479 Mich at 191-192. Whether the inverse of the statement in *Lash*—i.e., where a common-law remedy does exist, no statutory remedy should be inferred—is a categorical rule or merely a practical guide need not be resolved here, because, even if it is only the latter, our common-law negligence law provides private actors with sufficient remedies for violation of the concussion-protection statute, as explained below. Accordingly, we conclude that the concussion-protection statute does not create, explicitly or by implication, a private statutory cause of action.

D. COMMON-LAW CAUSES OF ACTION FOR VIOLATING THE CONCUSSION-PROTECTION STATUTE

We turn next to plaintiff's common-law causes of action. These claims take several forms, although all sound in negligence. To make a negligence claim, "a plaintiff must prove that (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). How plaintiff's negligence-based causes of action interact with the concussion-protection statute is critical to an understanding of this case.

1. LEGAL DUTY ARISING FROM STATUTE

Any negligence-based claim must, as its starting point, identify a legal duty owed by one to another. If there is no duty, then there is no negligence. See *Sabbagh*, 329 Mich App at 349-350. The Legislature can create a duty by statute, but not every statute creates such a duty. To determine whether a statute creates a particular duty with respect to a particular party, courts generally consider two questions: (1) did the Legislature intend that the statute would prevent the type of injury and harm actually suffered by the party; and (2) did the Legislature intend that the party was within the class of persons protected by the statute? *Wood v Detroit*, 323 Mich App 416, 422 n 3; 917 NW2d 709 (2018); 18A Michigan Civil Jurisprudence, Negligence, § 92, p 200. If the answers to both are *yes*, then a legal duty arises from the statutory enactment. See *Wood*, 323 Mich App at 422 n 3.

Upon review of the concussion-protection statute and relevant law, we conclude that the statute imposes a legal duty on the part of coaches and other covered adults to remove a youth athlete who is suspected of sustaining a concussion from further involvement in covered athletic activities. The statute defines a narrow class of persons needing protection—youth athletes involved in certain athletic activities. 57A Am Jur 2d, Negligence, § 729, p 703 ("The violation of a statute or ordinance is actionable negligence . . . only as to those persons for whose benefit or protection it was enacted."). Thus, this is not a statute intended to benefit the public

at-large. *Id*., § 726, p 701. Moreover, the statute is intended to protect youth athletes from a specific type of injury and harm—short- and long-term detrimental health effects from concussions. The statute does not impose standards of conduct related to the general welfare of youth athletes, but instead focuses on a singular, critical risk to those athletes.

The existence of a legal duty is not, however, the end of the analysis. Contrary to plaintiff's position, Michigan law does not "subscribe to the doctrine of negligence per se." *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 82; 600 NW2d 348 (1999). When a plaintiff proves that an actor has violated the terms of a statute, that is not conclusive proof of negligence. Rather, Michigan law provides that when a statute imposes a legal duty, violation of that statute creates "a rebuttable presumption of negligence," *id*. at 82 n 5, or stated another way, the violation "is only prima facie evidence of negligence," *Wood*, 323 Mich App at 422 n 3. It remains a question of fact, for example, whether the violation had a causal connection to the claimed injury. *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 86-87; 393 NW2d 356 (1986); *Vaas v Schrotenboer*, 329 Mich 642, 650; 46 NW2d 416 (1951); Am Jur 2d, § 738, p 711 ("A jury is free to find that a violation of a statutory duty is not necessarily the direct cause of the injury."). Similarly, evidence of a legally sufficient excuse (e.g., a natural hazard or sudden emergency) can be used to rebut evidence of a statutory violation. See *Massey v Scripter*, 401 Mich 385, 395; 258 NW2d 44 (1977).

2. ORDINARY NEGLIGENCE VERSUS MEDICAL MALPRACTICE

Further complicating the analysis in this case is the distinction between ordinary negligence and malprac-

tice. "A medical malpractice claim is sometimes difficult to distinguish from an ordinary negligence claim. But the distinction is often critical." *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 517-518; 918 NW2d 645 (2018). A court determines the gravamen of a claim by examining the underlying facts of the case rather than the label that the parties attach to the claim. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45-46; 594 NW2d 455 (1999).

Our Supreme Court has provided guidance on how to determine whether a claim is properly brought as a medical-malpractice action. The first issue is whether the claim "is being brought against someone who, or an entity that, is capable of malpractice." *Bryant*, 471 Mich at 420. This is a necessary condition for bringing a malpractice suit because a "malpractice action cannot accrue against someone who, or something that, is incapable of malpractice." *Adkins v Annapolis Hosp*, 420 Mich 87, 95; 360 NW2d 150 (1984); *LaFave*, 331 Mich App at 731-732. On this issue, the Legislature has provided that medical-malpractice claims can be brought against "a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency." MCL 600.5838a(1).

Once a court has determined that a claim has been brought against a person or entity that is capable of malpractice, a court must then determine whether the claim sounds in medical malpractice. To answer this question, two matters must be considered: "(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*, 471 Mich at 422. With respect to the latter

consideration, our Supreme Court has explained, "If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence." *Id*. at 423. But, "[i]f . . . the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id*.

Returning to the concussion-protection statute, our Legislature has imposed two different types of duty in the first two sentences of MCL 333.9156(3). The first sentence imposes an ordinary-negligence duty. It covers a "coach or other adult employed by, volunteering for, or otherwise acting on behalf of an organizing entity during an athletic event sponsored by or operated under the auspices of the organizing entity." MCL 333.9156(3). This list of covered persons includes lay persons who are not capable of malpractice and against whom a medical-malpractice claim cannot be brought. Furthermore, the action required by the first sentence is one to be taken by lay persons—*any* adult acting on behalf of an organizing entity of an athletic event. The statutory duty does not pertain to a professional relationship with a healthcare professional, as it can apply to a range of lay persons acting in such capacities as a coach, referee, or volunteer. Nor does the duty imposed by the first sentence require medical judgment beyond the realm of common knowledge and experience, as it requires covered adults to remove a youth athlete who is merely "*suspected* of sustaining a concussion." *Id*. (emphasis added). And, although the covered adults must undergo certain training required by other provisions of the concussion-protection statute, see, e.g., MCL 333.9155, there is nothing to suggest that this training alone would be sufficient to put a trainee's

knowledge and judgment on par with that of a medical professional. This statutory standard is consistent with our caselaw holding coaches and other nonparticipant adults in recreational activities "to an ordinary-negligence standard in the absence of an applicable immunity statute." *Sherry v East Suburban Football League*, 292 Mich App 23, 29; 807 NW2d 859 (2011).[1]

In contrast, the second sentence of MCL 333.9156(3) imposes a medical-malpractice duty. The sentence covers "an appropriate health professional," a term defined to mean "a health professional who is licensed or otherwise authorized to engage in a health profession under [MCL 333.16101 *et seq*.] and whose scope of practice within that health profession includes the recognition, treatment, and management of concussions." MCL 333.9155(4)(a). This means that a claim based on a violation of the second sentence "is being brought against someone who, or an entity that, is capable of malpractice." *Bryant*, 471 Mich at 420. The second sentence requires that the "appropriate health professional" evaluate a youth athlete who has already "been removed from physical participation in an athletic activity under this subsection" and further bars the youth athlete from returning to physical participation in that activity until the athlete "receives written clearance from that health professional authorizing the youth athlete's return to physical participation in the athletic activity." MCL 333.9156(3). Thus, the second sentence "pertains to an action that occurred within the course of

[1] The defendants on appeal appear to be private persons and entities, and therefore, there has been no claim on appeal that "[t]he gross-negligence standard" should apply to coaches and other nonparticipants "of *publicly* sponsored athletic teams who are entitled to governmental immunity." *Sherry*, 292 Mich App at 29 (emphasis added). Nor has there been a claim that any of the defendants are exempt under MCL 333.9156(4) from the statutory requirements.

a professional relationship," *Bryant*, 471 Mich at 422, because the duty applies only to an appropriate health professional who medically evaluates a youth for a suspected concussion. Further, "the claim raises questions of medical judgment beyond the realm of common knowledge and experience," *id*., because it involves whether a health professional properly diagnosed the youth athlete or properly cleared the youth athlete to return to physical participation in the athletic activity. Thus, a claim for breach of the duty created by the second sentence of MCL 333.9156(3), when brought against a health professional who evaluated the youth athlete, sounds in medical malpractice.

3. APPLICATION

a. DOCKET NO. 346135

We now apply these legal considerations to the factual record in these two appeals. In Docket No. 346135, Polazzo and Metro Health argue that plaintiff's claim against Polazzo sounds in medical malpractice rather than ordinary negligence. They further argue that plaintiff was required to follow the procedural requirements for filing medical-malpractice actions set forth in MCL 600.2912b and MCL 600.2912d. Because plaintiff failed to do so, these defendants argue that the trial court erred by failing to dismiss the claims against them. In response, plaintiff argues that Polazzo never medically evaluated plaintiff after the first collision and that a claim against him cannot sound in medical malpractice because Polazzo exercised no professional medical judgment.

The trial court stated that the question before it was "not whether Polazzo was negligent in his medical treatment, but whether he was negligent in failing to

provide medical treatment." That is not, however, the proper question. It is undisputed, for example, that Metro Health is a "licensed health facility or agency," that Polazzo is its employee or agent, and that, therefore, both are subject to medical-malpractice liability. See MCL 600.5838a(1). These matters are irrelevant because plaintiff's claims against these defendants are based on the duty arising from the *first* sentence of MCL 333.9156(3), not the *second*. The list of covered adults in the first sentence encompasses Polazzo, regardless of the fact that he was a licensed health professional, because it is undisputed that he was an adult acting on behalf of an organizing entity while he served as athletic trainer for the two teams involved in the hockey game. The determination whether a "coach or other adult" complied with the mandate of MCL 333.9156(3) that a youth athlete who is suspected of sustaining a concussion be immediately removed from physical participation in an athletic activity does not raise questions involving medical judgment, regardless of whether the "coach or other adult" was a health professional. Using its common knowledge and experience, a jury could determine whether, based on what happened to plaintiff on the ice, Polazzo should have reasonably suspected that plaintiff suffered a concussion.

Although a claim for breach of the duty established in the second sentence of the statute sounds in medical malpractice, plaintiff's claims in this lawsuit do not implicate that duty. The second sentence applies to the medical evaluation of a youth athlete *after* the athlete has been removed from physical participation in the athletic activity on suspicion that the athlete sustained a concussion. There are no facts in the record to indicate that Polazzo evaluated plaintiff after he was removed from the hockey game. In fact, plaintiff's

claims expressly allege that Polazzo should have—but did not—remove plaintiff from the hockey game. Accordingly, plaintiff's claim against Polazzo is not based on the duty created in the second sentence of the statute, and the claim does not sound in medical malpractice.

Because we conclude that plaintiff's claim against Polazzo sounds in ordinary negligence, the trial court properly denied the motion for summary disposition brought by Polazzo and Metro Health, even though the trial court did so for the wrong reason.

b. DOCKET NO. 346476

In Docket No. 346476, plaintiff appeals by leave granted the trial court's order granting the motion for summary disposition filed by the Association defendants under MCR 2.116(C)(10). In granting that motion, the trial court ruled that plaintiff had failed to raise a genuine issue of material fact that he lay on the ice, unresponsive, for four minutes. Furthermore, the trial court ruled that Fedorinchik could not be liable because he reasonably relied on Polazzo's medical evaluation and his resulting decision not to remove plaintiff from the game.

Regarding the question of how long plaintiff was on the ice, as we explained earlier, we will not consider evidence submitted by plaintiff on appeal that was not before the trial court when it ruled on the Association defendants' motion. With that said, we also recognize that granting summary disposition prior to the close of discovery, when the case turns on factual issues not yet settled, is only appropriate when there "is no reasonable chance that further discovery will result in factual support for the nonmoving party." *Colista v Thomas*, 241 Mich App 529, 538; 616 NW2d 249 (2000). In this

case, the trial court granted the motion for summary disposition filed by the Association defendants before the close of discovery, despite the reasonable chance that further discovery could result in factual support for plaintiff's claim that he was unconscious on the ice for a period of four minutes.

With respect to Fedorinchik, the first sentence of the statute unquestionably applies to him because he was acting in his capacity as a "coach" of "an organizing entity during an athletic event sponsored by or operated under the auspices of the organizing entity." MCL 333.9156(3). Under this sentence of the statute, Fedorinchik had a duty, independent of the actions of Polazzo, to "immediately remove from physical participation in an athletic activity a youth athlete who is suspected of sustaining a concussion during the athletic activity." *Id*. Whether there was a legally sufficient excuse for Fedorinchik to rely on Polazzo's recommendation given the latter's medical training, whether Polazzo actually made a recommendation, or whether Fedorinchik did or should have suspected that plaintiff had sustained a concussion, are all factual questions that cannot be answered conclusively on this limited record on appeal. Similarly, the trial court erroneously granted summary disposition to the Association defendants before the close of discovery.

III. CONCLUSION

Our Legislature enacted the concussion-protection statute to protect youth athletes from the harmful effects of concussions. In doing so, the Legislature did not create, explicitly or by implication, a private statutory cause of action for violation of the statute. Rather, the statute creates negligence-based duties on the part

of coaches and other covered adults, and a violation of the statute can be evidence of actionable negligence.

In Docket No. 346135, we affirm denial of the motion for summary disposition filed by Polazzo and Metro Health, and in Docket No. 346476, we vacate the grant of summary disposition for the Association defendants. We remand the case to the trial court for application of the standards set forth in this opinion and for further proceedings consistent with this opinion. On remand, the trial court may permit such additional discovery as it deems appropriate, and it may entertain additional motions for summary disposition from the parties after the close of discovery.

We do not retain jurisdiction. Plaintiffs, having prevailed in full, may tax costs under MCR 7.219(F).

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

In re SCHULTZ

Docket No. 350292. Submitted November 9, 2020, at Detroit. Decided November 24, 2020, at 9:00 a.m.

Timothy E. Schultz petitioned the Wayne Circuit Court to restore his firearm rights under MCL 28.424, asserting that he had been convicted of a felony in 2000 and had since discharged all the obligations arising out of that conviction. The court, Annette J. Berry, J., found by clear and convincing evidence that petitioner had satisfied all the requirements of MCL 28.424; however, because the court determined that its authority to restore petitioner's firearm rights was limited by the federal statute making it unlawful for a felon to possess a firearm, 18 USC 922(g), it limited the restoration of petitioner's firearm rights to arms that were excluded from the definition of "firearm" used in the federal felon-in-possession statute—specifically, pellet guns, muzzle loaders, and black powder guns that do not take a modern cartridge. Petitioner appealed.

The Court of Appeals *held*:

1. The circuit court erred by limiting the restoration of petitioner's firearm rights. Michigan's felon-in-possession statute, MCL 750.224f, prohibits a person convicted of a felony from engaging in various activities involving firearms, including possessing them. If the person was convicted of a felony that is specified in MCL 750.224f(10), these prohibitions last for five years after the person discharges all obligations related to the conviction, and the person's firearm rights must be restored by the circuit court pursuant to MCL 28.424. If the person committed a nonspecified felony, the prohibitions expire three years after the person has paid all fines imposed for the violation, served all terms of imprisonment imposed for the violation, and successfully completed all conditions of probation or parole imposed for the violation. Petitioner was convicted of unlawfully driving away an automobile, MCL 750.413, which is a property offense that does not involve the use of physical force, a substantial risk of the use of physical force, possession of a firearm, or the use of an explosive, nor does it involve possession of controlled substances or a trespass against an occupied

dwelling. Accordingly, it is not a specified felony, and petitioner's right to possess a firearm under Michigan law was restored by operation of law three years after he paid his fines and completed the terms of his probation.

2. Petitioner sought court restoration of his rights under MCL 28.424, which requires a court to restore a person's firearm rights by written order if it determines, by clear and convincing evidence, that the person properly submitted a petition for restoration of those rights and that five years had passed since the person paid all fines imposed for the violation resulting in the firearm-related prohibitions, served all terms of imprisonment imposed for the violation, and successfully completed all conditions of probation or parole imposed for the violation, provided that the person is not likely to act in a manner dangerous to the safety of other individuals. A federal statutory provision, 18 USC 922(g), prohibits felons from possessing firearms or ammunition under certain circumstances. Despite the fact that a person can be convicted under this federal law even if their Michigan firearm rights have been restored, MCL 28.424(4) requires the court to restore the petitioner's firearm rights if it finds by clear and convincing evidence that the statute's requirements were met. Further, 18 USC 922(g) did not preempt MCL 28.424 and MCL 750.224f under Article VI, Clause 2, of the United States Constitution. Federal law preempts state law in three circumstances: (1) where Congress has expressed an intent to preempt state law, (2) where state law regulates conduct in a field that Congress intended to occupy exclusively, and (3) where state law actually conflicts with federal law. In fields that the states have traditionally occupied, courts start with the assumption that the state's police powers were not to be superseded by federal law unless that was the clear and manifest purpose of Congress. The federal felon-in-possession statute, 18 USC 922(g), is part of the Gun Control Act, 18 USC 921 *et seq*., which expressly states that none of its provisions are to be construed as indicating congressional intent to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter unless there is a direct and positive conflict between that provision and the state law so that the two cannot be reconciled or consistently stand together. Because the Michigan statutes that provide for restoration of a felon's firearm rights do not interfere with the federal government's ability to enforce 18 USC 922(g) or require, authorize, or excuse its violation, there is no direct and positive conflict between the Michigan statutes and 18 USC 922(g). Moreover, 18 USC 921(a)(20) recognizes the

authority of states to restore a felon's firearm rights for purposes of state law. Therefore, the restoration of firearm rights to felons under Michigan law is not preempted by the federal felon-in-possession statute, and the circuit court lacked the authority to limit restoration of petitioner's firearm rights despite its concern that he could face federal criminal liability if he exercised his Michigan rights. The part of the circuit court's order limiting the restoration of petitioner's firearm rights was vacated.

Vacated in part and remanded for further proceedings.

1. CRIMINAL LAW — PROHIBITIONS ON FIREARMS FOR FELONS — UNSPECIFIED FELONIES — UNLAWFULLY DRIVING AWAY AN AUTOMOBILE — RESTORATION OF RIGHTS.

MCL 750.224f prohibits a person convicted of a felony from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm in Michigan; if the person was convicted of a felony specified by MCL 750.224f(10), the prohibition against possessing firearms lasts for five years after the person discharges all obligations related to the conviction and the person's firearm rights must be restored by the circuit court pursuant to MCL 28.424; if the person committed a nonspecified felony, the prohibition expires three years after the person has paid all fines imposed for the violation, served all terms of imprisonment imposed for the violation, and successfully completed all conditions of probation or parole imposed for the violation; unlawfully driving away an automobile under MCL 750.413 is not a specified felony for purposes of MCL 750.224f and MCL 28.424.

2. CONSTITUTIONAL LAW — STATE AND FEDERAL PROHIBITIONS ON FIREARMS FOR FELONS — RESTORATION OF RIGHTS — PREEMPTION.

The federal law prohibiting felons from possessing firearms or ammunition does not preempt the Michigan laws that operate to restore a felon's firearm rights (US Const, art VI, cl 2; 18 USC 922(g); MCL 28.424).

Lewis & Dickstein, PLLC (by *Loren M. Dickstein*) for petitioner.

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. Petitioner Timothy Erik Schultz appeals the circuit court's order granting, in part, his petition

for restoration of firearm rights. We vacate the part of the circuit court's order placing restrictions on petitioner's Michigan firearm rights.

I. BACKGROUND

Petitioner filed a petition in circuit court seeking restoration of his firearm rights under MCL 28.424. He stated that he had been convicted of unlawfully driving away an automobile (UDAA), MCL 750.413, in January 2000 and sentenced to a term of probation. He attached to the petition documentary evidence showing that he had discharged all obligations arising out of that conviction. The circuit court found by clear and convincing evidence that petitioner satisfied all the requirements of MCL 28.424. However, the court determined that its authority to restore petitioner's firearm rights was limited by the federal statute making it unlawful for a felon to possess a firearm, 18 USC 922(g). The court stated that it could not fully restore petitioner's firearm rights when he would still be exposed to federal criminal liability for possessing a firearm. Therefore, the court reasoned, the restoration of petitioner's firearm rights was limited to arms that were excluded from the definition of "firearm" used in the federal felon-in-possession statute. The court entered an order granting petitioner's request for restoration of rights but limited his right of possession to pellet guns, muzzle loaders, and black powder guns that do not take a modern cartridge. This appeal followed.

II. ANALYSIS

Petitioner argues that the circuit court erred when it limited restoration of his firearm rights. He contends that MCL 750.224f and MCL 28.424 provide for com-

plete relief from criminal liability under Michigan's felon-in-possession statute, regardless of potential liability under the federal statute. We agree.[1]

Michigan's felon-in-possession statute, MCL 750.224f, provides that unless certain conditions exist, "a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state . . . ." The length of that prohibition depends on whether the person committed a "specified felony." MCL 750.224f(10). If the person committed a nonspecified felony, the prohibition expires "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. [MCL 750.224f(1).]

If the person was convicted of a specified felony, the prohibition against possessing firearms lasts for five years after the person discharges all obligations related to the conviction and, in addition, the person's "right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm" must be restored by the circuit court pursuant to MCL 28.424. See MCL 750.224f(2)(a) and (b).

To begin, petitioner was not convicted of a specified felony, so his right to possess a firearm under Michigan law was restored by operation of law three years

---

[1] "Statutory interpretation and the issue of federal preemption are both questions of law reviewed de novo on appeal." *Nelson v Assoc Fin Servs Co of Indiana, Inc*, 253 Mich App 580, 587; 659 NW2d 635 (2002).

after he paid his fines and completed the terms of his probation. A specified felony for purposes of MCL 750.224f "means a felony in which 1 or more of the following circumstances exist":

> (a) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> (b) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (c) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (d) An element of that felony is the unlawful use of an explosive.
>
> (e) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson. [MCL 750.224f(10).]

UDAA is a property offense that does not involve use of physical force, a substantial risk of the use of physical force, possession of a firearm, or the use of an explosive. See *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993). Nor does UDAA involve possession of controlled substances or a trespass against an occupied dwelling. Thus, UDAA is not a specified felony under MCL 750.224f(10), and a person convicted of that offense may, under Michigan law, possess firearms three years after all obligations relating to the conviction are discharged. MCL 750.224f(1). So, at the time the petition was filed, petitioner could possess firearms under state law without court authorization under MCL 28.424.

Nonetheless, in an apparent abundance of caution, petitioner sought court authorization under that statute, which provides in pertinent part:

> (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. [MCL 28.424.]

Despite finding that petitioner had established these requirements by clear and convincing evidence, the circuit court determined that its authority to restore petitioner's firearm rights under Michigan law was limited by the federal felon-in-possession statute. In pertinent part, 18 USC 922(g) prohibits a person convicted of "a crime punishable by imprisonment for a term exceeding one year" from "possess-[ing] in or affecting commerce, any firearm or ammunition . . . ."

Petitioner does not dispute that, even if his Michigan firearm rights have been restored, he could still be convicted of possessing a firearm under 18 USC 922(g). But although MCL 750.224f and MCL 28.424 make no reference to federal law or the federal definition of "firearm," the circuit court reasoned that it could not grant petitioner a full restoration of rights "[b]ecause whatever I want to do is irrelevant," i.e., even if the court restored petitioner's firearm rights "that sets him up, if he gets pulled over, . . . to be charged [f]ederally." It is unclear from the circuit court's ruling if (a) the court thought it would be unwise to fully restore petitioner's firearm rights given that the federal prohibition would still be in effect, or (b) the court determined that its authority to restore petitioner's Michigan firearm rights was limited or preempted by federal law. If the former, the circuit court's concerns were irrelevant because MCL 28.424(4) requires the court to restore the petitioner's firearm rights if it finds by clear and convincing evidence that the statute's requirements were met, as was the case here. If, on the other hand, the court determined that MCL 28.424 and MCL 750.224f were preempted by 18 USC 922(g), it erred.

"Under the Supremacy Clause of the United States Constitution, US Const, art VI, cl 2, federal law preempts state law where Congress so intends." *Konynenbelt v Flagstar Bank, FSB*, 242 Mich App 21, 25; 617 NW2d 706 (2000). "[F]ederal law preempts state law in three circumstances: (1) where Congress has expressed an intent to preempt state law, (2) where state law regulates conduct in a field that Congress intended to occupy exclusively, and (3) where state law actually conflicts with federal law." *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 197-198; 658 NW2d 804 (2002). " '[I]n all pre-emption cases, and particularly in those in which Congress has legis-

lated . . . in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ter Beek v Wyoming*, 495 Mich 1, 10; 846 NW2d 531 (2014), quoting *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009).

The federal felon-in-possession statute, 18 USC 922(g), is part of the Gun Control Act (GCA), 18 USC 921 *et seq*. Relevant to preemption, the GCA provides:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. [18 USC 927.]

Therefore, the question before us is whether restoration of firearm rights to felons under Michigan law is in "direct and positive conflict" with 18 USC 922(g).

A similar issue was raised in *Ter Beek*, 495 Mich 1. In that case, the Supreme Court held that § 4(a) of the Michigan Medical Marihuana Act, MCL 333.26424(a), was not preempted by the federal Controlled Substances Act (CSA), 21 USC 801 *et seq*., which prohibits the use of marijuana. *Id*. at 10-19. The Court concluded that § 4(a), which provides immunity from arrest and prosecution for lawful medical marijuana activities, did not interfere with the enforcement or purposes of the CSA. *Id*. at 13-19. The Court explained:

> Section 4(a) simply provides that, under state law, certain individuals may engage in certain medical marijuana use without risk of penalty. . . . [W]hile such use is prohibited under federal law, § 4(a) does not deny the federal govern-

> ment the ability to enforce that prohibition, nor does it purport to require, authorize, or excuse its violation. [*Id.* at 17.]

Likewise, in this case, the Michigan statutes that provide for restoration of a felon's firearm rights do not interfere with the federal government's ability to enforce 18 USC 922(g) or require, authorize, or excuse its violation. Accordingly, there is no direct and positive conflict between the Michigan statutes and 18 USC 922(g). In addition, 18 USC 921(a)(20) recognizes the authority of states to restore a felon's firearm rights for purposes of state law and further provides that a state restoration will, in certain cases,[2] bar the prior conviction from being used as a predicate offense under 18 USC 922(g):

> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. [18 USC 921(a)(20).]

Regardless of whether a state's postfelony restoration of rights satisfies the exception provided by 18 USC 921(a)(20), Congress clearly contemplated that states

---

[2] Defendant does not claim that the restoration of his state firearm rights would prevent his prior felony from serving as a federal predicate offense, and we make no conclusions in that regard. We note that one federal court has held that a prior Michigan felony continues to qualify as a federal predicate offense even after restoration of rights under Michigan law because MCL 28.425b(7)(f) (precluding felons from carrying concealed firearms) triggers the "unless" clause in 18 USC 921(a)(20). *United States v Kenny*, 375 F Supp 2d 622, 625 (ED Mich, 2005); *United States v Brown*, 69 F Supp 2d 925, 944 (ED Mich, 1999).

have that authority, notwithstanding the federal liability a felon may face under 18 USC 922(g). Preemption does not arise merely because federal and state law do not "perfectly align." *Moran v Wisconsin Dep't of Justice*, 388 Wis 2d 193, 211; 2019 WI App 38; 932 NW2d 430 (2019); see also *id*. at 211-213 (holding that Wisconsin's law requiring a pardon for removal of a felon's firearm disabilities was not preempted by 18 USC 921(a)(20)).[3]

In sum, the circuit court lacked the authority to limit restoration of petitioner's firearm rights despite its concern that he would potentially face federal criminal liability if he exercised his Michigan rights. The restoration of firearm rights to felons under Michigan law is not preempted by the federal felon-in-possession statute.

We vacate the part of the circuit court's order limiting the restoration of petitioner's firearm rights to pellet guns, muzzle loaders, and black powder guns that do not take a modern cartridge. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and K. F. KELLY, J., concurred with SHAPIRO, J.

---

[3] "Although not binding, authority from other jurisdictions may be considered for its persuasive value." *Voutsaras Estate v Bender*, 326 Mich App 667, 676; 929 NW2d 809 (2019).

BARSHAW v ALLEGHENY PERFORMANCE PLASTICS, LLC

Docket No. 350279. Submitted November 5, 2020, at Detroit. Decided November 24, 2020, at 9:05 a.m.

Steven Barshaw sued Allegheny Performance Plastics, LLC, a Pennsylvania company, in the Macomb Circuit Court for breach of the parties' separation agreement, in addition to other claims. Plaintiff had been defendant's employee, but his employment was terminated in 2018. In his complaint, plaintiff, who lived in Michigan, alleged that defendant did business in Michigan and that plaintiff had performed his duties as defendant's employee within Michigan. As part of the termination process, the parties entered into a separation agreement that included a provision stipulating that the agreement "shall be governed by and shall be interpreted in accordance with the laws" of Pennsylvania and that the parties agreed to "confer jurisdiction upon the courts of any jurisdiction within" Pennsylvania to determine disputes arising out of the separation agreement. Defendant moved for summary disposition and argued that plaintiff's breach-of-contract claim should be dismissed because the contract's forum-selection clause required plaintiff to pursue his claim in a Pennsylvania forum. The trial court, Jennifer M. Faunce, J., dismissed plaintiff's breach-of-contract claim on the basis of the forum-selection clause. Although the court concluded that dismissal was not required under Michigan law because of the permissive, rather than mandatory, nature of the forum-selection clause, this result would have been different under Pennsylvania law. The court determined that the conflict had to be resolved under Pennsylvania law because the choice-of-law provision in the separation agreement provided that Pennsylvania law governed disputes arising out of the agreement. Plaintiff applied for leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. When presented with a contractual forum-selection clause, a court must first determine the threshold issue of whether a party is bound by a contract, and accordingly, any forum-selection or choice-of-law provisions in the contract. When the action was filed in Michigan, the Michigan court had the initial jurisdiction

to make this determination. Michigan public policy favors enforcement of contractual forum-selection and choice-of-law provisions, and in general, Michigan courts enforce forum-selection clauses pursuant to MCL 600.745(3). Under the statute, contractual forum-selection clauses are to be enforced unless any of the exceptions listed in the statute apply. However, when a contract contains both a forum-selection clause and a choice-of-law clause, it is necessary to determine which state's laws govern the enforceability of the forum-selection clause itself. In other words, the trial court in which the action is filed must decide whether to determine the enforceability of the forum-selection clause by applying its own law or by applying the law designated in the choice-of-law provision. Michigan courts had never squarely addressed whether the enforceability of a contractual forum-selection clause should be governed by the law of the state where the action was filed or by the law selected by the parties in the choice-of-law provision. Some jurisdictions follow the rule that a contract's forum-selection clause should be read independently of the choice-of-law provision and that the validity of the forum-selection clause should always be determined according to the law of the jurisdiction where the action is filed. Other jurisdictions follow the rule that, when a choice-of-law provision is enforceable under the law of the state where the action is filed, the law selected in the choice-of-law provision governs the applicability or enforceability of the forum-selection clause. Whether the enforceability of a forum-selection clause should be governed by the law of the state where the action was filed or by the law selected by the parties in the choice-of-law provision does not concern the underlying merits of a lawsuit and only affects *where* the action is litigated. In this way, dismissing an action on the basis of a contractual forum-selection clause is analogous to dismissing an action under the doctrine of forum non conveniens. In *Sinochem Int'l Co Ltd v Malaysian Int'l Shipping Corp*, 549 US 422, 425, 432-433 (2007), the United States Supreme Court described forum non conveniens as a threshold, nonmerits issue, and the Court has also referred to the enforcement of a forum-selection clause as a "threshold" issue. Therefore, the question that a court must answer when considering whether to dismiss an action pursuant to a contractual forum-selection clause is similar to the question a court must decide when considering whether to dismiss an action under the doctrine of forum non conveniens; namely, whether there is a sufficient reason that the action should be litigated in another forum rather than the one where the plaintiff filed the action. Although dismissal on forum non conveniens grounds is based on concepts related to convenience,

and dismissal pursuant to a forum-selection clause is based on honoring the contractual agreement between the parties, this distinction is not substantial. Because of the similarities between the operation of a forum-selection clause and the doctrine of forum non conveniens in both effect and underlying purposes, the validity and effect of a forum-selection clause is a threshold, nonmerits issue that the Michigan court in which the action is filed may address before considering other threshold issues. Therefore, a forum-selection clause may be considered separately from any choice-of-law provision in the contract, and the Michigan court in which the action was filed must apply Michigan law in determining the effect of the forum-selection clause.

2. Determining whether a forum-selection clause is mandatory or permissive requires a court to decide whether the forum specified in the contract is the exclusive jurisdiction for litigation concerning the contract. MCL 600.745(3) plainly indicates that when an action is filed in a Michigan court, the court must consider dismissing or staying the action if the parties agreed in writing that any such action had to be brought only in another state. Permissive forum-selection clauses indicate consent to jurisdiction and venue in the named forum but do not exclude jurisdiction or venue in other forums; accordingly, a plaintiff may choose to file suit in a forum other than in the forum referred to in a permissive forum-selection clause. In order to determine whether a clause was mandatory or permissive, a court must examine the language of the clause for words of exclusivity. Absent such language, the clause is permissive. In the parties' contract in this case, nothing in the forum-selection clause evidenced an intent to forgo the personal jurisdiction of all forums other than those in Pennsylvania. Therefore, the language of the clause did not support an inference that the parties had agreed that Pennsylvania would be the sole forum in which disputes under the contract could be litigated, to the exclusion of all other forums. Notably, the choice-of-law provision used the mandatory "shall," which showed that the parties knew how to use mandating language. The lack of this same language in the forum-selection clause indicated that the parties intended for that clause to be permissive. Because the forum-selection clause was permissive under Michigan law and provided that Pennsylvania was one potential appropriate forum without excluding other appropriate forums, the forum-selection clause did not prevent plaintiff from filing this action in Michigan, and the trial court was not required to dismiss the case under MCL 600.745(3).

Reversed and remanded.

1. CONTRACTS — FORUM-SELECTION CLAUSES — CHOICE-OF-LAW CLAUSES — ENFORCEABILITY — GOVERNING LAW.

Michigan public policy generally favors enforcement of forum-selection clauses; however, when a contract includes both a forum-selection clause and a choice-of-law clause, a court must determine whether the enforceability of a forum-selection clause should be governed by the law of the state in which the action was filed or the law selected by the parties in the choice-of-law clause; because the validity and effect of a forum-selection clause is a threshold, nonmerits issue, it may be considered separately from any choice-of-law provision in the contract; in such cases, when the action has been filed in Michigan, the court shall apply Michigan law in determining the effect of the forum-selection clause.

2. CONTRACTS — FORUM-SELECTION CLAUSES — MANDATORY OR PERMISSIVE.

MCL 600.745(3) provides that if the parties to a contract agreed in writing that an action under the contract "shall be brought only in another state," the court must dismiss or stay the action absent certain exceptions listed in the statute; in order to be considered mandatory, a forum-selection clause must require that a particular forum be the exclusive jurisdiction for litigation concerning the contract; by contrast, a permissive forum-selection clause constitutes merely a consent to jurisdiction in the named forum and does not exclude jurisdiction in other forums; absent words of exclusivity, a forum-selection clause is considered permissive and does not require the plaintiff to file suit in the forum referred to in the clause.

Law Office of Daniel J. Bernard (by *Daniel J. Bernard*) for Steven Barshaw.

Starr, Butler, Alexopoulos & Stoner, PLLC (by *William R. Thomas* and *Joseph A. Starr*) for Allegheny Performance Plastics, LLC.

Before: BOONSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

BORRELLO, J. In this matter, the trial court was asked to interpret an employment agreement that contained a choice-of-law clause and a forum-selection clause.

The trial court concluded that because Pennsylvania law controlled the issue of whether the forum-selection clause was permissive or mandatory, the parties' contract evidenced the parties' agreement to litigate claims arising under the employment agreement in Pennsylvania rather than Michigan. On the basis of this conclusion, the trial court dismissed plaintiff's action. Plaintiff appeals by leave granted.[1] For the reasons set forth in this opinion, we reverse and remand to the trial court for further proceedings consistent with this opinion.

I. BACKGROUND

The parties do not dispute that defendant is a Pennsylvania company, that plaintiff lives in Michigan, and that plaintiff was defendant's employee. In 2018, plaintiff's employment was terminated. As part of the termination process, the parties entered into a separation agreement that contained the following provision:

> **Governing Law; Jurisdiction.** This Agreement shall be governed by and shall be interpreted in accordance with the laws of the State of Pennsylvania, and the parties hereby confer jurisdiction upon the courts of any jurisdiction within the State of Pennsylvania to determine any dispute arising out of or related to this Agreement, or the breach hereof.

Plaintiff filed the instant lawsuit in Macomb County, Michigan, alleging in relevant part[2] that defendant

---

[1] *Barshaw v Allegheny Performance Plastics LLC*, unpublished order of the Court of Appeals, entered November 27, 2019 (Docket No. 350279).

[2] In addition to asserting a breach-of-contract claim, plaintiff also alleged that defendant had violated the Bullard-Plawecki Employee Right to Know Act (BPERKA), MCL 423.501 *et seq*. The trial court

had breached the separation agreement.[3] In his complaint, plaintiff also alleged that he had performed his duties as defendant's employee within Michigan and that defendant did business in Michigan.

Defendant argued in its motion for summary disposition that plaintiff's breach-of-contract claim should be dismissed because the contract's forum-selection clause required plaintiff to pursue this claim in a Pennsylvania forum. Plaintiff argued in response that Michigan was a proper forum because the forum-selection clause did not state that Pennsylvania was the only proper forum or otherwise indicate that jurisdiction was limited exclusively to Pennsylvania.

The trial court dismissed plaintiff's breach-of-contract claim on the basis of the forum-selection clause. The trial court concluded that under Michigan law, the forum-selection clause was unambiguously permissive in nature, rather than mandatory, and that Michigan law therefore did not require dismissal of the claim. However, the trial court concluded that the result would be different under Pennsylvania law and that the conflict should be resolved by following Pennsylvania law because of the choice-of-law provision that was also contained in the parties' separation agreement. The trial court determined that the forum-selection clause was enforceable under Pennsylvania law, and the court granted defendant's summary disposition motion with respect to plaintiff's breach-of-contract claim.

---

denied defendant's motion for summary disposition with respect to plaintiff's BPERKA claim in the same order in which it dismissed plaintiff's breach-of-contract claim and from which plaintiff now appeals. No issues concerning plaintiff's BPERKA claim are before this Court.

[3] The specific underlying allegations of this claim are not relevant to the issue presented in this appeal.

II. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). In this case, the trial court did not explicitly state which subrule of MCR 2.116 it relied on in dismissing plaintiff's breach-of-contract claim. However, dismissal is appropriate under MCR 2.116(C)(7) when there is "an agreement to arbitrate or to litigate in a different forum." This Court has also stated that dismissal "on the basis of the existence of a valid forum-selection clause falls under MCR 2.116(C)(8), because pursuant to MCL 600.745(3),[4] [the] plaintiff's complaint fails to state a claim upon which the courts of this state are permitted to grant relief." *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 477 n 6; 760 NW2d 526 (2008).

Furthermore, "a trial court's dismissal of an action pursuant to a contractual forum-selection clause is properly reviewed on appeal under a de novo standard." *Turcheck v Amerifund Fin, Inc*, 272 Mich App 341, 345; 725 NW2d 684 (2006). To the extent our analysis requires the interpretation of contractual and statutory language, our review is also de novo. *Id*. ("The legal effect of a contractual clause is a question of law that we review de novo."); *Allen*, 281 Mich App at 52 ("The proper interpretation of statutes is also a question of law reviewed de novo on appeal.").

III. ANALYSIS

"[A] dismissal based on a forum-selection clause necessarily requires interpretation and application of

[4] This statutory provision is quoted and discussed later in this opinion.

contractual language." *Turcheck*, 272 Mich App at 345. Therefore, we begin our analysis by examining the core principles of contract interpretation:

> In interpreting a contract, our obligation is to determine the intent of the contracting parties. If the language of the contract is unambiguous, we construe and enforce the contract as written. Thus, an unambiguous contractual provision is reflective of the parties' intent as a matter of law. Once discerned, the intent of the parties will be enforced unless it is contrary to public policy. [*Id*., quoting *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003) (quotation marks omitted).]

We have previously instructed that when presented with a contractual forum-selection clause, a court's first step is to "determine the threshold issue whether a party is bound by a contract, and, accordingly, any forum selection and choice-of-law provision in the contract."[5] *Turcheck*, 272 Mich App at 346 n 2 (quotation marks and citation omitted). When the action has been filed in Michigan, "Michigan courts have the initial jurisdiction" to make this determination. *Id*. "A contractual forum selection clause, though otherwise valid, may not be enforced against one not bound by the contract." *Offerdahl v Silverstein*, 224 Mich App 417, 420; 569 NW2d 834 (1997).

In general, Michigan courts enforce forum-selection clauses, *Turcheck*, 272 Mich App at 348, and "Michigan's public policy favors the enforcement of contractual forum-selection clauses and choice-of-law provisions," *id*. at 345. The approach to enforcing contractual forum-selection clauses similar to the clause at issue here is grounded in MCL 600.745(3), which provides:

---

[5] Here, both parties concede they are bound by the contract.

> (3) If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:
>
> (a) The court is required by statute to entertain the action.
>
> (b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.
>
> (c) The other state would be a substantially less convenient place for the trial of the action than this state.
>
> (d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.
>
> (e) It would for some other reason be unfair or unreasonable to enforce the agreement.

If none of the exceptions listed in Subdivisions (a) through (e) applies, then Michigan courts will enforce the parties' contractual forum-selection clause as written pursuant to MCL 600.745(3). *Turcheck*, 272 Mich App at 345-346, 348.

However, the analysis becomes "more complicated" when, as here, "a single agreement contains both a forum-selection clause and a choice-of-law provision." *Id*. at 346. We explained in *Turcheck*:

> When a party to such an agreement sues in a state that is not designated by either the forum-selection clause or the choice-of-law provision, it becomes necessary to determine which state's law will govern the enforceability of the forum-selection clause itself. In other words, the trial court where the action is filed must decide whether to determine the enforceability of the forum-selection clause by applying its own law, or by applying the law designated in the choice-of-law provision. [*Id*.]

In *Turcheck*, we also noted that "Michigan courts have never squarely addressed whether the enforceability of a contractual forum-selection clause should be governed by the law of the state where the action was filed or, in the alternative, the law selected by the parties in the choice-of-law provision." *Id*. at 347 n 3. We further observed that there were examples of jurisdictions following each approach, and we explained the rationale for each view. *Id*. at 347. Regarding the first approach, we stated:

> [C]ertain jurisdictions follow the rule that a contract's forum-selection clause is to be read independently of the choice-of-law provision, and that the validity of the forum-selection clause will always be determined according to the law of the jurisdiction where the action was filed. This rule is based on the notion that because choice-of-law provisions only require application of the chosen state's *substantive* law, the state where the action was filed remains free to apply its own law on matters of *procedure*, including the question whether the forum-selection clause is valid in the first place. [*Id*.]

With respect to the second approach, we stated:

> Many jurisdictions follow the rule that, provided the choice-of-law provision is enforceable under the law of the state where the action was filed, the law selected in the choice-of-law provision will govern the applicability or enforceability of the forum-selection clause. The rationale for this view is that the parties contracted for the law of a specific jurisdiction, and therefore the law of the state where the action was filed should not be applied to displace the contractually chosen law. [*Id*.]

We left open in *Turcheck* the question of which approach to follow in Michigan because we determined in that case that the forum-selection clause at issue, which designated a forum in the state of Washington, was "equally enforceable" under the law of the forum

where the action was filed (Michigan) and the law of the forum designated in the choice-of-law provision (Washington). *Id*. at 342, 346, 348. In *Hansen Family Trust*, 279 Mich App at 479 n 9, this Court again found it unnecessary to resolve this question because, as in *Turcheck*, we concluded that the forum-selection clause was equally enforceable under the law of each of the implicated forums.

Addressing the question of whether a contractual forum-selection clause should be governed by the law of the state where the action was filed or, in the alternative, the law selected by the parties in the choice-of-law provision, we initially note that this question does not concern the underlying merits of the lawsuit and will only affect *where* the action is litigated. In this respect, dismissing an action under a contractual forum-selection clause is analogous to dismissing an action under the doctrine of forum non conveniens. See *Sinochem Int'l Co Ltd v Malaysia Int'l Shipping Corp*, 549 US 422, 432; 127 S Ct 1184; 167 L Ed 2d 15 (2007) (stating that a dismissal on forum non conveniens grounds "den[ies] audience to a case on the merits" and "is a determination that the merits should be adjudicated elsewhere") (quotation marks and citation omitted; alteration in original).

The two concepts are also fundamentally similar in another crucially important respect: both involve situations in which the court where the action was filed decides to refrain from exercising jurisdiction to adjudicate the merits of the action, instead allowing the merits of the action to be resolved in a different forum, even though the court in which the action was originally filed has not been divested of its jurisdiction. See *Turcheck*, 272 Mich App at 344, 345 (stating that Michigan courts generally enforce contractual forum-

selection clauses as written and that "[a]lthough a valid forum-selection clause does not *divest* the Michigan courts of personal jurisdiction over the parties, it evinces the parties' intent to forgo personal jurisdiction in Michigan and consent to *exclusive* jurisdiction in another forum"); *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 604; 719 NW2d 40 (2006) ("[A] court may refuse to hear a case on the basis of the doctrine of forum non conveniens even though it otherwise may have jurisdiction."); *Sinochem*, 549 US at 429 (characterizing the doctrine of forum non conveniens "as, essentially, 'a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined' ") (citation omitted).

The United States Supreme Court has further described a forum non conveniens determination as a "threshold, nonmerits issue" that a court may resolve before addressing other threshold issues, such as subject-matter and personal jurisdiction, if "considerations of convenience, fairness, and judicial economy so warrant" and make a "foreign tribunal . . . plainly the more suitable arbiter of the merits of the case." *Sinochem*, 549 US at 425, 432-433. The enforcement of a forum-selection clause has also been referred to as a "threshold" issue. See *Bremen v Zapata Off-Shore Co*, 407 US 1, 12; 92 S Ct 1907; 32 L Ed 2d 513 (1972) ("The threshold question is whether that court should have exercised its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.").

Our Supreme Court and the United States Supreme Court have similarly described the fundamental aims of the doctrine of forum non conveniens. Compare

Radeljak, 475 Mich at 604-605 (defining forum non conveniens as "the discretionary power of court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum" and further stating that "[t]he ultimate inquiry is where trial will best serve the convenience of the parties [and the ends] of justice") (quotation marks and citations omitted; last alteration in original), with *Sinochem*, 549 US at 429 ("A federal court has discretion to dismiss a case on the ground of *forum non conveniens* when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems. Dismissal for *forum non conveniens* reflects a court's assessment of a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality.") (quotation marks and citations omitted; alterations and ellipses in original).

Therefore, the question to be answered by a court considering whether to dismiss an action pursuant to a contractual forum-selection clause is similar to the question facing a court considering whether to dismiss an action under the doctrine of forum non conveniens; namely, whether there is a sufficient reason that the action should be litigated in another forum rather than the one in which the plaintiff filed the action.[6] The

[6] We note that although actions in federal court entail additional procedural issues not relevant to the issues before us, the United States Supreme Court essentially treats forum-selection-clause issues under the general umbrella of forum non conveniens. See *Atlantic Marine*

difference between the two situations is that a dismissal on forum non conveniens grounds is based on concepts related to convenience, the ends of justice, court administration, and other relevant considerations, see *Radeljak*, 475 Mich at 604-605; *Sinochem*, 549 US at 429, whereas a dismissal pursuant to a forum-selection clause is based on honoring the contractual agreement reached between the parties, see *Turcheck*, 272 Mich App at 345-346 (recognizing that the enforcement of forum-selection clauses is grounded on their "contractual nature," favorability under Michigan public policy, and statutory authority present in MCL 600.745(3)); *Bremen*, 407 US at 11-12 (stating that parties may contractually agree in advance on a neutral forum for resolving disputes that may arise and that the parties' choice of forum "in an arm's-length negotiation" should, "absent some compelling and countervailing reason[,] . . . be honored by the parties and enforced by the courts").

However, this distinction is not a substantial one: the United States Supreme Court in comparing these two concepts has stated that generally " 'the interest of justice' is served by holding parties to their bargain" when those parties have "contracted in advance to litigate disputes in a particular forum." *Atlantic Marine*

Constr Co, Inc v US Dist Court for Western Dist of Texas, 571 US 49, 60; 134 S Ct 568; 187 L Ed 2d 487 (2013) ("[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. [28 USC] 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer."); *id*. at 62 ("When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.").

Constr Co, Inc v US Dist Court for Western Dist of Texas, 571 US 49, 66; 134 S Ct 568; 187 L Ed 2d 487 (2013). Moreover, a forum-selection clause can be understood as the embodiment of the parties' negotiation for the most convenient or best forum. See *Bremen*, 407 US at 15 (concluding that the parties' forum-selection clause "expressly resolved" the issue of the most convenient forum); *Atlantic Marine*, 571 US at 63 (noting that a contractual forum-selection clause "represents the parties' agreement as to the most proper forum") (quotation marks and citation omitted).

Our Supreme Court has applied Michigan law in making a forum non conveniens determination, while also looking to federal law for guidance. See *Radeljak*, 475 Mich at 605-617. Because of the similarities between the operation of a forum-selection clause and the doctrine of forum non conveniens in both effect and underlying purpose, we hold that analyzing the validity and effect of a forum-selection clause is also a threshold, nonmerits issue that the Michigan court in which the action has been filed may address first before considering other threshold issues. Hence, in the absence of certain factors not germane to this appeal, a forum-selection clause may be considered separately from any choice-of-law provision in the contract. In such cases, the Michigan court in which the action has been filed shall apply Michigan law in determining the effect of the forum-selection clause.

This conclusion is in accordance with this Court's prior observation that in MCL 600.745(3), "[t]he Michigan Legislature has elected to honor the parties' contractual choice of forum, in the absence of certain factors, by requiring Michigan courts to dismiss, or stay, actions in which it is demonstrated that the parties have agreed that a forum other than Michigan

shall be the exclusive forum for resolution of their disputes." *Hansen Family Trust*, 279 Mich App at 476.

We are also guided by the following concerns expressed by the Florida Third District Court of Appeal[7] on the precise issue before us, i.e., which forum's law is applicable in determining the validity and enforceability of a forum-selection clause when the contract also contains a choice-of-law clause and the action has been filed in a forum other than what was named in the forum-selection and choice-of-law provisions:

> As the current case illustrates, commercial contracts frequently include both a forum selection provision and a choice of law provision, often in the same sentence or paragraph. If we were to adopt [the appellees'] position [that the choice-of-law provision provided the governing law], Florida courts would be required to apply the law of the forum to determine the validity of a choice of law clause, while applying the law of a different jurisdiction to determine the validity of a forum selection clause.
>
> Such a procedure would often result in divergent outcomes and would require our already overburdened trial courts to engage in the complicated task of interpreting and applying the law of a foreign jurisdiction. . . . [*Fendi Srl v Condotti Shops, Inc*, 754 So 2d 755, 759 (Fla App, 2000).]

The *Fendi* Court stated the rule that in Florida, the validity of a contractual forum-selection clause is determined under Florida law and without reference to any accompanying choice-of-law provision because the question of a forum-selection clause's validity is a procedural matter. *Id*. at 757-759.

---

[7] "Although this Court is not bound by decisions of federal courts or courts of other states, we may consider them persuasive." *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 496 n 2; 892 NW2d 467 (2016).

We share the concerns[8] expressed in *Fendi* and accordingly find that our conclusion to apply Michigan law under the circumstances presented in this case—thus employing the same approach taken by the *Fendi* court—adequately addresses these problems.

The next question to address is whether the forum-selection clause is permissive or mandatory. We begin our analysis by returning to the relevant statutory language in MCL 600.745(3), which provides that "[i]f the parties agreed in writing that an action on a controversy *shall be brought only in another state* and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the [circumstances in Subdivisions (a) to (e)] occur." When interpreting statutes, we give effect to unambiguous statutory language as written. *Gleason v Kincaid*, 323 Mich App 308, 317-318; 917 NW2d 685 (2018). MCL 600.745(3) plainly indicates that when an action is filed in a Michigan court, the court is required to consider dismissing or staying the action if the parties agreed in writing that any such action was required to be brought *only* in another state. Thus, under the statute, there must be an agreement to litigate *exclusively* in another state before a Michigan court is required to dismiss the action on the basis of a forum-selection clause.

We find the reasoning provided by Florida courts when considering the question of whether a forum-selection clause is "permissive or mandatory" to be in line with our statutory mandate. In *Golden Palm*

[8] See *Turcheck*, 272 Mich App at 347 n 3 (explaining that other jurisdictions follow the approach that, "*provided the choice-of-law provision is enforceable under the law of the state where the action was filed*, the law selected in the choice-of-law provision will govern the applicability or enforceability of the forum-selection clause") (emphasis added).

Hospitality, Inc v Stearns Bank Nat'l Ass'n, 874 So 2d 1231, 1236 (Fla App, 2004), the Florida Fifth District Court of Appeal stated:

> [M]andatory jurisdiction clauses in contracts . . . require that a particular forum be the exclusive jurisdiction for litigation concerning the contract . . . . As a general principle, a trial court must honor a mandatory forum selection clause in a contract in the absence of a showing that the clause is unreasonable or unjust. [P]ermissive forum clauses constitute nothing more than a consent to jurisdiction and venue in the named forum and do not exclude jurisdiction or venue in other forums. Hence, [a] permissive forum selection clause may provide an alternative to the statutory choices of venue but it does not require the plaintiff to file the suit in the forum referred to in the agreement. [Quotation marks and citations omitted; alterations and ellipses in original.]

The court continued by explaining how to determine whether a forum-selection clause was permissive or mandatory:

> Recognizing the clear distinctions between mandatory and permissive forum selection clauses, this court delineated a general test to determine which type of clause is contained in a written instrument. Under this test, the court must examine the language of the clause for words of exclusivity. Absent such language, the clause will be considered permissive. *Shoppes Ltd*[*Partnership v Conn*, 829 So 2d 356, 358 (Fla App, 2002)] (holding that "a classic permissive forum selection clause doing nothing more than consenting to jurisdiction . . . but not excluding jurisdiction in another forum" is not mandatory); see also *World Vacation Travel, SA, de CV v Brooker*, 799 So 2d 410, 412 [(Fla App, 2001)] ("[A]ny clause which submits parties to the laws in force and the competent courts of a specific forum and simultaneously waives any other territorial jurisdiction can only be deemed mandatory.") (citation omitted)[.] [*Golden Palm Hospitality*, 874 So 2d at 1236 (ellipsis and third alteration in original).]

We find this analysis persuasive and adopt it as our own.[9] Moreover, such analysis is consistent with the manner in which this Court has referred to the similar forum-selection-clause analysis. See *Turcheck*, 272 Mich App at 344 ("Although a valid forum-selection clause does not *divest* the Michigan courts of personal jurisdiction over the parties, it evinces the parties' intent to forgo personal jurisdiction in Michigan and consent to *exclusive* jurisdiction in another forum."); *id*. at 345 ("[A]ssuming that certain [statutory] exceptions do not apply, Michigan courts will enforce an *express* forum-selection clause as written.") (emphasis added); *Hansen Family Trust*, 279 Mich App at 476 ("The Michigan Legislature has elected to honor the parties' contractual choice of forum, in the absence of certain factors, by requiring Michigan courts to dismiss, or stay, actions in which it is demonstrated that the parties have agreed that a forum other than Michigan shall be the *exclusive forum* for resolution of their disputes. MCL 600.745(3).") (emphasis added). The test enunciated by the court in *Golden Palm Hospitality* is also consistent with the approach employed in a prior unpublished decision of our Court,[10] in which we held as follows:

> Consequently, in the absence of language indicating that the parties intended for the grant of jurisdiction to be exclusive to Arizona state and federal courts, we conclude that the plain language of the clause at issue permits the parties to pursue litigation in Arizona state and federal courts, but it does not mandate that any litigation between the parties must be filed in Arizona state or federal courts,

---

[9] *Bank of America, NA*, 316 Mich App at 496 n 2.

[10] Unpublished opinions of this Court may be considered for their instructive or persuasive value, although they are not binding precedent. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

> and thus this provision does not prevent the parties from filing suit in Michigan. Because the clause did not prevent plaintiff from filing suit in Michigan, the trial court erred by dismissing the case under MCL 600.745(3). [*Rieth-Riley Constr Co, Inc v Ecopath Contracting LLC*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2015 (Docket No. 321562), p 3.]

Applying this test to the forum-selection clause at issue in this case, we return to the pertinent language of the contract which states:

> **Governing Law; Jurisdiction.** This Agreement shall be governed by and shall be interpreted in accordance with the laws of the State of Pennsylvania, and the parties hereby confer jurisdiction upon the courts of any jurisdiction within the State of Pennsylvania to determine any dispute arising out of or related to this Agreement, or the breach hereof.

There is nothing in this clause evidencing an intent by the parties to forgo the personal jurisdiction of all forums other than those within the state of Pennsylvania. Therefore, we cannot infer from the language of the clause that the parties agreed that Pennsylvania would be the sole forum in which they could litigate disputes to the exclusion of all other forums. We base our conclusion, in part, on the fact that in contrast to the forum-selection clause, the choice-of-law provision employs the word "shall," evidencing that the parties understood how to use mandating language.[11] Conversely, the conscious lack of the same mandating language in the forum-selection clause leads us to conclude that the clause was intended by the parties to be permissive. See *Golden Palm Hospitality*, 874 So 2d at 1236.

---

[11] Given the mandatory language in the choice-of-law provision, on remand, the trial court shall apply Pennsylvania law.

We therefore conclude that the forum-selection clause is permissive under Michigan law. Because the forum-selection clause was permissive and provided that Pennsylvania was one potential appropriate forum without excluding the use of other appropriate forums, the parties' forum-selection clause did not prohibit plaintiff from filing this action in a Michigan court, and the trial court therefore was not required to dismiss this case under MCL 600.745(3). Accordingly, we reverse the trial court's order dismissing plaintiff's contract claim based on the forum-selection clause and remand this matter for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction. This being a case of first impression, no costs are awarded. MCR 7.219(A).

BOONSTRA, P.J., and CAVANAGH, J., concurred with BORRELLO, J.