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COURT OF APPEALS CASES

In re JP

Docket No. 344812. Submitted September 5, 2019, at Grand Rapids. Decided September 24, 2019, at 9:00 a.m.

JP, a minor, was found responsible by a jury in the Gogebic Circuit Court, Juvenile Division, for having violated MCL 750.540e(1)(a), which prohibits maliciously using a telecommunications service under certain circumstances to threaten physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device. The charge was predicated on respondent's involvement in a group discussion with three other teenagers on the application Snapchat in which the parties exchanged messages about killing a classmate. The classmate never read the messages in question. After the jury found respondent responsible for violating MCL 750.540e(1)(a), her counsel brought a motion for a directed verdict or a new trial, arguing that there was no evidence that respondent intended to threaten or disturb the classmate who was the subject of the Snapchat discussion. The court, Joel L. Massie, J., denied the motion, and respondent appealed.

The Court of Appeals *held*:

1. The jury's verdict was against the great weight of the evidence. Under MCL 750.540e(1)(a), it is a misdemeanor to maliciously use any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person or to disturb the peace and quiet of another person by threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device. To be convicted under this provision, a defendant must specifically intend to annoy, terrorize, or disturb the peace of another person, and the defendant must use a telecommunications device to do so. The other person's perception of the nature of the communication does not determine a defendant's liability. There was no evidence to support the proposition that respondent intended to harass, terrorize, annoy, or otherwise interfere with her classmate's peace and quiet. Rather, the great weight of the evidence demonstrated the opposite; namely, that

none of the Snapchat participants intended that the classmate would ever read or see the texts or feel threatened by their existence. No evidence indicated that respondent undertook or intended to undertake any acts consistent with threatening her classmate. Under MCL 750.540e, respondent's speech alone was not enough to establish criminal conduct.

2. Respondent may not be punished because she negligently overlooked the possibility that someone else would show her classmate the Snapchat contents. MCL 750.540e(1)(a) would have applied to respondent only if she had meant to communicate her threats to her classmate and actually threatened him. There was no evidence that respondent intended or carried out a threat, and no such act or intent could be inferred from any of the testimony. While respondent's messages were unwise in light of the risk that they would be seen by people outside the chat, that did not suffice to prove the intent required by the statute.

Orders of adjudication and disposition vacated.

SWARTZLE, P.J., concurred in full but wrote separately to note that respondent had come close to the line of criminal responsibility and that the outcome might have been different had respondent showed any of the messages to her classmate, had anyone outside the group read the messages before the investigation, and had the jury been properly instructed.

M. J. KELLY, J., concurred in Parts I and II of the majority opinion.

CRIMINAL LAW — TELECOMMUNICATIONS — MALICIOUS USE — SPECIFIC INTENT.

Under MCL 750.540e(1)(a), it is a misdemeanor to maliciously use any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person or to disturb the peace and quiet of another person by threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device; to be convicted under this provision, a defendant must have specifically intended to annoy, terrorize, or disturb the peace of another person.

Nicholas Jacobs, Prosecuting Attorney, and *Tracie L. Wittla*, Chief Assistant Prosecutor, for petitioner.

Rudolph F. Perhalla for respondent.

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

GLEICHER, J. Young teenagers sometimes make poor judgments born of impetuosity, immaturity, and an inability to foresee the painful consequences of their actions. Here, four teenaged girls decided they did not like a 13-year-old boy, and fantasized via group text messages about killing him, his dog, and even his goldfish. The texts are not pretty or clever. They also were not sent to the boy. He learned the content of the hateful messages from his mother, and he never actually read them.

The prosecutor charged one of the girls, respondent JP, with a violation of MCL 750.540e(1), which subjects those who send text messages intended to "terrorize, frighten, intimidate, threaten, harass, molest, or annoy" another person to criminal punishment. Despite that no evidence supported that respondent intended that the boy would ever see the text messages, a jury adjudicated her as responsible for the violation, and the trial court entered a dispositional order. Because no evidence or reasonable inference suggests that the teenagers intended to terrorize, frighten, intimidate, threaten, harass, molest, or annoy the teenaged boy discussed in their texts, we vacate the orders of adjudication and disposition.

I

The four involved girls formed a "Snapchat" group. Snapchat is an application for mobile phones used to share text messages, photographs, and other images among a defined group of "real friends." See Snapchat, *About* <https://www.youtube.com/user/OfficialSnapchat/about> (accessed September 17, 2019)

[https://perma.cc/78B8-KL63]. One feature of the application vaporizes the messages after a few seconds unless a recipient deliberately saves them. Even then, the messages remain accessible for only 24 hours unless a participant captures a "screen shot." In other words, the messages are usually temporary and ephemeral by design. See *State v Bariteau*, 884 NW2d 169, 172 n 1; 2016 SD 57 (2016) ("Snapchat is an image messaging mobile phone application in which a user can send a photograph or text message with a set time to expire. The receiving user can only view the text message or photograph for one to ten seconds before the image or text message expires and is automatically deleted from the mobile phone.").

The girls in the Snapchat group used personally selected monikers rather than their real names. Respondent was 7Up. As displayed in the record, the other girls were Lady Gaga, and Dream Ruiner. All were in sixth or seventh grade. The boy involved, S, was a seventh grader. The girls assigned a name to their Snapchat: "R.I.P. [S] (& Goldfish)"; R.I.P., of course, means "rest in peace."

The girls did not like S. According to the girls, he pushed the books off Lady Gaga's desk and called her "fat and gay." They claimed that S also "shoved" the books off respondent's desk. S denied the allegations.[1]

[1] Outside the jury's presence, the judge twice observed that he found S's protestations of innocence unconvincing. After the verdict was rendered, the judge commented, "Oh, and the last thing I was going to say is, you know, even though I do believe he pushed your books, I do believe he was a bug on a lot of this stuff; I think he was doing it to get your attention." At the dispositional hearing, the judge reiterated: "I said on the record I do believe he was annoying but I also feel that part of the reason he is annoying is because he is a challenged young man and he was trying to get your attention. He was trying to get you girls to like him in a completely, not a good strategy type of way."

Based on the perceptions of at least some of the girls that S had transgressed the norms of middle school decorum, the girls fantasized about killing S, his goldfish, and his dog (if he had one). Here is a sample of their creative work:

> *7Up* [respondent]: I WILL MARGARITA SQUARE UP LIKE [S]'S HEAD
>
> *Lady Gaga*: HAHAHAHAHHAHAHAGA [sic]
>
> *7Up*: LETS GOOOOO
>
> 
>
> *Lady Gaga*: WE SHOULD STAB HIM
>
> *Dream Ruiner*: 
>
> *7Up*: YES
>
> * * *
>
> *7Up*: MURDER HIM
> LET'S DO IT
>
> *Lady Gaga*: AND HIS FAMILY
> AND HIS DOG
>
> *7Up*: YEEEESSS
>
> *Dream Ruiner*: MURDER HIM
>
> *Lady Gaga*: AND HIS GOLD FISH
>
> *Dream Ruiner*: XD[2]
>
> *Me*: What if he doesn't have a dog!!

---

[2] "XD" in electronic communications represents an "emoticon" for "laughing out loud." The letter "X" represents "the eyes all scrunched up," and the letter "D" "represents a really big mouth that is laughing." See Reference, *What Does "XD" Mean in Chatting?* <https://www.reference.com/technology/xd-mean-chatting-1723977c2976c9e3> (accessed September 17, 2019) [https://perma.cc/RV3J-2ZD6].

7Up: WE WILL DRUG HIM THEN STAB HIM TO DEATH

Lady Gaga: And rip his skin off
And fee[d] it to his dog

7Up: Yes

Lady Gaga: [cartoon bitmoji of a woman captioned "wow, such amaze, very story, :O, many interest, so care"]

7Up: YES TO ALL O IT

* * *

Lady Gaga:[3]

7Up: AWEEEEEE

Lady Gaga: @[S]'s gold fish

7Up: WHO ELSE HATES [S] IN HERE

---

[3] Lady Gaga found a clean version of this photograph for the Snapchat thread. The image has been licensed on the Internet, and that version is included in this opinion. It is available, with photo credit, at Shutterstock, Young Attractive Dangerous Woman Aiming at Gold Fish <https://www.shutterstock.com/image-photo/young-attractive-dangerous-woman-aiming-gold-55445056> (accessed September 17, 2019) [https://perma.cc/M68R-7C6D].

Lady Gaga: ME

* * *

7Up: PATRICIA WILL KIL [sic] HIM ONE DAY

Lady Gaga: Yee

* * *

Dream Ruiner: His head will turn to a fucking rectangle

Lady Gaga: A CIRCLE
YES

* * *

Me: Or a triangle??!?!!?

Lady Gaga: Yes then I'll play volleyball with it
ILLUMANATI CONFIRMED

Dream Ruiner: 

* * *

7Up: [triangle graphics]
@me shipping myself to china after killing [S]

Me: HAHAHHAHAHAHA

Dream Ruiner: I WILL PAY FOR SHIPPING

* * *

7Up: ILL BE THROWN AWAY IN THE TRASH ALONG WITH [S']S REMAINS

Dream Ruiner: You will be shipped on a luxury cruise ship
XD
XDD

It is reasonable for a school to condemn and punish misuse of social media and the potential for cyberbul-

lying it represents.[4] Children should be strongly encouraged to use digital media responsibly, to consider all the potential consequences of their words, and to refrain from any aggressive, inflammatory, or hurtful commentary. But school rules are not criminal laws. The relevant facts in this criminal case include that none of the girls took any action intended to communicate the threats to S. S was not invited to the Snapchat, and according to his testimony, he never actually read the texts.[5] The messages came to light only after someone mentioned their existence to S, who asked Me about it. S's mother informed the school principal of the existence of the Snapchat. The principal brought the girls into his office, seized their phones, and contacted law enforcement. Respondent was charged with a violation of MCL 750.540e, which provides, in relevant part:

> (1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:

---

[4] The Michigan Legislature recently enacted a statute making cyberbullying a misdemeanor. MCL 750.411x, enacted by 2019 PA 47, effective March 27, 2019. Notably, the statute contains two intent requirements that are consistent with our analysis:

> "Cyberbully" includes posting a message or statement in a public media forum about any other person if both of the following apply:
>
> (*i*) The message or statement is intended to place a person in fear of bodily harm or death and expresses an intent to commit violence against the person.
>
> (*ii*) The message or statement is posted with the intent to communicate a threat or with knowledge that it will be viewed as a threat. [MCL 750.411x(6)(a).]

[5] While using Snapchat, the participants can tell if someone is added to their assembled collection of chatters. The girls agreed that S was never added to the group.

> (a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device.

We turn to a detailed review of the evidence relevant to respondent's intent.

Lady Gaga testified that she never told S about the Snapchat and was "surprised" that he found out about it. She explained, "[H]e like wasn't added into the group chat and nobody else that was really friends with him or close to him was added into the group chat and so I really didn't think he was going to know about it." The texts were "just a way of kind of venting I guess, in some twisted way." Lady Gaga testified that she deleted the screenshot texts regarding S from her phone. On cross-examination she agreed that she "never thought any of this would get back to S."

Me testified that S was her friend, and still is. S found out about the Snapchat from someone else, and asked her about it:

> *Q*. So from what you recall [S] had some kind of idea that this Snapchat existed and he asked you if it existed or not?
>
> *A*. Yes.
>
> *Q*. What'd you tell him?
>
> *A*. I told him it did and he asked me to show him and I showed him.
>
> *Q*. So, when you say he asked me to show him, you showed him these messages?
>
> *A*. Yes.

Me conceded that "[i]t was never meant for it to be sent to [S]."

Dream Ruiner, a sixth grader, testified that she did not "really" know S, but understood "that he'd given

some of the other girls in the group a hard time." She, too, believed that the Snapchat was "private" while the girls were engaged in it, although she saved the messages on her phone. Dream Ruiner suspected that Me had started the Snapchat group.

During his testimony, S contradicted Me's testimony regarding his view of the Snapchat. He recalled that Me exposed the *name* of the Snapchat, but not the messages themselves:

Q. How did you find out that the group existed?

A. [Me] came to me and showed me it.

Q. And when you say she showed it to you, what did she show you?

A. She just showed me the group chat name.

Q. The group chat name?

A. Yeah.

Q. And what was the group chat name?

A. R.I.P. [S] and his goldfish.

Q. At the time that she showed that to you, what did she show it to you with?

A. She just showed me it out of the blue.

Q. I mean, like, was it a piece of paper, was it a computer?

A. No, it was on her phone.

* * *

Q. Did [Me] show you the messages in addition to the name of the Snapchat group?

A. She didn't show me the messages.

Q. Okay, so just the name?

A. Yes.

Q. Have you ever personally read the messages?

A. No.

Q. Did you ever talk to [Me] about it after that first time when she showed you the name of the group?

A. No.

S's mother informed him of the content of the texts, which "kind of made me feel worse," S admitted. On cross-examination, S agreed that respondent had never said anything to him that he viewed as harassing or annoying and that she had never communicated with him at all by using a phone, a computer, or a tablet.

Respondent was in the eighth grade at the time of the adjudication trial. She testified that she believed the Snapchat conversation was "just private." "I had no clue people were saving it," she explained, and she said that she never intended that the communications would be shown to S. And, consistent with S's testimony, respondent agreed that she had never communicated with him in any fashion.

Thus, no direct evidence supported that respondent intended that her threats would be communicated to S. The girls agreed that they did not intend for S to see their messages. S testified that he did not learn the content of the messages until his mother told him about them. No evidence was presented warranting even an inference that respondent did, in fact, anticipate, expect, plan, or desire that S would learn of the texts.

From the onset of the case, respondent's counsel insisted that respondent lacked an intent to threaten or harass S and that such intent was fundamental to a finding of responsibility for having violated MCL 750.540e(1)(a). The prosecutor acknowledged that S had not been included in the Snapchat, but focused on

the girls' awareness that "[t]here's no such thing as privacy on the internet." The girls should have known, the prosecutor maintained, that S likely would find out about their "malicious" threats.

Regarding the offense, the trial court instructed the jury as follows:

> The juvenile is charged with a crime of malicious [use] of a telecommunications device. To prove this charge, the prosecutor must prove each of the following all beyond a reasonable doubt. First that the use of telephone line or any electronic medium of communication, the internet, a computer, a computer program, a computer system, a computer network, or any electronic medium of telecommunication [sic]. *It does not matter whether the communication was actually sent or received.* It was pretty much acknowledged that the medium here was a cell phone and a Snapchat. 2. Second, that the juvenile did this maliciously. This means the juvenile did the act with intent to terrorize, frighten, intimidate, threaten, harass, molest, annoy, or disturb the peace and quiet. It's an either/or again as I pointed out to you; it does not have to be all of them. Third, the communication threatened physical harm or damage to any person or property through the use of the device. [Emphasis added.]

The jury found respondent responsible. Her counsel brought a motion for a directed verdict or a new trial, arguing that there was no evidence that respondent (or the other girls) intended to threaten or disturb S in any manner. The prosecutor rested her response on the content of the girls' statements, contending that they "could certainly be viewed as intending to terrorize, frighten, intimidate, threaten, harass, molest, annoy or disturb the peace and quiet of someone else[.]" The trial court concluded that because "in the end" S was intimidated and felt threatened, the jury's verdict would stand.

Respondent now appeals.

II

Respondent contends that the jury's verdict is against the great weight of the evidence. Because the girls did not intend that S would see their texts, respondent argues, she cannot be adjudicated responsible based on the threatening or offensive language they employed. Respondent is correct. The statute underlying the jury's verdict requires proof of specific intent "to terrorize, frighten, intimidate, threaten, harass, molest, or annoy *another person*, or to disturb the peace and quiet of *another person*[.]" MCL 750.540e (emphasis added). No evidence supports that respondent specifically intended that S would ever read or learn of the text messages. Accordingly, the jury's verdict contravened the great weight of the evidence, and the orders of adjudication and disposition must be vacated.

A verdict is against the great weight of the evidence when "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Lacalamita*, 286 Mich App 467, 469; 780 NW2d 311 (2009). We review for an abuse of discretion a trial court's denial of a motion for a new trial grounded in a great weight of the evidence claim. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A "court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted). An abuse of discretion may also occur when a trial court "operates within an incorrect legal framework." *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). We review de novo whether conduct falls within the scope of a criminal law. *People v Cassadime*, 258 Mich App 395, 398; 671 NW2d 559 (2003).

We begin our analysis by repeating the language of the statute at the center of this case:

> (1) A person is guilty of a misdemeanor who maliciously uses any service provided by a telecommunications service provider with intent to terrorize, frighten, intimidate, threaten, harass, molest, or annoy another person, or to disturb the peace and quiet of another person by any of the following:
>
> (a) Threatening physical harm or damage to any person or property in the course of a conversation or message through the use of a telecommunications service or device. [MCL 750.540e(1)(a).]

In construing this statute, our goal is to ascertain and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). The language of this statute is unambiguous, and so we presume that the Legislature intended the meaning conveyed. *Id*. at 330.

In *People v Taravella*, 133 Mich App 515, 523; 350 NW2d 780 (1984), this Court held that MCL 750.540e is a specific-intent crime, and we reaffirm that holding.[6] To be convicted under the statute, a defendant must specifically intend to annoy, terrorize, or disturb the peace of *another person*, and the defendant must use a telecommunications device to do so. *Id*. The listener's perception of the nature of the call does not determine a defendant's liability, this Court emphasized in *Taravella*, as "[t]he statute clearly provides that the focus is on the caller; it is the malicious intent with which the transmission is made that establishes the criminality of the conduct." *Id*. at 521. In other words, the statute criminalizes the use of a telephonic

[6] Cases decided before November 1, 1990, can be considered persuasive authority, although they are not binding precedent. MCR 7.215(J)(1).

device when the defendant harbors the specific intent to harass, terrorize, annoy, or otherwise interfere with the peace and quiet of another person.

No evidence supports that respondent intended to harass, terrorize, annoy, or otherwise interfere with S's peace and quiet. Rather, the great weight of the evidence demonstrates precisely the opposite: none of the Snapchat participants intended that S would *ever* read or see the texts, or would ever feel threatened by their existence. In *Taravella*, this Court highlighted that even if a recipient *does* receive a telephonic communication, the "listener's subjective perceptions, without the necessary intent on the part of the caller," do not make out the crime. *Id*. The focus remains on the intent of the sender.

The prosecution asserts that respondent's "[m]alice is apparent from the graphic nature of the threats and the attempt to build consensus on hating [S] with whoever else was in the group chat." This argument disregards the language of the statute, which requires that the maker of a threat intend that the threat disturb or otherwise negatively affect "another person." The nature of the language, standing alone, does not make out the crime, nor does the fact that violence was discussed.[7] Rather, *Taravella* instructs that MCL 750.540e sur-

[7] Although not raised as an issue on appeal, we note that the jury instruction regarding the offense inaccurately posited that "[i]t does not matter whether the communication was actually sent or received." The failure to actually send a communication bears on a defendant's intent to annoy or harass the recipient and thus matters. Although the record is vague regarding the source of the jury instruction, the court appears to have obtained the "does not matter" language from M Crim JI 35.1, which relates to an entirely different crime (interfering with an electronic communication). Moreover, the instruction omitted a critical part of the statutory language—that the defendant intended "to terrorize, frighten, intimidate, threaten, harass, molest, or annoy *another person*." The statute's intent requirement mandates that speech be deliberately

vives constitutional scrutiny precisely because it pairs speech with a speaker's malicious intent that the content of the speech be communicated to a listener and some form of follow-through on that intent.[8]

In *Taravella*, the defendant was charged under MCL 750.540e with having made obscene or harassing telephone calls. He brought a motion to quash, contending that the statute was unconstitutionally overbroad because it allowed for punishment of constitutionally protected speech. *Id*. at 517-519. This Court acknowledged that the First Amendment limits "the extent to which states may punish or criminalize the use of words or language." *Id*. at 519. Therefore, a statute regulating speech "must be narrowly drawn so as not to infringe on constitutionally protected speech." *Id*. We upheld the statute's constitutionality by construing it as requiring both a malicious intent to annoy or terrorize or disturb the peace and quiet of another, and evidence that the defendant "*further* does one of the activities listed" in the statute's subsections. *Id*. at 523. To violate Subsection (1)(a), a defendant must "[t]hreaten[] physical harm or damage *to* any person . . . in the course of a conversation or message . . . ." MCL 750.540e(1)(a) (emphasis added).

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aimed at "another person." By omitting those words, the court inaccurately conveyed the statute's reach. Our holding does not rest on these grounds, however.

[8] In this case, the prosecution alleged that respondent "threatened physical harm or damage" to a person, which is outlawed under Subsection (1)(a). The statute also criminalizes six other acts, including "[f]alsely and deliberately reporting by message . . . that a person has been injured, has suddenly taken ill, has suffered death, or has been the victim of a crime or an accident," MCL 750.540e(1)(b), and "[d]eliberately engaging or causing to engage the use of a telecommunications service or device of another person in a repetitive manner that causes interruption in telecommunications service or prevents the person from utilizing his or her telecommunications service or device," MCL 750.540e(1)(g).

Respondent did not undertake any acts consistent with threatening S, and no evidence substantiates that she intended to do so. Under MCL 750.540e, respondent's speech alone was not enough to establish criminal conduct. See also *People v Relerford*, 2017 IL 121094, ¶¶29, 45; 104 NE3d 341 (2017) (in which the Illinois Supreme Court found unconstitutional a statute criminalizing communications "to or about a person" without requiring "any relationship—integral or otherwise—to unlawful conduct").

The prosecution asserts that respondent should have anticipated that the chat would be leaked to S and that her responsibility may be inferred by her failure to understand that the Internet is not a secure place. It is true that respondent's texts were unwise in light of the risk that they would be seen by people outside the chat, but that does not suffice to prove the intent required by the statute, or to transform digital stupidity into criminal activity.

Here, and in the trial court, the prosecution propounds an argument premised on respondent's *negligence* rather than her specific intent to threaten S. Although it addresses an entirely different statute, we find analogous and helpful the United States Supreme Court's opinion in *Elonis v United States*, 575 US 723; 135 S Ct 2001; 192 L Ed 2d 1 (2015). The federal statute at issue in *Elonis* made it "a crime to transmit in interstate commerce 'any communication containing any threat . . . to injure the person of another.' " *Id*. at 726 (citation omitted, alteration in original). Elonis posted "graphically violent language" on Facebook which included his wish to hurt his soon-to-be ex-wife and one of his coworkers. *Id*. at 726-727. The subjects of the defendant's Facebook postings read his words and became fearful. *Id*. at 727-729. At trial, Elonis requested

an instruction that "the government must prove that he intended to communicate a true threat." *Id*. at 731 (quotation marks and citation omitted). The district court denied this request and instead informed the jury that

> [a] statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual. [*Id*. (quotation marks and citation omitted).]

Pertinent here, the government contended that Elonis could be convicted "if he himself knew the contents and context of his posts, and a reasonable person would have recognized that the posts would be read as genuine threats." *Id*. at 739. The Supreme Court soundly rejected the government's argument, characterizing it as erecting "a negligence standard" inconsistent with the mental state required under the statute. *Id*. " '[W]rongdoing must be conscious to be criminal,' " the Supreme Court reminded. *Id*. at 734, quoting *Morissette v United States*, 342 US 246, 252; 72 S Ct 240; 96 L Ed 288 (1952). "The 'central thought' " expressed in *Morissette*, the *Elonis* Court highlighted, "is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like." *Elonis*, 575 US at 734.

Respondent may not be punished because she negligently overlooked the possibility that someone else would show S the Snapchat contents. MCL 750.540e(1)(a) applies to respondent only if she meant

to communicate her threats to S and actually threatened him. No evidence of record supports that she intended or carried out a threat, and we are unable to infer such an intent or act from any of the testimony. The evidence that respondent lacked an intent to threaten S preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand.

We vacate the orders of adjudication and disposition.

SWARTZLE, P.J., concurred with GLEICHER, J.

SWARTZLE, P.J. (*concurring*). *A. Alarming and Concerning, But Lack of Intent.* I concur in full with the majority opinion. As recounted by the majority, the messages in the Snapchat group are alarming and concerning, and it is understandable and commendable that S's mother and the authorities took the matter seriously. Taken in isolation, the comments would certainly appear to qualify as those that would tend "to terrorize, frighten, intimidate, threaten, [or] harass" a person. MCL 750.540e(1). In this new and evolving world of school violence and social media, messages like these cannot be ignored, and thankfully in this case, they were not. Notwithstanding this, I agree that there is an absence of evidence that respondent had the requisite intent to threaten or otherwise negatively affect S or anyone else, as contemplated under the current version of the criminal statute.

B. Cautionary Tale. I write separately simply to point out how close respondent got to the line of criminal responsibility. This would have been a much different case, in my opinion, had respondent showed any of the messages to S, or even had respondent learned that another person was going to show the

messages to S and done nothing to minimize the harmful impact. Respondent and other members of the group testified to receiving Internet-safety training at school, and they knew both that their messages could be difficult-to-impossible to delete (even in Snapchat) and that someone outside of the group might gain access to the messages at some point.

Similarly, this would have been a much different case had S or even someone else outside of the group actually read the messages (prior to the investigation). The statute does not require that the purported target of the message be the one who is actually terrorized or frightened. One could envision a scenario where a parent is intentionally targeted and actually terrorized by comments threatening harm to the parent's child, but there is nothing on this record to suggest that was the case here.

Finally, this would have been a much different case had the jury been properly instructed, as appellate courts are generally reluctant to overturn a jury verdict. See *People v Stewart*, 36 Mich App 93, 98; 193 NW2d 184 (1971). But, as the majority opinion observes, the jury did not receive the appropriate instructions, and, in my opinion, the improper instructions alone justified reversal in a case like this one. See *People v Craft*, 325 Mich App 598, 608; 927 NW2d 708 (2018).

Accordingly, I concur.

M. J. KELLY, J. (*concurring*). I concur in Parts I and II of the majority opinion.

SPECTRUM HEALTH HOSPITALS v
MICHIGAN ASSIGNED CLAIMS PLAN

Docket No. 343563. Submitted September 4, 2019, at Grand Rapids. Decided September 24, 2019, at 9:05 a.m.

Spectrum Health Hospitals brought an action in the Kent Circuit Court against the Michigan Assigned Claims Plan (MACP), the Michigan Automobile Insurance Placement Facility (MAIPF), and an unnamed insurance company, seeking to recover payment under the no-fault act, MCL 500.3101 *et seq*., for medical services it provided to Robin Benoit after a motor vehicle crash in which Benoit was injured and seeking an order directing the MACP/MAIPF to assign the claim to a no-fault insurer under MCL 500.3174. On August 30, 2016, Benoit was injured in a single-car motor vehicle crash; Benoit, who was not covered by a no-fault insurance policy at the time of the accident, verbally consented at the hospital to an assignment of her rights to Spectrum. On August 10, 2017, Spectrum filed an application for personal protection insurance (PIP) benefits, signed by an agent of Spectrum, with the MACP/MAIPF. The preparer of the affidavit answered many questions related to the accident and marked the availability of no-fault insurance as "unknown" because Spectrum was unable to locate Benoit for the information. On August 14, 2017, the MACP/MAIPF denied the application, stating that the claim was ineligible for assignment under the no-fault act. Spectrum subsequently located Benoit, and Benoit signed an assignment of rights, benefits, and causes of action to Spectrum to allow it to seek PIP benefits on her behalf. On August 30, 2017, Spectrum sent the affidavit to the MACP/MAIPF, which notified Spectrum that it was unable to process the claim and that it required additional information. Spectrum thereafter filed this action. The MACP/MAIPF moved for summary disposition, arguing that before filing the action, Spectrum had failed to adequately investigate whether Benoit had available insurance and that the application was invalid because although Spectrum's preparer signed it, the application had not been signed by Benoit or her representative as required by the plan's internal regulations. Spectrum filed a countermotion for summary disposition, arguing that the MACP/MAIPF should have accepted the claim under MCL 500.3173a(1) because it was not "obviously ineligible"; Spectrum

also submitted an affidavit in which Benoit averred that at the time of the accident, she did not have a no-fault policy or reside with relatives maintaining policies and that, to her knowledge, neither the driver nor the vehicle involved in the crash were covered by a no-fault policy. The MACP conceded that with the affidavit, it had sufficient information to determine that Benoit did not have insurance available to her at the time of the accident; however, it insisted that the application was invalid at its inception—and, therefore, properly denied—because it was not signed by Benoit. The court, Donald A. Johnston, J., granted the MACP/MAIFP's motion and dismissed Spectrum's action, reasoning that the application was not valid when it was originally filed because Benoit or her representative had not filed it as required by the plan's regulations. Spectrum appealed.

The Court of Appeals *held*:

1. Under MCL 500.3172(1), when it does not appear that a person involved in a car accident is covered by a no-fault insurance policy, the person may obtain PIP benefits through the MACP. MCL 500.3171(1), as amended by 2012 PA 204, provides that the MAIPF now has the obligation—instead of the Secretary of State, which originally had the obligation—to adopt and maintain the MACP. Although the Legislature authorized the MAIPF to establish its own MACP, it did not authorize it to establish eligibility criteria. The authority to adopt a plan does not grant the authority to establish rules governing the processing, timing, and review of claims under the MACP; those requirements are established by statute. In that regard, MCL 500.3172(1) sets forth eligibility criteria, providing that a person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in Michigan may obtain PIP benefits through the MACP if (1) no PIP is applicable to the injury, (2) no PIP applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained because of a dispute among insurers, or (4) the only applicable insurance is inadequate because of financial inability; under MCL 500.3173, certain persons are disqualified from coverage under the MACP. MCL 500.3174, as amended by 2012 PA 204, provides that a person claiming PIP benefits through the MACP must notify the MAIPF of his or her claim within the time limits for filing a PIP claim with an insurer; under MCL 500.3142(2), notice refers to reasonable proof of the fact and the amount of loss sustained. With

regard to the act's timing requirements, MCL 500.3145 provides that an action for recovery of PIP benefits may not be commenced later than one year after the date of the accident. A claimant provides timely notice for purposes of MCL 500.3174 and MCL 500.3145(1) by filing a lawsuit seeking to recover PIP benefits. Once the MAIPF receives the claim, MCL 500.3173a(1), as enacted by 2012 PA 204, requires the MAIPF to make an initial determination of a claimant's eligibility for benefits under the MACP, and it must deny an obviously ineligible claim and notify the claimant promptly in writing of any denial. If the claim is not denied as "obviously ineligible," MCL 500.3174 provides that the MAIPF must promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. MCL 500.3173a granted the MAIPF limited authority to deny claims that are obviously ineligible. The MAIPF does not have authority to reject a claimant's application because it does not conform to the internal form application and signature requirements adopted by the MAIPF in the plan; that is, MCL 500.3175 does not grant it authority to impose eligibility filing requirements beyond those already provided in MCL 500.3172(1) and MCL 500.3173a(1).

2. In this case, when Spectrum submitted the application on August 10, 2017, it provided the notice required under MCL 500.3174 and did so within one year as required by MCL 500.3145(1). The application was not obviously ineligible for assignment as contemplated by MCL 500.3173a(1) because Spectrum's statement in the application that it was unknown to Spectrum whether Benoit, her resident relatives, the driver, or the involved vehicle possessed a no-fault policy was sufficient for purposes of MCL 500.3172(1) to notify the MACP/MAIPF that applicable PIP benefits could not be identified. The MACP/MAIPF erred by declaring the application obviously ineligible because it was not signed by Benoit; the MACP/MAIPF did not have authority under the act to impose additional eligibility requirements outside those set forth in MCL 500.3172(1). Accordingly, the trial court erred by granting summary disposition in favor of the MACP/MAIPF. Spectrum was entitled to summary disposition in its favor and to have the claim assigned to a member insurer because the claim was not obviously ineligible. Remand was not necessary because the MACP/MAIPF conceded that the documentation presented by Spectrum in its summary-disposition motion supported assignment of the claim to an insurer member.

Reversed.

INSURANCE — NO-FAULT INSURANCE — MICHIGAN ASSIGNED CLAIMS PLAN — CLAIMS — "OBVIOUSLY INELIGIBLE" — AUTHORITY OF MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY TO SET ELIGIBILITY REQUIREMENTS.

MCL 500.3172(1) provides that a person who is entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in Michigan may obtain personal protection insurance (PIP) benefits through the Michigan Assigned Claims Plan if (1) no PIP is applicable to the injury, (2) no PIP applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained because of a dispute among insurers, or (4) the only applicable insurance is inadequate because of financial inability; under MCL 500.3173a(1), the Michigan Automobile Insurance Placement Facility (MAIPF) must immediately deny a claim for PIP benefits under the MACP if the claim is obviously ineligible; the MAIPF may reject a claim as "obviously ineligible" if it is not filed within the time limit set forth in MCL 500.3174 and MCL 500.3145 or if it does not meet the eligibility requirements set forth in MCL 500.3172(1); the MAIPF may not reject a claim as "obviously ineligible" based on the claimant's failure to follow the MACP/MAIPF's internal regulations; the MAIPF does not have authority under the no-fault act to expand the eligibility requirements for receiving PIP benefits under the MACP (MCL 500.3101 *et seq*.).

Miller Johnson (by *Joseph J. Gavin*) for plaintiff.

Hewson & Van Hellemont, PC (by *Nicholas S. Ayoub*) for defendants.

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

PER CURIAM. The Michigan Assigned Claims Plan (MACP)/Michigan Automobile Insurance Placement Facility (MAIPF) rejected Spectrum Health Hospital's claim for assignment because the injured party did not sign the assignment application. The purpose of the MACP is to ensure prompt coverage for persons injured in motor vehicle accidents when coverage cannot be found or is unavailable. To achieve that end, the MACP/MAIPF has extremely limited authority to deny

claims for assignment—it may only deny an "obviously ineligible" claim. The absence of a signature does not meet that threshold. We reverse the award of summary disposition in the MACP/MAIPF's favor and remand for entry of summary disposition in favor of Spectrum.

I. BACKGROUND

Robin Benoit was seriously injured on August 30, 2016, while a passenger in a vehicle involved in a single-car motor vehicle accident. Spectrum Health provided more than $129,000 in services to Benoit from August 30 through September 19, 2016. Benoit was not covered by any no-fault insurance policy. Upon Benoit's admission, Spectrum secured a "verbal consent" witnessed by two staff members for a general assignment of rights; however, Benoit was "unable to sign." The hospital did not secure a more specific assignment to apply to the MACP/MAIPF on Benoit's behalf. Spectrum allegedly misplaced the general assignment and then searched high and low for Benoit, but to no avail.

On August 10, 2017, almost a year after the accident, Spectrum filed an "application for personal injury protection [PIP] benefits"[1] with the MACP/MAIPF. Spectrum's agent signed as the "preparer," and the signature line for the "Injured Person or Representative" was left blank. Spectrum directed the MACP/MAIPF to the police report, which indicated that the driver of the vehicle did not have no-fault insurance. The preparer answered "unknown" to several application questions, including the names of persons with whom Benoit lived at the time of the accident and any vehicles owned by Benoit at that time. The preparer also answered "unknown" to the

[1] Capitalization altered.

following questions: "At the time of the accident, did you have any auto insurance? If yes, list Name of Automobile Insurance Company & Policy Number," and "Are you filing this claim because there is a dispute between two or more insurance companies for your [PIP] coverage?" The application did include the address and phone number provided by Benoit in the hospital, her Medicaid policy number, and the vehicle operator's driver's license number. The preparer did not know if there was "automobile insurance in effect for this vehicle on the date of the accident" or whether "the driver [had] automobile insurance in effect on the date of the accident."

Spectrum provided the MACP/MAIPF a "list of steps taken to find Auto Insurance" along with the application. It described Spectrum's attempts to contact Benoit by phone and mail and to uncover additional contact information for its patient by searching various databases.

On August 14, 2017, the MACP/MAIPF sent Spectrum a generic form letter denying the application, stating:

> We have received the application for benefits through the [MACP], which you submitted on 08/10/2017. After careful review it has been determined that your application is ineligible for assignment under Michigan No Fault Act. If you have any questions regarding this determination please contact a representative for the [MACP], operated by the [MAIPF].

Spectrum then hired a private investigator to continue the search for Benoit. The investigator learned that the address and phone number given by Benoit at the hospital actually belonged to a personal friend who refused to speak to the investigator. The investigator uncovered another address for Benoit that was a vacant

lot. Benoit's former landlord had no forwarding information. On August 25, 2017, the investigator sent Benoit a private message on Facebook, and she telephoned him five minutes later. Benoit indicated that at the time of the accident, her ex-boyfriend was driving his personal vehicle, which he had neither registered nor insured. Benoit confirmed that at the time of the accident, she did not own a vehicle, did not have no-fault insurance, and did not live with anyone who carried no-fault insurance.

On August 28, 2017, Benoit met with the investigator in person and signed an "assignment of rights, benefits and causes of action" to permit Spectrum to seek PIP benefits on her behalf.[2] Spectrum forwarded the assignment to the MACP/MAIPF by fax on August 30, 2017, the final day to timely file a claim. The cover sheet informed the MACP/MAIPF that Spectrum had provided medical treatment to Benoit following her motor vehicle accident and that Spectrum had filed an application for assignment on August 10. Spectrum requested, "Please assign the claim, and notify us as to the assigned carrier."

The MACP/MAIPF immediately notified Spectrum that it was "unable to process the claim you have submitted on behalf of" Benoit and that it "require[d] additional information in order to move forward with [its] initial eligibility determination . . . ." The MACP/MAIPF stated that the matter had been referred to its "legal counsel for further handling which may include, but is not limited to, examinations under oath of the appropriate individuals."

That same day, Spectrum filed suit for mandamus and declaratory relief, asserting that the MACP/

[2] Capitalization altered.

MAIPF had a clear legal and ministerial duty to assign the claim to a no-fault insurer under MCL 500.3174, which, at the time of Spectrum's application and suit, provided:

> A person claiming through the [MACP] shall *notify* the [MAIPF] of his or her claim within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect. The [MAIPF] shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned. [MCL 500.3174, as amended by 2012 PA 204 (emphasis added).][3]

The MACP/MAIPF bucked discovery attempts, contending that Spectrum's application for assignment was facially deficient as Spectrum made inadequate efforts before filing to determine whether Benoit had available insurance coverage. At a motion-to-compel hearing, the MACP/MAIPF announced its intent to file a motion for summary disposition "to draw a line in the sand to prevent these efforts at obtaining assignment with little more than the most bare of information." In its subsequent summary disposition motion, the MACP/MAIPF added that Spectrum did not have an independent right to assert a claim in its own name after *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).[4] The MACP/MAIPF further contended that the application was invalid because although Spectrum signed it as the preparer, no one signed as the claimant or claim-

[3] The statute was amended by 2019 PA 21, effective June 11, 2019.

[4] The Michigan Legislature "overruled" *Covenant* by amending MCL 500.3112 to give healthcare providers the right to file a direct claim or cause of action against an insurer for reimbursement for services provided to an injured person. See 2019 PA 21, effective June 11, 2019. As such, the MACP/MAIPF's argument in this regard is no longer valid.

ant's representative as required by the plan's internal operating procedures. Specifically, Michigan Assigned Claims Plan, § 5.1(A)(1)(a)[5] provides that "[a] claim for [PIP] benefits under the Plan must be made on an application prescribed by the MAIPF" and that the application "must be complete and signed by the claimant," i.e., by "a person suffering accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle in this state."

Spectrum replied that it was entitled to summary disposition because the MACP/MAIPF was only authorized to reject an application if from the outset the claim was obviously ineligible under the no-fault act. The standard did not require the applicant to conclusively prove that no insurance was available, only that it had made a good-faith effort to determine whether insurance was available. With its response, Spectrum included an affidavit from Benoit, avowing that she was merely a passenger in the vehicle involved in the accident and that she had had no ownership or control over it. "[T]o the best of [her] knowledge, neither the Vehicle nor the [driver] were covered by a no-fault insurance policy at the time of the accident," Benoit asserted. Benoit continued that she did not have a no-fault policy or reside with relatives maintaining policies at that time.

At the hearing on the countermotions for summary disposition, the MACP/MAIPF agreed that it now had sufficient information that Benoit did not have insurance available to her at the time of the accident.

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[5] The "Michigan Assigned Claims Plan" is available at <https://www.michacp.org/documents/MACP-Plan-of-Ops-Final.pdf> (accessed September 17, 2019) [https://perma.cc/64BC-AFSN].

However, it continued to insist that the application was invalid at its inception based on the absence of Benoit's signature as the claimant.

The circuit court agreed with the MACP/MAIPF and summarily dismissed Spectrum's action. The court acknowledged that Spectrum secured an assignment from Benoit after it filed its application. However, the court reasoned, the focus was on the application and whether it was valid when originally filed. The plan rules required that the application be signed by the claimant or her representative, and Spectrum did not sign in that capacity. And Spectrum did not file a new or amended application after locating Benoit. The court concluded, "I'm constrained to agree that while it's a technical point, the law is full of technicalities, and in this case, the statute requires a person entitled to claim because of accidental bodily injury to file the request for the MACP to assign a carrier, and that person did not do so . . . ." The application was therefore fatally "defective," the court ruled.

The circuit court denied Spectrum's subsequent motion for reconsideration. Spectrum now appeals.

II. STANDARD OF REVIEW

We review de novo a circuit court's resolution of 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 Subrule (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 such motions, we "consider[] the plead-

ings, 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.

We also review de novo underlying issues of statutory interpretation. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012). The primary goal of statutory interpretation is to discern the intent of the Legislature. *Id*. The best indicator of the Legislature's intent is a plain reading of the statutory language. *Id*. at 205-206. "If the statutory language is unambiguous, we presume that the Legislature intended the meaning that it clearly expressed, and further construction is neither required nor permitted." *Id*. at 206.

III. GUIDING LEGAL PRINCIPLES

In 1973, the Legislature enacted the no-fault insurance act, MCL 500.3101 *et seq*., "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). It established the no-fault scheme, in part, to rectify problems with the tort-based compensation scheme, which frequently "denied benefits to a high percentage of motor vehicle accident victims[.]" *Id*. at 579.

To achieve its goals, the Legislature required, in relevant part, the "owner or registrant of a motor vehicle required to be registered in this state" to

purchase PIP insurance to cover injuries to persons caused by motor vehicles. MCL 500.3101(1). The Legislature provided that the policies required under MCL 500.3101(1) must cover more than just the named insured; policies must also cover injuries incurred in motor vehicle accidents by the named individual's spouse and any relative of either domiciled in the same household. MCL 500.3114(1). When an injured person is not covered by his or her own insurance policy or a policy owned by a relative, the Legislature provided that the insurers of the various vehicles involved or occupied during the accident, or the insurers of persons operating such vehicles, must cover the loss. See MCL 500.3114(2) through (5); MCL 500.3115. Even 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. See MCL 500.3172(1). All 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." MCL 500.3171(2). In this way, 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.

The Legislature initially required the Secretary of State to "organize and maintain" the MACP/MAIPF. See MCL 500.3171, as enacted by 1972 PA 345. It further authorized the Secretary of State to "promulgate rules to implement the facility and plan . . . ." *Id*. In 2012, the Legislature shifted the obligation to adopt and maintain the MACP from the Secretary of State to

the MAIPF. MCL 500.3171(1), as amended by 2012 PA 204. The Legislature originally created the MAIPF to provide no-fault insurance to any person who was unable to obtain insurance through ordinary means. See MCL 500.3301. The MAIPF is not a state agency; it is a "nonprofit organization of insurer members[.]" MCL 500.134(6)(d). Therefore, it is not subject to the rules governing state agencies, such as the Freedom of Information Act, MCL 15.231 *et seq*. MCL 500.134(4). After the passage of 2012 PA 204, the insurers tasked with covering losses under the MACP indirectly controlled the administration of the MACP through their control of the MAIPF. MCL 500.3310 (establishing a board of governors to govern the MAIPF and providing that 7 of the 11 governors were to be elected as provided in the plan of operation and 4 were to be selected by the insurance commissioner).

Although the Legislature authorized the MAIPF to establish its own MACP, MCL 500.3171(2), the Legislature did not authorize the MAIPF to establish eligibility criteria. Rather, MCL 500.3172(1) provided the eligibility criteria for the MACP:

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain [PIP] benefits through the [MACP] if no [PIP] is applicable to the injury, no [PIP] applicable to the injury can be identified, the [PIP] applicable to the injury 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, or the only identifiable [PIP] applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. [MCL 500.3172(1), as amended by 2012 PA 204.]

The phrase "a person entitled to claim" refers to a person who is entitled to claim PIP benefits under the no-fault act. *Allstate Ins Co v State Farm Mut Auto Ins Co*, 321 Mich App 543, 558-559; 909 NW2d 495 (2017). And that person may claim against the MACP when any of the four following conditions are true: "(1) no [PIP] is applicable to the injury, (2) no [PIP] applicable to the injury can be identified, (3) the applicable insurance cannot be ascertained due to a dispute among insurers, or (4) the only applicable insurance is inadequate due to financial inability." *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 170; 909 NW2d 38 (2017). The Legislature also disqualified some persons from coverage under the MACP. See MCL 500.3173 (stating that a person who falls within a limitation or exclusion under MCL 500.3105 through MCL 500.3116 is disqualified from receiving benefits under the MACP as well).

In addition to establishing eligibility criteria and disqualifying factors, the Legislature provided a framework for the processing, timing, and review of claims under the MACP. The Legislature stated that a person who claims PIP benefits through the MACP must notify the MAIPF of his or her claim within the time limit for filing a PIP claim with an insurer: "A person claiming through the [MACP] shall notify the [MAIPF] of his or her claim within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect." MCL 500.3174, as amended by 2012 PA 204. Once the person notifies the MAIPF of his or her claim, it must "promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned." *Id*. Before assigning the claim to a member insurer, however, the MAIPF must "make an initial

determination of a claimant's eligibility for benefits under the [MACP] and shall deny an obviously ineligible claim." MCL 500.3173a(1), as enacted by 2012 PA 204.[6] The MAIPF must notify the claimant promptly in writing of the reasons for denial. *Id*.

IV. NOTICE

Spectrum gave the MACP/MAIPF the notice required under MCL 500.3174. Spectrum filed the application for assignment within one year as required by MCL 500.3145. The claim described in the August 10, 2017 application was not "obviously ineligible" for assignment as contemplated in MCL 500.3173a(1). MCL 500.3172(1) provides that a claim is eligible for assignment when "no [PIP] applicable to the injury can be identified[.]" By indicating that it was "unknown" to Spectrum whether Benoit, her resident relatives, the driver, or the involved vehicle possessed a no-fault policy, Spectrum communicated that applicable PIP benefits could not be identified. The MACP/MAIPF was then required by MCL 500.3174 to promptly assign the claim.

The MACP/MAIPF did not promptly assign the claim. Indeed, it did not even comply with MCL 500.3173a(1) in notifying Spectrum of its denial. The form letter did not cite the reasons for rejection.

By the August 30, 2017 deadline for providing notice of its claim, Spectrum definitively learned that the claim was eligible for assignment under the first condition of MCL 500.3172(1): there was "no [PIP] . . . applicable to the injury . . . ." Spectrum had located Benoit

[6] The passage of 2019 PA 21, effective June 11, 2019, added several requirements to MCL 500.3173a, which are not applicable to this 2017 case.

and confirmed that no no-fault insurance policy covered her injury. Benoit did not own a car or possess insurance; she was not domiciled with insured relatives; and her ex-boyfriend, the driver, had neither registered nor insured his vehicle. Spectrum then forwarded Benoit's assignment of rights to the MACP/MAIPF.

Spectrum notified the MACP/MAIPF of the grounds supporting eligibility and the right to assignment by also filing suit on August 30. This Court implicitly held in *Mendelson Orthopedics PC v Everest Nat'l Ins Co*, 328 Mich App 450, 462-466; 938 NW2d 739 (2019), that a claimant can provide timely notice as required by MCL 500.3174 and MCL 500.3145(1) by filing a lawsuit. Spectrum's August 30, 2017 complaint listed the amount of the claim, stated that Benoit did not maintain a no-fault insurance policy and was not domiciled with an insured relative, and indicated that the sole involved vehicle was not insured. Even if the earlier notice failed, upon receiving notice of the lawsuit, Spectrum's claim could not be deemed "obviously ineligible" and the MACP/MAIPF was duty-bound to assign it to an insurer.

V. SIGNATURE REQUIREMENT

The MACP/MAIPF continues to argue, however, that Spectrum's application was "obviously ineligible" for assignment because its rules mandated that Benoit or her representative sign the application. The MACP/MAIPF contends that the claim remained "obviously ineligible" because Spectrum never submitted an amended application with a signature of the claimant or her representative.

We start by noting that nothing in the no-fault act requires a claimant to file a claim with the MACP/MAIPF on a form application or through com-

munication signed by the claimant. These requirements come entirely from the "Michigan Assigned Claims Plan" "adopt[ed], implement[ed] and maintain[ed]" by the MAIPF. Michigan Assigned Claims Plan, § 1. Section 5.1(A) of the plan provides, "A claim for [PIP] benefits under the [MACP] must be made on an application prescribed by the MAIPF." The MAIPF requires that the application "be complete[d] and signed by the claimant." Michigan Assigned Claims Plan, § 5.1(A)(1). The application also "must be accompanied by reasonable proof of loss, and documentation supporting that due diligence was exercised to establish the claimant is entitled to claim benefits through the [MACP]." Michigan Assigned Claims Plan, § 5.1(B)(1).

Mandating strict adherence to the minutiae of these notice provisions would be inconsistent with Michigan law. Even with the notice provisions enacted by our Legislature in the no-fault act, substantial compliance that fulfills the purpose of the statute is sufficient to preserve a claim. *Perkovic v Zurich American Ins Co*, 500 Mich 44, 52; 893 NW2d 322 (2017). The purpose of notice under MCL 500.3145(1) is simply to convey "the name and address of the claimant and . . . the name of the person injured and the time, place and nature of the injury." *Id*. at 53 (quotation marks and citation omitted). Given this purpose, the Supreme Court found adequate notice when the injured person never notified his insurer of the accident but the healthcare provider submitted its bills for reimbursement directly to the insurer. *Id*. at 47-48, 56. The notice provided under MCL 500.3145(1) need not even be in writing. *Linden v Citizens Ins Co of America*, 308 Mich App 89, 95; 862 NW2d 438 (2014).

Ultimately, the MACP/MAIPF has only those rulemaking powers conveyed to it by the Legislature. See

Consumers Power Co v Pub Serv Comm, 460 Mich 148, 155-156; 596 NW2d 126 (1999). The MACP/MAIPF's powers must derive from MCL 500.3171 to MCL 500.3179. The Legislature authorized the MAIPF's board of governors to adopt an MACP. MCL 500.3171(3). However, the authority to adopt a plan does not grant the authority to establish rules governing the processing, timing, and review of claims under the MACP; those requirements are enumerated by statute. *Jackson v Secretary of State*, 105 Mich App 132, 138-140; 306 NW2d 422 (1981). While the Legislature subsequently enacted MCL 500.3173a, giving the Secretary of State and then the MAIPF the limited authority to deny claims that are "obviously ineligible," the Legislature did not substantively alter the remainder of the no-fault act to expand the MAIPF's authority. Under the act, notice is "reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2). As our Supreme Court has stated in an analogous context, an insurer cannot vitiate its statutory duty to pay benefits in a timely fashion through a contractually agreed upon condition precedent; rather, once it receives reasonable proof of the fact and amount of loss sustained, the insurer must comply with its statutory duty to pay. See *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 600; 648 NW2d 591 (2002). Similarly, once the MAIPF receives reasonable proof of the fact and amount of loss sustained by a claimant eligible to claim benefits as stated in MCL 500.3172(1), it must "promptly assign the claim in accordance with the plan . . . ." MCL 500.3174.

Contrary to the MACP/MAIPF's contention, MCL 500.3175 did not grant it authority to impose filing requirements beyond those provided in the statutes. MCL 500.3175 includes a list of elements that the MAIPF was required to incorporate into the MACP

when power transferred to the MAIPF from the Secretary of State. The statutory provisions address the transfer of claims already assigned or filed under the Secretary of State's plan to the MAIPF's plan and the allocation of costs during the crossover period. The purpose of the statute was to set the start date for filing claims with the new MACP, not to confer additional rulemaking authority. The existence of similar filing requirements in the administrative rules promulgated by the Secretary of State under the former MACP also does not control the outcome here. The fact that no court was asked to invalidate the old administrative rule requiring a signed application is not dispositive and does not establish that the Secretary of State had the statutory authority to promulgate the rule and deny claims for noncompliance.

The MACP/MAIPF is tasked only with making the initial determination of eligibility of a claim and may only deny a claim if it is "obviously ineligible." MCL 500.3173a(1). Eligibility is determined by the conditions outlined in MCL 500.3172(1), not by the form in which the notice is given. The MACP/MAIPF could request that the claimant amend the notice to comply with its form application to make its tasks more manageable, but it could not declare the claim to be obviously ineligible based on a minor nonconformity. As Spectrum's claim was not "obviously ineligible," the MACP/MAIPF was required to assign it to a member insurer.

As the MACP/MAIPF has conceded that the documentation presented by Spectrum during this suit supports assignment of the claim to a member insurer, there is no ground to remand this matter for further consideration. Accordingly, we reverse the award of summary disposition in the MACP/MAIPF's favor and

remand for entry of summary disposition in favor of Spectrum. We do not retain jurisdiction.

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

PEOPLE v BAILEY

Docket No. 342175. Submitted September 5, 2019, at Detroit. Decided September 24, 2019, at 9:10 a.m. Leave to appeal denied 506 Mich 947 (2020).

Kenyon Bailey was convicted following a bench trial in the Wayne Circuit Court of being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; second-degree murder, MCL 750.317; and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Bailey had apparently purchased narcotics from the victim. After learning that the drugs were not effective, Bailey and a friend drove to the automobile repair shop owned by the victim. Bailey entered the shop, exited, and after a few minutes, reentered the shop. After Bailey reentered the shop, his friend heard several gun shots. When Bailey returned to the vehicle, according to his friend, he had a .40 caliber gun in his possession and appeared shaken. When police officers responded to the repair shop, they discovered the victim dead on the floor of his shop and determined that he had multiple gunshot wounds. The officers found multiple .40 caliber bullet casings on the floor of the repair shop. There was a .32 caliber revolver beneath the victim's body, but no .32 caliber bullets were found at the scene. Bailey argued at trial that he shot the victim in self-defense after the victim had threatened him with a gun. Bailey initially entered a plea agreement but withdrew his plea during the first sentencing hearing. The trial court, Dalton A. Roberson, J., assigned new appointed counsel, and the case proceeded to trial. Following trial, Bailey was convicted of the charged offenses, and the trial court sentenced him to 10 to 15 years in prison for felon-in-possession; 30 to 50 years in prison for second-degree murder; and five years in prison, to be served consecutively, for felony-firearm.

The Court of Appeals *held*:

1. The evidence was sufficient to convict Bailey of second-degree murder because the evidence did not support that he acted in self-defense. The trial court viewed surveillance video of the incident, which did not show the victim threatening Bailey with a gun. Instead, it showed Bailey immediately firing his gun upon reentering the repair shop. Further, the evidence established that

Bailey shot the victim six times, including once in the back, which suggested that Bailey did not believe he was in immediate danger when he shot the victim. Additionally, Bailey argued that because he acted in self-defense, the prosecution failed to show that he acted with malice. In order to establish that Bailey acted with malice, the prosecution was not required to prove that he intended to harm or kill a specific victim. Rather, it had to establish that Bailey had the intent to act in obvious disregard of life-endangering consequences. It was clear that Bailey fired a gun at the victim in an enclosed space with, at the very least, complete disregard for the fact that his conduct could cause the victim great bodily injury or harm. Therefore, the evidence proved beyond a reasonable doubt that Bailey acted with malice and without the justification of self-defense.

2. The trial court did not err when it allowed Bailey to withdraw his plea. Under MCR 6.310(B)(1), after a plea has been accepted but before sentencing, a trial court may withdraw a plea on the defendant's motion or with his or her consent only in the interest of justice. The trial court allowed Bailey to withdraw his plea after Bailey expressed a desire to withdraw the plea and go to trial, and Bailey told the court that he did not understand the plea agreement and had only accepted it because he was "scared." Further, Bailey maintained that he had acted in self-defense and responded affirmatively when the court asked him if he wanted to withdraw his plea. Bailey's claim that the trial court effectively denied him his right to counsel by failing to give him time to discuss his decision to withdraw his plea with defense counsel was not supported by the record. Neither Bailey nor his attorney requested time to discuss Bailey's decision, and a trial court has no obligation to require attorney-client discussions to take place. Further, there was no indication that Bailey was forced to withdraw the plea or that he failed to understand the consequences of his decision.

3. The trial court violated Bailey's right to counsel by substituting appointed counsel without his consent. The trial court determined that Bailey's attorney could no longer represent him because Bailey had claimed his innocence before the court while stating that he had pleaded guilty on the advice of counsel. The rule in Michigan, set forth in *People v Fox*, 97 Mich App 324, 328 (1980), is that a trial court may only sua sponte remove and substitute appointed counsel for "gross incompetence, physical incapacity, or contumacious conduct." However, the Court in *Fox* cited *United States v Dinitz*, 538 F2d 1214 (CA 5, 1976), which held that a court may remove *retained* counsel in certain in-

stances based on the court's authority, within certain limits, to control the conduct of attorneys. Whether a trial court may replace appointed counsel for reasons other than "gross misconduct, physical incapacity, or contumacious conduct" is a discernibly different question than the one addressed in *Dinitz*. The *Fox* rule sets an unjustifiably high bar before appointed counsel may be removed by a court. The standard that this Court should adopt is set forth in *Daniels v Lafler*, 501 F3d 735 (CA 6, 2007). Under *Daniels*, because Bailey had no right to choose his appointed counsel as an indigent defendant, no violation would occur without a showing that the trial court violated his constitutional right to adequate representation or due process. Under Michigan law, however, appointed counsel's conduct did not rise to the level of gross incompetence, and there was no evidence of incapacity or contumacious conduct. Rather, the trial court removed counsel because of the court's expressed belief that counsel had assisted Bailey in pleading guilty, and in light of Bailey's claim of innocence, the attorney-client relationship must have been fatally compromised. Therefore, the court erroneously substituted counsel. Bailey was not entitled to the reversal of his convictions, however, because he was never without adequate legal representation and his substantial rights were not adversely affected.

4. Bailey's sentences had to be vacated and the case remanded for rescoring of the sentencing guidelines, to give Bailey an opportunity to allocute before resentencing, and for recalculation of his jail credit. The trial court wrongly assessed 15 points under MCL 777.35 for Offense Variable 5 because there was no evidence that the victim's family suffered the serious psychological harm contemplated by the statute. The trial court should correct Bailey's score on remand, but resentencing is not required because Bailey's guidelines minimum sentence range would not be altered by the corrected score. Bailey is also entitled to remand for recalculation of his jail credit because the record is not clear regarding the number of days Bailey spent in jail in Michigan before sentencing because of being denied or unable to furnish bond for the charges underlying his convictions. Finally, the trial court erred when it denied Bailey an opportunity to allocute before he was sentenced, in violation of MCR 6.425(E)(1)(c). Bailey was not given an opportunity to inform the trial court of any circumstances that he believed the court should have considered, which may have resulted in the court giving him a longer sentence, and almost certainly affected the fairness of the proceedings.

Convictions affirmed, sentences vacated, and case remanded for resentencing and recalculation of defendant's jail credit.

Kym L. Worthy, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Deborah K. Blair*, Assistant Prosecuting Attorney, for the people.

Lee A. Somerville for defendant.

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

CAMERON, J. Following a bench trial, defendant, Kenyon Bailey, was convicted of murdering the drug dealer who reportedly sold him poor-quality narcotics. Bailey now appeals his convictions of felon in possession of a firearm (felon-in-possession), MCL 750.224f; second-degree murder, MCL 750.317; and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. Bailey was sentenced to 10 to 15 years' imprisonment for the felon-in-possession conviction, 30 to 50 years' imprisonment for the second-degree murder conviction, and a consecutive sentence of five years' imprisonment for the felony-firearm conviction. We affirm Bailey's convictions, but vacate his sentence and remand for resentencing and recalculation of Bailey's jail credit.

I. FACTUAL BACKGROUND

At the time of the offenses, Bailey had recently purchased narcotics from the victim (the owner of an automobile repair shop in Detroit) and later discovered that the drugs were ineffective. Bailey and his friend, Stacey Reilly, drove to the victim's repair shop, and Bailey attempted to get his money back from the victim. Bailey entered the repair shop, returned to his car approximately four minutes later, and then went back inside the repair shop.

After Bailey reentered the repair shop, Reilly heard a series of gunshots. Reilly stepped into the repair shop and encountered two of the victim's employees. Reilly searched the employees for weapons. As Reilly searched the employees, he saw Bailey run out of the repair shop. Reilly found Bailey seated in his car with a gun on his lap. At trial, Reilly identified the gun in Bailey's lap as a .40 caliber handgun. Bailey appeared shaken and distressed, and asked Reilly if he planned to "tell on him." Reilly told Bailey he would not tell anyone what he saw.

Officers from the Detroit Police Department responded to the shooting. Two officers at the scene saw blood and multiple spent .40 caliber bullet casings on the floor of the repair shop. The officers found the victim on the ground between two cars and determined that he had died of multiple gunshot wounds. The officers discovered a .32 caliber revolver wedged underneath the victim's body, and six spent shell casings were discovered in the cylinder of the revolver. However, no .32 caliber bullets were discovered at the scene of the crime. A medical examination concluded that the victim was shot six times. Bailey was arrested and charged with felon-in-possession, second-degree murder, and felony-firearm.

Bailey testified at trial, asserting that the victim threatened him with a gun first and that the killing was in self-defense. Bailey was convicted of the charged crimes. This appeal followed.

II. SUFFICIENCY OF THE EVIDENCE

Bailey argues that there was insufficient evidence to convict him of second-degree murder because he acted in self-defense when he shot the victim. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "Evidence is sufficient if, when viewed in the light most favorable to the prosecution, 'a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.' " *People v Blevins*, 314 Mich App 339, 357; 886 NW2d 456 (2016) (citation omitted). Direct and circumstantial evidence, including reasonable inferences arising from the use of circumstantial evidence, may provide sufficient proof to meet the elements of a crime. *People v Henderson*, 306 Mich App 1, 9; 854 NW2d 234 (2014).

Bailey maintains that the trial court erred by finding him guilty of second-degree murder because his shooting of the victim was justified as an act of self-defense. The elements of second-degree murder are as follows:

> (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death. [*People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007).]

A killing may be considered justified if the defendant acts in self-defense. *People v Dupree*, 486 Mich 693, 707; 788 NW2d 399 (2010). Generally, an individual "who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary," but only if the individual believes that he is in immediate danger of bodily harm and that the use of force is necessary to avoid said danger. *Id*. (quotation marks and citation omitted). When a defendant raises the issue of self-defense, the defendant must "satisf[y] the initial burden of producing some evidence from which a [fact-finder] could conclude that the elements

necessary to establish a prima facie defense of self-defense exist . . . ." *People v Stevens*, 306 Mich App 620, 630; 858 NW2d 98 (2014) (quotation marks and citation omitted). The prosecution is then required to "exclude the possibility of self-defense beyond a reasonable doubt." *Id*. (quotation marks and citation omitted).

Bailey argues that he acted in self-defense because the victim pulled out a gun and shot at him. Bailey further contends that he felt it necessary to pull out his own gun and shoot back at the victim because he believed that he was in imminent danger of great bodily harm. In support of this assertion, Bailey argues that he was within his right to stand his ground in the face of a perceived attack. Bailey directs this Court to *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002), in which our Supreme Court opined:

> [A] person is *never* required to retreat from a sudden, fierce, and violent attack; nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon. In these circumstances, as long as he honestly and reasonably believes that it is necessary to exercise deadly force in self-defense, the actor's failure to retreat is never a consideration when determining if the necessity element of self-defense is satisfied; instead, he may stand his ground and meet force with force. [Citation omitted.]

The evidence presented at trial does not suggest that the victim used a deadly weapon against Bailey, which would have necessitated Bailey's use of deadly force as a means of self-defense. Rather, the evidence indicates that Bailey walked into the repair shop and walked back out again. After approximately seven minutes, Bailey reentered the repair shop, got into an argument with the victim, and shot him. The trial court viewed a surveillance video of the offense, and found that there was no indication that the victim

pulled a gun out and fired at Bailey; rather, the trial court found that the surveillance video suggested that Bailey left the repair shop and then opened fire on the victim immediately after returning to the repair shop. Additionally, the evidence showed that Bailey shot the victim six times. One of the bullets entered through the victim's back, suggesting that the victim had his back to Bailey when he was shot. The trial court could certainly choose to disbelieve Bailey's argument that he acted in self-defense when he shot the victim six times, particularly in light of the surveillance video and the fact that one of the bullets entered the victim's body through his back. Further, although a .32 caliber revolver was discovered underneath the victim's body, there was no evidence that this gun was fired inside the repair shop. No .32 caliber bullets were found in the repair shop after the shooting, suggesting to the trial court that the victim did not fire his gun at Bailey. Thus, the prosecution presented sufficient evidence to rebut Bailey's theory of self-defense. See *Stevens*, 306 Mich App at 630.

Additionally, Bailey argues that because he acted in self-defense, the prosecution could not establish that he acted with malice. As previously noted, one of the elements of second-degree murder requires a defendant to act with malice. *Smith*, 478 Mich at 70. Malice is defined as

> the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Malice may be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. [*People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation and quotation marks omitted).]

The prosecution is not required to prove that a defendant intended to harm or kill a specific victim. *Id*.

Rather, "the prosecution must prove the intent to do an act that is in obvious disregard of life-endangering consequences." *Id*. (quotation marks and citation omitted). In this instance, the prosecution proved that the victim's murder was not done in self-defense, and thus, no justification or excuse for the killing was presented in the trial court. It is clear that Bailey opened fire on the victim in a closed space, with—at the very least—complete disregard for the fact that his conduct could cause the victim great bodily injury or harm. Therefore, the prosecution presented evidence that proved, beyond a reasonable doubt, that Bailey acted with malice and without the justification of self-defense. See *id*. Accordingly, sufficient evidence existed to support Bailey's conviction of second-degree murder.

III. DUE PROCESS AND RIGHT TO COUNSEL

Bailey also argues that the trial court violated his right to due process and his right to counsel. Bailey first argues that the trial court violated his right to due process by failing to allow him time to consult with his attorney before withdrawing his plea. He then argues that the trial court violated his right to counsel when it sua sponte substituted his appointed defense counsel. We disagree that the trial court's plea procedures violated Bailey's right to due process, but we agree that the trial court erred by substituting defense counsel. However, the trial court's substitution of counsel did not constitute plain error affecting Bailey's substantial rights; therefore, Bailey is not entitled to relief.

A. WITHDRAWAL OF PLEA

This Court reviews a trial court's decision regarding a motion to withdraw a plea for an abuse of discretion. *People v Martinez*, 307 Mich App 641, 646; 861 NW2d

905 (2014). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id*. (quotation marks and citation omitted). This Court reviews all underlying questions of law de novo. *Id*. "[A] trial court's factual findings are reviewed for clear error." *Id*. at 646-647 (quotation marks and citation omitted).

In this case, Bailey withdrew his plea before sentencing. Before sentencing, a trial court may withdraw a plea "on the defendant's motion or with the defendant's consent, only in the interest of justice . . . ." MCR 6.310(B)(1). A plea is considered to be withdrawn "in the interest of justice" if a defendant provides "a fair and just reason" for withdrawing the plea. *People v Fonville*, 291 Mich App 363, 378; 804 NW2d 878 (2011) (quotation marks and citation omitted). "Fair and just reasons include reasons like a claim of actual innocence or a valid defense to the charge." *Id*. Conversely, "dissatisfaction with the sentence or incorrect advice from the defendant's attorney" are not considered "fair and just reasons" for withdrawing a plea. *Id*.

Bailey was scheduled to be sentenced following his entry into a plea agreement. At the sentencing hearing, the following exchange took place:

> *Defendant Bailey*: Hey I—listen, I am not guilty . . . . I shouldn't have took [sic] this plea, I should have went [sic] to trial you know.
>
> I was scared. I didn't understand it really, you know, what I'm saying, and—
>
> *The Court*: You had a right to be scared.
>
> *Defendant Bailey*: Right, you know, I didn't go up there to kill that man, no, honest to God I didn't. [The victim] shot at me first, and that man had a gun on him and I had my gun on me but he pulled his out first and it's on camera and that's all I got to say, sir.

Ms. Logan [the prosecutor]: Well, Your Honor, it sounds like the defendant is trying to withdraw his plea.

The Court: That's what it sounds like, is that what you are trying to do?

Defendant Bailey: Yes, sir, that's why I went to the library, I want to withdraw my plea.

The Court: Hold it, hold it. I don't want to hear about you going to the library . . . .

* * *

Ms. Logan [the prosecutor]: Well, Your Honor . . . I don't want an innocent man to go to prison, and if the defendant is claiming that he did this in self-defense, albeit, it's all on video—

The Court: Right. Right.

Ms. Logan [the prosecutor]: —I think the court should withdraw his plea and let us go to trial.

The Court: Is that what you want to do?

Defendant Bailey: Yes, sir.

The Court: All right. I'll allow [you to] withdraw your plea.

The trial court asked Bailey whether he intended to withdraw his plea on two occasions during the conversation, and Bailey confirmed that he wished to withdraw his plea and go to trial.

Bailey does not argue that the trial court erred by accepting his request to withdraw his plea. Rather, he argues that the trial court violated his right to due process by failing to allow him time to consult with defense counsel before withdrawing his plea. In support of his argument, Bailey cites *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), which concerns a defendant's right to represent himself at trial, and MCR 6.005(D), concerning the trial court's responsibil-

ity to appoint legal counsel to represent indigent defendants. Bailey contends that the trial court effectively denied him the right to counsel by failing to give him time to discuss his decision to withdraw the plea with defense counsel. However, the record does not support Bailey's argument. Bailey clearly and unequivocally stated that he should not have entered a plea and that he wished to go to trial because he acted in self-defense. The trial court made an effort to clarify Bailey's request with defense counsel, who told the judge "[w]ell, judge, I'm going to let [Bailey] speak." Bailey followed his attorney's direction and agreed with the trial court that he did want to withdraw his plea. Neither Bailey nor his counsel requested additional time to reexamine the wisdom of Bailey's request to withdraw his plea, nor was there any indication that Bailey was forced to withdraw his plea or that he did not understand the consequences of his actions. A trial court has no obligation to require that attorney-client discussions take place.

B. SUBSTITUTION OF COUNSEL

Bailey also argues that the trial court violated his right to counsel by substituting his appointed defense counsel without his consent. We agree.

After the trial court granted Bailey's request to withdraw his plea, the trial court removed Bailey's first appointed attorney and replaced him with Lillian F. Diallo. The trial court appointed new counsel following Bailey's explanation that he only pleaded guilty because he was "scared," and that he "didn't understand [the legal issues] really" until he "went to the library" before sentencing. The trial court expressed concern about defense counsel's continued representation:

The Court: Do you want Mr. Harris to continue representing you?

Defendant Bailey: Yes, sir.

The Court: Oh, all right.

* * *

The Court: Well, let me speak, to say this to . . . Bailey.

Usually when a person has represented you—of course, you have a difference with Mr. Harris, now, you're saying that you are innocent and he's assisted you in pleading guilty, so I think you should have a different lawyer.

Defendant Bailey: Well—

The Court: We'll appoint a lawyer to represent you.

Mr. Harris [defense counsel]: Judge, first of all, I have not addressed the court on this, I am not moving to withdraw.

The Court: Yeah, but Mr. Harris, I think that when you—that's quite a problem, you have already—this man has said to me this morning that he plead [sic] guilty on your advice and now he said he is innocent.

Mr. Harris [defense counsel]: Well wait a minute.

The Court: No, you are out.

Harris explained that he informed Bailey regarding his option to enter into a plea agreement or go to trial, but that he never forced Bailey to enter a plea. Nevertheless, new counsel was appointed.

Because Bailey did not object to the substitution of defense counsel in the trial court, this issue is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, this Court's review is for plain error affecting Bailey's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 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." *Id*. at 763. The third requirement "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Reversal will only be warranted when the plain error leads to "the conviction of an actually innocent defendant" or when an error affects the "fairness, integrity, or public reputation" of judicial proceedings. *Id*. (citation and quotation marks omitted).

Since 1985, this Court has held in several decisions that a trial court may only sua sponte remove and substitute appointed counsel for "gross incompetence, physical incapacity, or contumacious conduct." See *People v Abernathy*, 153 Mich App 567, 569; 396 NW2d 436 (1985); *People v Durfee*, 215 Mich App 677, 681; 547 NW2d 344 (1996); *People v Johnson*, 215 Mich App 658, 663; 547 NW2d 65 (1996); *People v Coones*, 216 Mich App 721, 728; 550 NW2d 600 (1996). In light of the principle of stare decisis codified under MCR 7.215(J)(1), we are bound by the rule established in these cases.

However, we question the legal support upon which this rule was first established in Michigan. In 1980, this Court held in *People v Fox*, 97 Mich App 324, 328; 293 NW2d 814 (1980), rev'd on other grounds 410 Mich 871 (1980), that "it is well settled that gross incompetence, physical incapacity or contumacious conduct may justify the court's removal of an attorney . . . ." The *Fox* Court cited *United States v Dinitz*, 538 F2d 1214 (CA 5, 1976), as support for this newly established rule under Michigan law. In *Dinitz*, the trial court removed the defendant's *retained* counsel, Maurice Wagner, from the courtroom at the beginning of

the trial, which resulted in a mistrial shortly after Wagner made his opening statement. *Id*. at 1217.[1] According to the federal court, "the judge was prompted to order Wagner's removal by Wagner's efforts, during his opening statement, to tell the jury about [a federal agent's] attempt to extort money from [the defendant]." *Id*. Wagner did not move for reinstatement, but the defendant made repeated motions requesting Wagner's reinstatement before the next trial. *Id*. at 1218.

The defendant in *Dinitz* argued that "his Sixth Amendment right to counsel was violated when the district court banned Wagner from the first trial and precluded him from appearing thereafter." *Id*. at 1219. Acknowledging that courts must respect a defendant's choice of counsel, the *Dinitz* court explained that the defendant had a right to choose his counsel—subject to certain limits. *Id*. Because "attorneys are officers of the courts before which they appear," the *Dinitz* court held that "courts are necessarily vested with the authority, within certain limits, to control attorneys' conduct." *Id*. While the Sixth Amendment helped define the limits of judicial discretion, the inquiry turned on "whether, *given the defendant's qualified right to choose his own counsel*, the trial court's refusal to hear the defendant through his chosen counsel constituted an abuse of discretion." *Id*. (emphasis added). Given Wagner's conduct at trial, the court in *Dinitz* concluded that the district court did not abuse its discretion when it dismissed Wagner. *Id*. at 1220-1222.

The court in *Dinitz* addressed a very different question than that posed in this case, which is whether the

[1] During the first trial, the defendant had two other attorneys also representing him. *Dinitz*, 538 F2d at 1217 n 1. However, he chose to represent himself during the second trial. *Id*. at 1218.

trial court erred when it removed Bailey's *appointed* counsel. Importantly, a defendant has a "right to choice of counsel," but this right is "limited and may not extend to a defendant under certain circumstances." *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009) (citation omitted). Under Michigan law, "[a]s an indigent receiving counsel at public expense," Bailey "was not entitled to choose his attorney." *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003). The court's decision in *Dinitz* relied on the well-settled rule that all defendants have the right to retain counsel of their choice. However, in this case, there is no such right implicated, and whether a trial court may replace a defendant's appointed counsel for reasons other than "gross incompetence, physical incapacity or contumacious conduct" is a discernibly different question than the one addressed in *Dinitz*. Thus, we question the rule adopted in *Fox* and later applied in *Abernathy*, *Durfee*, *Coones*, and *Johnson*. Importantly, those cases all involved appointed counsel—not retained counsel—yet this distinction is neither recognized nor addressed in those cases.

Furthermore, not even the *Dinitz* court articulated the standard established in *Fox*—that courts may only substitute counsel upon a showing of gross incompetence, incapacity, or contumacious conduct. *Fox*, 97 Mich App at 328. Rather, the court in *Dinitz* examined each of the defense counsel's transgressions and determined whether the district court's dismissal constituted an abuse of its discretion. See *Dinitz*, 538 F2d at 1219-1220 ("Thus, in the context of [the defendant's] case, we must consider each instance at which the district judge exercised his discretion in disallowing Wagner to appear for [defendant]."). Nevertheless, the Court in *Fox* used these case-specific facts to establish a rule that treats the removal of appointed and re-

tained counsel the same. This approach relies upon a flawed legal analysis and sets an unjustifiably high bar for trial courts to find "gross incompetence, physical incapacity or contumacious conduct" before appointed counsel may be removed.

In our view, the standard that this Court should adopt is set forth in *Daniels v Lafler*, 501 F3d 735 (CA 6, 2007). In *Daniels*, the Sixth Circuit stated, "[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Id*. at 739, quoting *Caplin & Drysdale v United States*, 491 US 617, 624; 109 S Ct 2646; 105 L Ed 2d 528 (1989) (quotation marks omitted). The defendant in *Daniels*, as in this case, argued that the district court violated his Sixth Amendment right to counsel when it replaced his court-appointed attorney with another court-appointed attorney. *Id*. at 737. The court held "that a defendant relying on court-appointed counsel has no constitutional right to the counsel of his choice." *Id*. at 740. While this is a maxim well established under Michigan law, the court in *Daniels* further explained:

> This does not mean that an indigent defendant never could establish that the arbitrary replacement of court-appointed counsel violated his constitutional rights. The replacement of court-appointed counsel might violate a defendant's Sixth Amendment right to adequate representation or his Fourteenth Amendment right to due process if the replacement prejudices the defendant—e.g., if a court replaced a defendant's lawyer hours before trial or arbitrarily removed a skilled lawyer and replaced him with an unskilled one. [*Id*.]

Thus, under *Daniels*, Bailey would have no right to choose his appointed counsel, and without a showing

that the trial court violated his constitutional right to adequate representation or due process, there would be no violation.

The standard in Michigan, however, requires us to determine whether the trial court's substitution of counsel violated Bailey's right to counsel. As stated previously, binding caselaw provides that "[a] trial court may remove appointed counsel for gross incompetence, physical incapacity, or contumacious conduct." See, e.g., *Coones*, 216 Mich App at 728. The trial court attempted to justify the removal of Bailey's defense counsel by opining that there must be a conflict of interest between Bailey and his appointed counsel because appointed counsel "assisted [Bailey] in pleading guilty" and would now have to assert Bailey's innocence at trial. In doing so, the trial court implied that Bailey's appointed counsel encouraged him to plead guilty and this advice, in light of Bailey's later claim of innocence, must have fatally compromised their attorney-client relationship. However, no evidence was presented to the trial court supporting the notion that defense counsel erroneously urged Bailey to plead guilty or that any actual conflict existed. Instead, it merely appeared that Bailey changed his mind about pleading guilty and expressed his desire to go to trial. Bailey expressed no desire to have new defense counsel appointed, and there was no apparent reason to do so. Clearly, appointed counsel's conduct did not rise to the level of gross incompetence. Moreover, there is no evidence of incapacity or contumacious conduct. Thus, the trial court erroneously substituted counsel.

However, this Court is not obligated to reverse Bailey's convictions, as he requests, because the trial court's decision did not affect his substantial rights.

When a trial court's error "implicates a constitutional right," this Court must determine whether the error was structural. *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Structural errors require automatic reversal, and this Court held in *Durfee* that the harmless-error doctrine does not apply when analyzing a preserved claim that the trial court violated the defendant's right to counsel when it substituted appointed counsel. *Durfee*, 215 Mich App at 681. When the issue is preserved, "[a] 'prejudice' standard simply does not apply." *Id*. However, unlike in *Fox*, *Abernathy*, *Durfee*, *Coones*, and *Johnson*, the issue here is unpreserved given that neither Bailey nor his original appointed counsel expressly objected to the trial court appointing new trial counsel. An unpreserved constitutional issue—structural or nonstructural—is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. The record indicates that Bailey was never without representation because Diallo replaced Bailey's original appointed counsel immediately after he was removed by the trial court, and Bailey was represented at all times, including during trial. Bailey has not argued that he was deprived of the effective assistance of counsel or that counsel failed to adequately represent him. There is no evidence that the removal of Bailey's original appointed counsel affected the outcome of the proceedings. If anything, the trial court appointed a new attorney who was more willing to go to trial than Bailey's original attorney, given that his original attor-

ney was—in the trial court's eyes—more favorable to taking a plea than going to trial. Accordingly, because the trial court's substitution of counsel did not amount to plain error affecting Bailey's substantial rights, Bailey is not entitled to the relief he seeks. See *Carines*, 460 Mich at 763-764.

IV. SENTENCING ERRORS

Bailey argues that the trial court erred in a number of different ways during sentencing. Namely, Bailey contends that the trial court erred by (1) assessing 15 points for offense variable (OV) 5, (2) failing to consider mitigating factors in crafting an appropriate sentence, (3) failing to properly calculate jail credit, and (4) denying him his right of allocution.

We agree that the trial court erred in its assessment of 15 points under OV 5, denied Bailey the right of meaningful allocution at sentencing, and incorrectly calculated Bailey's jail credit. However, we conclude that the trial court did not fail to consider mitigating factors when sentencing Bailey.

Bailey first argues that the trial court erred by assessing 15 points under OV 5. The prosecution agrees, and so do we. This Court reviews for clear error the trial court's factual determinations at sentencing and "review[s] de novo whether the factual determinations were sufficient to assess points under OV [5]." *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016). "When calculating the sentencing guidelines scores, a trial court may consider all evidence in the record, including but not limited to the presentence investigation report (PSIR) and admissions made by a defendant during a plea proceeding." *People v Jackson*, 320 Mich App 514, 519; 907 NW2d 865 (2017).

OV 5, MCL 777.35, "is scored when a homicide or homicide-related crime causes psychological injury to a member of a victim's family." *People v Calloway*, 500 Mich 180, 184; 895 NW2d 165 (2017). MCL 777.35 provides:

> (1) Offense variable 5 is psychological injury to a member of a victim's family. Score offense variable 5 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Serious psychological injury requiring professional treatment occurred to a victim's family ..... 15 points
>
> (b) No serious psychological injury requiring professional treatment occurred to a victim's family ..... 0 points
>
> (2) Score 15 points if the serious psychological injury to the victim's family may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive.

"In this context, 'serious' is defined as 'having important or dangerous possible consequences.' " *Calloway*, 500 Mich at 186 (citation omitted).

At the original sentencing hearing, the victim's wife gave a victim-impact statement, stating:

> I was [the victim]'s wife. We be [sic] together since I was 14. I am 50 years old now, we would have been celebrating our 20th anniversary August the 4th of this year.
>
> I am—I just want to say that I forgave [Bailey], I don't even know him, but I forgave him a month after this happened. Before they even caught him.
>
> But I knew that [Bailey] wasn't a stranger to my husband. And [Bailey] not only took my husband[,] he took a son, he took a brother, he took a grandfather[,] he took a great grandfather.
>
> * * *

> [The victim] have [sic] 15 grand kids. And for [Bailey] to go in the shop and do this to my husband . . . . I feel that [Bailey] should get life . . . .

The victim's wife also gave a statement at Bailey's second sentencing hearing, stating that she "pray[ed] that [the trial court] and God give [Bailey] the sentence that he deserves and [he] never see[s] the light of day again for doing this" to the victim. On the basis of the statements presented to the trial court, insufficient evidence was presented in support of the finding that the victim's wife suffered psychological injury warranting the assessment of 15 points under OV 5. Although the victim's wife clearly experienced grief following her husband's death, there was no evidence presented to show that she experienced the type of serious psychological trauma contemplated in MCL 777.35. See *Calloway*, 500 Mich at 186. Consequently, the trial court erred when it scored OV 5 at 15 points. See *Schrauben*, 314 Mich App at 196. OV 5 should have been scored at zero. See MCL 777.35(1)(b).

Although the trial court should have assessed zero points for OV 5, the trial court's error does not affect Bailey's guidelines minimum sentence range. Bailey had a total of 117 prior record variable points, which places him in Level F of the sentencing grid. Although Bailey's total OV score is not noted in the available record, his guidelines minimum sentence range for the second-degree murder conviction was 315 months to 1,050 months. This indicates that his OV score was between 50 and 99 points under the applicable sentencing grid, which places him in OV Level II. MCL 777.61. On appeal, the prosecution confirms that Bailey was placed in OV Level II and that correcting the assessment of points assessed under OV 5 would not change Bailey's guidelines minimum sentence range.

OV Level II is a broad range, and there is no indication that Bailey's guidelines minimum sentence range would change if OV 5 were properly scored. Therefore, resentencing is not required even though OV 5 was improperly scored. See *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required."). Nonetheless, for the reasons discussed *infra*, it is necessary to vacate Bailey's sentence and remand this matter to the trial court so that Bailey can be resentenced and his jail credit can be recalculated. On remand, the trial court shall correct Bailey's sentencing information report to reflect a score of zero points for OV 5.[2]

Second, Bailey argues that it was unclear whether the trial court took into account mitigating factors when sentencing him. More specifically, Bailey contends that the trial court likely ignored his psychiatric history, particularly the fact that he was previously diagnosed with schizophrenia. Because this sentencing challenge is unpreserved, our review is for plain error affecting Bailey's substantial rights. See *Carines*, 460 Mich at 763-764.

Bailey presents no supporting authority for the proposition that a trial court must consider mitigating factors on the record at sentencing. Indeed, contrary to Bailey's suggestion, trial courts are not required to expressly or explicitly consider mitigating factors at sentencing. See *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). However, the trial court was

[2] Even if it was not proper to vacate Bailey's sentence, we would nonetheless remand this matter to the trial court for the ministerial task of correcting Bailey's sentencing information report to reflect a score of zero points for OV 5. See *People v Harmon*, 248 Mich App 522, 534; 640 NW2d 314 (2001).

provided with a copy of the PSIR, and the court discussed its contents at sentencing. The PSIR provides that "previous reports indicate the defendant suffered from [S]chizophrenia when he was shot in the face in 2006. The defendant denies taking any medication for that diagnosis." Because the trial court was clearly aware of the contents of the PSIR, which discussed Bailey's schizophrenia diagnosis, Bailey cannot conclusively show that the trial court failed to take into account his previously diagnosed mental illness. Thus, Bailey has failed to establish plain error. See *Carines*, 460 Mich at 763-764.

Third, Bailey argues that the trial court improperly calculated his jail credit. This argument is unpreserved, and our review is for plain error affecting Bailey's substantial rights. See *Carines*, 460 Mich at 763-764.

The calculation of jail credit is governed by MCL 769.11b, which provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Bailey was granted 222 days of jail credit but asserts that he is entitled to an additional 27 days of jail credit. Bailey contends that he was arrested on March 24, 2017, but that his jail credit was calculated from the later date of April 20, 2017. The parties do not dispute that Bailey was arrested in Kentucky on March 24, 2017. However, the parties disagree regarding whether Bailey was arrested in Kentucky "for the offense[s] of which he [was] convicted" in this

case. See MCL 769.11b. Bailey contends that he was arrested in Kentucky and extradited to Michigan on crimes committed in relation to the victim's murder, whereas the prosecution asserts that Bailey was arrested and detained in Kentucky on unrelated charges. Bailey's PSIR indicates that he was arrested in Kentucky for heroin trafficking and possession of drug paraphernalia. MCL 769.11b " 'neither requires nor permits sentence credit in cases . . . where a defendant is . . . incarcerated as a result of charges arising out of an unrelated offense or circumstance . . . .' " *People v Clark*, 315 Mich App 219, 234; 888 NW2d 309 (2016) (citation omitted). Therefore, because Bailey was arrested and jailed in Kentucky for offenses unrelated to the victim's murder, he is not entitled to additional jail credit for the time he spent in jail in Kentucky before he was extradited to Michigan.

However, the prosecution notes that Bailey may be entitled to one additional day of jail credit because the April 20, 2017 date from which his jail credit was calculated is incorrect. The PSIR indicates that Bailey was arrested on April 20, 2017, but the prosecution explains that Bailey was initially arraigned on the warrant in Wayne County on April 18, 2017. It is unclear how long Bailey was incarcerated in the Wayne County Jail after he was extradited from Kentucky. A review of the record suggests that Bailey was extradited to Michigan before April 20, 2017. Further, although Bailey was initially arraigned on April 18, 2017, it is unclear whether he spent additional time in the Wayne County Jail after his extradition to Michigan for which he is entitled to jail credit. We cannot conclusively determine whether Bailey is entitled to additional jail credit on the basis of the available record. Therefore, we remand this matter so that the trial court can verify the number of days that Bailey

spent in jail in Michigan before sentencing because of being denied or unable to furnish bond for the offenses of which he was convicted.

Finally, Bailey argues that he was not afforded the right of allocution at sentencing. Because Bailey failed to object at the sentencing hearing, this Court's review is for plain error affecting Bailey's substantial rights. See *Carines*, 460 Mich at 763-764.

The right of allocution allows a defendant "to speak in mitigation of the sentence" and offers defendants "an occasion to accept responsibility" and begin the process of atonement. *People v Petty*, 469 Mich 108, 119-121; 665 NW2d 443 (2003). A defendant's right of allocution is recognized in MCR 6.425(E)(1)(c), which states:

> (E) Sentencing Procedure.
>
> (1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:
>
> * * *
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . .

Bailey was originally scheduled to be sentenced on September 15, 2017, following his entry into a plea agreement. Bailey used his opportunity for allocution during the first sentencing hearing to profess his innocence and indicate that he should not have pleaded guilty. Bailey was permitted to withdraw his plea, and he was not sentenced on September 15, 2017. Bailey's second sentencing hearing took place on

November 27, 2017. At the second sentencing hearing, the following exchange occurred:

> *The Court*: Mr. Bailey, do you have anything to say before I pass sentence on it?
>
> *Defendant Bailey*: Thank you, sir.
>
> *Ms. Diallo* [defense counsel]: Stand up sir.
>
> *Defendant Bailey*: I'm sorry to [the victim's wife], and—
>
> *The Court*: Mr. Bailey, this is another case where this could have been avoided even though you claimed I don't have a lot of reason to suspect there wasn't something going on.
>
> You can't kill people because you bought some bad dope. That's not the way.
>
> When you get involved in criminal activity you can't go out and start killing people about it. You have to just chalk it up to a bad deal.
>
> *Defendant Bailey*: Yes, sir.

Thus, review of the transcript from the sentencing hearing establishes that the trial court did not give Bailey a meaningful opportunity for allocution. Rather, the trial court, without justification, interrupted Bailey almost immediately. The trial court then proceeded to impose Bailey's sentence without providing Bailey with the opportunity to speak further, which is a clear violation of MCR 6.425(E)(1)(c).

We find that the trial court's failure to comply with MCR 6.425(E)(1)(c) constitutes plain error. See *Carines*, 460 Mich at 763. The error likely affected the outcome of the proceedings in that Bailey was not given an opportunity to inform the trial court of "any circumstances" that he believed the trial court should consider when crafting and imposing the sentence. This could have resulted in Bailey being given a longer sentence, and it most certainly affected the fairness of

the judicial proceeding. See *id*. at 763 (holding that reversal is warranted where the plain error affects the "fairness, integrity, or public reputation" of judicial proceedings). Consequently, it is necessary to vacate Bailey's sentence and remand for the limited purpose of providing Bailey with the opportunity for allocution at resentencing. Of course, the trial court is not precluded from imposing the same sentence on remand if it determines that it is proper to do so.

V. CONCLUSION

Sufficient evidence was presented to support Bailey's conviction of second-degree murder, MCL 750.317. Additionally, the trial court did not abuse its discretion by granting Bailey's request to withdraw his plea, but it committed harmless error by dismissing defense counsel following the plea withdrawal. The trial court erred by assessing 15 points for OV 5. The trial court correctly sentenced Bailey on the basis of facts contained in the PSIR, but it appears that Bailey may be entitled to additional jail credit. The trial court erred by failing to provide Bailey with the opportunity for allocution at sentencing.

We affirm Bailey's convictions, but vacate Bailey's sentence and remand for recalculation of Bailey's jail credit. On remand, the trial court shall give Bailey an opportunity for allocution at resentencing and shall correct Bailey's sentencing information report to reflect a score of zero points for OV 5. We do not retain jurisdiction.

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

FRANKS v FRANKS

Docket No. 343290. Submitted June 5, 2019, at Grand Rapids. Decided September 24, 2019, at 9:15 a.m.

Jeffrey Franks, the Franks Family Trust, and Willis Franks brought an action in the St. Joseph Circuit Court against Newell A. Franks II, Brian McConnell, LeeAnn McConnell, David Franks, Lawrence Franks, and Burr Oak Tool, Inc., in connection with a shareholders' dispute between the parties. Each individual defendant owned voting shares of stock—Class A shares—in Burr Oak. In contrast, each plaintiff owned Class B or Class C shares in the company, neither of which had voting rights; however, while Class B shares did not receive dividends, they could be converted into Class C shares, which did receive dividends. The individual defendants were involved in the operation of Burr Oak in some capacity, while plaintiffs had no role in the management of the corporation. Burr Oak's regular payment of dividends ended after the founder of the company, Newell A. Franks, died in 2007. In 2012, in anticipation of a stock buyback, the company was valued at approximately $598 per share. Six months later, the individual plaintiffs were offered $62 per share for their stock; plaintiffs declined the offer. In 2013, plaintiffs declined the company's two subsequent offers, both of which were at a higher price per share; thereafter, plaintiffs filed this action, asserting that the individual defendants had used their control of the company to benefit themselves and their families at the expense of the Class B and Class C shareholders; specifically, plaintiffs asserted, among other claims, that the individual defendants' conduct amounted to shareholder oppression for purposes of MCL 450.1489. In 2014, defendants moved for summary disposition, arguing that the shareholder-oppression claim should be dismissed because the alleged conduct did not establish a question of fact regarding whether the conduct constituted shareholder oppression and that there were legitimate business reasons, protected under the business-judgment rule, for the company not issuing dividends after Newell Franks's death in 2007; defendants also claimed that plaintiffs failed to state a claim against LeeAnn McConnell because she was not a director of Burr Oak and did not participate in any of the decisions at issue. Plaintiffs

then moved for partial summary disposition of their shareholder-oppression claim. In December 2014, the court, Paul E. Stutesman, J., denied defendants' motion for summary disposition. Although the court found that defendants' actions infringed the minority shareholders' rights, it declined to grant plaintiffs' motion for partial summary disposition at that time but requested that the parties file briefs regarding the appropriate remedy for a shareholder-oppression claim. In October 2016, the court granted plaintiffs' motion for partial summary disposition, finding that defendants had suppressed the minority shareholders' interests; the court determined that the appropriate remedy was to compel the corporation to buy back the nonvoting members' shares at a price to be determined. The court denied defendants' motion for reconsideration. Following a hearing regarding the value of the nonvoting shares, the trial court ordered defendants to purchase plaintiffs' shares within two years at a price of $712 per share, specifically stating that it could not apply a discount to lower the fair value of the shares. The court also ordered Burr Oak to pay equitable interest and attorney fees, entered a stipulated order dismissing plaintiffs' remaining claims without prejudice, and stayed the redemption order pending appeal of the order. The court subsequently dismissed plaintiffs' remaining claims with prejudice. Defendants appealed.

The Court of Appeals *held*:

1. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. The moving party is entitled to judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact; in other words, the nonmoving party must demonstrate that there are issues that must be decided by the factfinder. The nonmoving party may not rely on the fact that a jury might disbelieve a witness's testimony to establish a question of fact that precludes summary disposition. Accordingly, summary judgment is not inappropriate whenever state of mind is at issue; instead, specific facts must be produced in order to put credibility in issue so as to preclude summary disposition. Traditional equity actions do not lend themselves to summary disposition because those actions may involve numerous questions that must be determined by the trial court sitting in equity in order to shape a proper decree. However, a trial court may grant summary disposition in favor of a plaintiff in an equitable action when the material facts are not in dispute. In that regard, claims brought under MCL 450.1489 are equitable in nature and may be tested in a motion for summary disposition using ordinary proofs even if the court sitting in equity might

need to take evidence to craft an equitable decree. In this case, plaintiffs presented evidence that if not rebutted established that defendants engaged in shareholder oppression under MCL 450.1489(1) and (3) and that they did so with the requisite intent. Therefore, if defendants had failed to establish a question of fact on the issue of intent, the trial court could have granted summary disposition on liability.

2. A claim under MCL 450.1489 is targeted at remedying harms against shareholders of closely held corporations whose shares are not readily marketable. MCL 450.1489(1) provides that a shareholder may bring an action to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. In turn, MCL 450.1489(3) provides that the phrase "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Because the words "illegal, fraudulent, or willfully unfair and oppressive" are grouped together, the terms are of the same class or character and have related meaning; because the terms "illegal" and "fraud" encompass a malevolent intent, the phrase "willfully unfair and oppressive" requires proof of an intent to act in a manner that was unfair and oppressive to the shareholder. A defendant can avoid liability by showing that he or she did not have the requisite intent when he or she took the acts that interfered with the shareholder's interests. Thus, even when a defendant's actions may have substantially interfered with the shareholder's interest as a shareholder, a defendant can establish a question of fact on the intent element by proffering evidence from which a fact-finder could conclude that the defendant's actions were done for a legitimate business reason and otherwise not done with the intent to harm the shareholder's interests as a shareholder.

3. Generally, courts will not substitute their judgment for that of directors concerning dividend policies in the absence of evidence that the policy was fraudulent or formulated in bad faith. Under the business-judgment rule, courts refrain from interfering in matters of business judgment and discretion unless the directors or officers are guilty of willful abuse of their discretionary powers or act in bad faith. A shareholder overcomes the business-judgment rule by presenting evidence that establishes a claim under MCL 450.1489 because the statute specifically identifies wrongful conduct and identifies a remedy for it. The business-judgment rule therefore does not prohibit a court

from reviewing the totality of the evidence when evaluating a defendant's business decisions—including its dividend policy—to determine whether the evidence shows that the defendant formulated policy in bad faith and as part of a plan to commit acts amounting to shareholder oppression under MCL 450.1489(1). In this case, because plaintiffs presented evidence establishing a claim for shareholder oppression under MCL 450.1489(1), the trial court correctly considered the totality of the evidence when evaluating defendants' business decisions—including defendants' dividend policy, their act of not divulging the accountant's valuation, and the fairness of the initial $62 per share offer—to determine whether the evidence showed that defendants formulated policy in bad faith and as part of a plan to commit acts amounting to shareholder oppression under the act.

4. Plaintiffs presented evidence that defendants worked in concert to take acts that were willfully unfair and oppressive to plaintiffs as shareholders—that is, their right to receive reasonable dividend payments or to sell their shares at fair value—and that they did so with the intent to substantially interfere with those shareholder rights. In turn, defendants presented evidence that Burr Oak had legitimate business reasons for withholding dividend payments, establishing a question of fact as to whether their acts were fraudulent or willfully unfair and oppressive for purposes of MCL 450.1489. Because there were genuine issues of material fact with respect to whether defendants' alleged actions violated MCL 450.1489(1), the trial court erred by granting partial summary disposition in favor of plaintiff.

5. Even if there were not a question of fact regarding liability, the trial court also erred by granting summary disposition on the remedy. MCL 4501489(1) provides that if the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, certain enumerated actions. A court has broad discretion to fashion a remedy to fit the equities of a case; in that regard, if the equities warrant it, a trial court may even refuse to grant any relief even though the shareholder established acts of shareholder oppression. In this case, because there was conflicting evidence, the court could not have decided as a matter of law what remedy best fit the equities of the case. For that reason, the trial court erred by granting summary disposition on the remedy—that is, ordering Burr Oak to repurchase plaintiffs' shares for $712 per share—because the record had not been developed sufficiently to permit the court to select an appropriate remedy.

6. MCL 450.1489(1)(e) provides that if the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including the purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts; the court has discretion to value the shares in any way it determines appropriate under the totality of the circumstances. The Legislature used the term "fair value" to distinguish the remedy from the term "fair market value." The meaning of the statutorily undefined term "fair value" is different from the meaning of "fair market value." "Fair market value" takes into consideration the fact that a ready, willing, and able buyer might discount the value of the shares on the basis of limitations inherent in the shares, while "fair value" takes into consideration the totality of the circumstances when valuing shares. While a trial court has authority under MCL 450.1489(1)(e) to order a defendant to purchase the plaintiff's shares at fair value, nothing within the statutory scheme requires the court to value the shares in a particular way. Thus, the statute does not preclude a trial court from considering fair market value when determining fair value or from applying discounts when crafting a remedy. Instead, the statute requires a court to order an appropriate remedy, which may include an order to purchase shares at fair value or at any other value that the court concludes is appropriate under the totality of the circumstances. In this case, although the court had authority to value the shares without discounts under MCL 450.1489(1)(e), the statute does not require that it do so. Accordingly, the trial court erred to the extent that it felt compelled by the statute to value the shares without any discounts.

7. The trial court correctly denied defendants' motion for summary disposition of the claims against LeeAnn McConnell because there was a question of fact whether she participated in the acts of shareholder oppression by the other defendants.

Order dismissing plaintiffs' action with prejudice reversed, order granting plaintiffs' motion for summary disposition of the stockholder-oppression claim and the appropriate remedy reversed, order requiring Burr Oak to repurchase plaintiffs' shares vacated, and case remanded for further proceedings.

1. CORPORATIONS — SHAREHOLDER OPPRESSION — EQUITABLE ACTIONS — SUMMARY DISPOSITION.

A trial court may grant summary disposition in favor of a plaintiff in an equitable action when the material facts are not in dispute;

claims brought under MCL 450.1489 are equitable in nature and may be tested in a motion for summary disposition using ordinary proofs even if the court sitting in equity might need to take evidence to craft an equitable decree.

2. CORPORATIONS — SHAREHOLDER OPPRESSION — "WILLFULLY UNFAIR AND OPPRESSIVE" — PROOF OF INTENT REQUIRED.

MCL 450.1489(1) provides that a shareholder may bring an action to establish that the acts of the directors or those in control of a corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder; under MCL 450.1489(3), the phrase "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder; the phrase "willfully unfair and oppressive" requires proof of an intent to act in a manner that was unfair and oppressive to the corporation or to the shareholder.

3. CORPORATIONS — SHAREHOLDER OPPRESSION — INTENT — LEGITIMATE BUSINESS REASONS — QUESTION OF FACT.

When defending against a shareholder-oppression claim, a defendant can avoid liability by showing that he or she did not have the requisite intent when he or she took the acts that interfered with the shareholder's interests; even when the defendant's actions may have substantially interfered with the shareholder's interest as a shareholder, a defendant can establish a question of fact on the intent element by proffering evidence from which a fact-finder could conclude that the defendant's actions were done for a legitimate business reason and otherwise not done with the intent to harm the shareholder's interests as a shareholder (MCL 450.1489).

4. CORPORATIONS — SHAREHOLDER OPPRESSION — EVIDENCE — BUSINESS-JUDGMENT RULE.

Under the business-judgment rule, courts refrain from interfering in matters of business judgment and discretion unless the directors or officers are guilty of willful abuse of their discretionary powers or act in bad faith; because MCL 450.1489 specifically identifies wrongful shareholder-oppression conduct and identifies a remedy for it, a shareholder can overcome the business-judgment rule by presenting evidence that establishes a claim under that statute; the business-judgment rule does not prohibit a court from reviewing the totality of the evidence when evaluating a defendant's business to determine whether the evidence

shows that the defendant formulated policy in bad faith and as part of a plan to commit acts amounting to shareholder oppression under MCL 450.1489(1).

5. CORPORATIONS — SHAREHOLDER OPPRESSION — RELIEF.

MCL 450.1489(1)(e) provides that if a shareholder establishes grounds for relief under Subsection (1), the circuit court may make an order or grant relief as it considers appropriate, including the purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts; the court has discretion to value the shares in any way it determines appropriate under the totality of the circumstances; the statute does not require the court to value the shares in a particular way.

Mantese Honigman, PC (by *Gerard V. Mantese*, *Ian M. Williamson*, *Douglas L. Toering*, and *Fatima M. Bolyea*) for plaintiffs.

Warner Norcross + Judd LLP (by *Christopher E. Tracy*) and *Foley & Lardner LLP* (by *Norman C. Ankers*) for defendants.

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

PER CURIAM. In this shareholders' dispute, defendants, Newell A. Franks II, Brian McConnell, LeeAnn McConnell, David Franks, Lawrence Franks, and Burr Oak Tool, Inc., appeal by right the trial court's order dismissing certain claims, which was entered following an earlier order granting summary disposition in favor of plaintiffs—Jeffrey Franks, the Franks Family Trust,[1] and Willis Franks. Defendants also challenge the trial court's order compelling Burr Oak to purchase plaintiffs' shares in Burr Oak. We reverse and remand for proceedings consistent with this opinion.

[1] The Franks Family Trust was substituted for Richard Franks after he died during the course of the litigation in the lower court.

I. BASIC FACTS

The late Newell A. Franks founded Burr Oak in 1944. Burr Oak manufactures and sells machine tools in the heat-transfer industry. It is located in Sturgis, Michigan. The parties to this case are all related to Newell A. Franks in some way. Newell A. Franks was the father of defendant Lawrence Franks, former plaintiff Richard Franks, and Tom Franks, who was deceased by the time of this litigation. Lawrence Franks is the father of defendant Newell A. Franks II, defendant David Franks, and defendant LeeAnn McConnell. LeeAnn McConnell is married to defendant, Brian McConnell. Tom Franks was the father of plaintiffs Jeffrey Franks and Willis Franks.

Each individual defendant owns voting shares—Class A shares—of Burr Oak or has an active role in the management of the corporation, as noted by Burr Oak's then accountant, Bruce Gosling. Newell A. Franks II is the corporation's chief executive officer and the chair of the board of directors. Plaintiffs each own Class B or Class C shares in the corporation, which are nonvoting shares. Class B shares do not get dividends, but Class B shares can be converted into Class C shares, which do get dividends. Plaintiffs have no role in the management of the corporation.

Historically, Burr Oak distributed dividends to its shareholders: Burr Oak issued dividends every year from 1950 to 2004 with the exception of five years. In 2001, for example, Burr Oak distributed $23 per share to holders of Class A stock and $45 per share to holders of Class C stock. Burr Oak paid out about $2.2 million to shareholders in 2002, and paid out $2,288,000 in 2003. It distributed another $2.2 million to shareholders in 2004. However, Burr Oak ceased paying dividends after the death of Newell A. Franks in 2007.

Newell A. Franks II testified that Burr Oak stopped paying dividends because the company incurred a "tremendous outflow of cash" related to his grandfather's estate. He stated that the company had no formal policy for determining when to make a dividend distribution. Previously, his grandfather would just make the decision and it would be carried out.

Newell A. Franks II agreed that he had Gosling calculate the value of Burr Oak in 2012 in anticipation of a stock buyback. He agreed that Gosling's report, which was dated May 21, 2012, valued the company at $46,125,355, or at approximately $598 per share for the 77,043 shares of outstanding stock. Gosling testified that Newell A. Franks II asked him to prepare the valuation to help with a proposed buyout of the "minority shareholders." Newell A. Franks II stated that Burr Oak had more than $20 million in cash in May 2012. He indicated that it was not all available for the payment of dividends but agreed that some could have been used to pay dividends. He also testified that Burr Oak loaned $1 million to Sturgis Bank in 2012, and he conceded that David Franks served on the board of directors for the bank. David Franks testified that he was a voting shareholder of the bank.

Six months after Gosling's valuation, defendants had Burr Oak offer to purchase plaintiffs' shares for $62 per share. Newell A. Franks II conceded that there was no valuation to support that offer. He further acknowledged that Gosling wrote him and stated that his offer was "a good plan" because the nonvoting members were astute enough to realize that their shares had no value unless a different buyer were to offer them more. Gosling said that he made that statement to Newell A. Franks II because, "if no dividends are being paid and there are no redemptions

being made, then nobody else is going to buy the stock." He explained that Burr Oak was probably the only market for the shares and that if one cannot convert the stock certificate into cash in some way, it has no value. David Franks similarly testified that he knew that the $62 offer did not have any support, but he agreed to the offer being made with the understanding that it would get the conversation started. He also testified that he did not expect anyone to accept that offer. Newell A. Franks II admitted that no one accepted the offer of $62 per share. He also admitted that there was no valuation to support it. He opined, however, that $62 per share was a fair return given that plaintiffs had paid zero dollars for their shares.

E-mail communications between David Franks and Brian McConnell suggested that the $62 per share offer to the "outside stock holders" was not made in good faith. David Franks wrote that the justification for the offer that Brian McConnell proposed to provide to Jeffrey Franks after Jeffrey Franks questioned the basis of the offer should not mention a related company —Oak Press Solutions, Inc.—because they had taken measures to ensure that that entity paid a fair price and he did not want to "plant a bug" about that company, which itself did not have the same "ownership concerns." Notably, plaintiffs had alleged that defendants caused Burr Oak to conduct business through related entities such as Oak Press Solutions to receive undisclosed distributions. Newell A. Franks II also admitted that his grandfather had in the past paid dividends of $62 per share in a single year. At a February 2013 meeting of the board of directors, the directors agreed to offer plaintiffs $141.26 per share. In September 2013, Burr Oak offered to buy shares at $248 per share. Plaintiffs did not, however, accept any of these offers.

In September 2013, Jeffrey Franks, Richard Franks, and Willis Franks sued defendants. They alleged that Lawrence Franks, David Franks, Newell A. Franks II, Brian McConnell, and LeeAnn McConnell used their control of Burr Oak to benefit themselves and their families at the expense of the minority shareholders. They asserted that the identified conduct amounted to "illegal, fraudulent, or willfully unfair and oppressive conduct" in violation of MCL 450.1489. They asked the trial court to remedy the oppression by, among other possible remedies, ordering defendants to purchase plaintiffs' shares at fair value. They also alleged a claim of breach of fiduciary duty and a claim for an accounting. Plaintiffs filed an amended complaint in October 2013. They alleged seven claims in the amended complaint: shareholder oppression under MCL 450.1489, breach of fiduciary duties, accounting, fraud, constructive fraud, breach of contract, and aiding and abetting the scheme to deprive plaintiffs of their interests as shareholders.

On June 16, 2014, plaintiffs filed a motion with the trial court asking it to order Burr Oak to issue a dividend. In that same month, defendants moved for summary disposition of plaintiffs' claims under MCR 2.116(C)(8) and (C)(10). Defendants argued that the trial court had to dismiss the shareholder-oppression claim because the conduct at issue did not establish a question of fact as to whether there was shareholder oppression. Specifically, they maintained that the failure to purchase stock was not by itself oppressive conduct and that, similarly, an offer to purchase stock at a particular price was also not oppressive. Moreover, they stated, defendants eventually offered to purchase plaintiffs' shares at $248 per share, which was the same price earlier offered to Lawrence Franks for his shares. Finally, they argued and presented evidence

that the board of directors elected not to issue dividends for legitimate business reasons, which were protected under the business-judgment rule. Namely, they maintained that Burr Oak had to retain its profits for capital improvements, to retire debt, and to possibly redeem stock. Defendants relied, in part, on Brian McConnell's affidavit. Brian McConnell averred that he was Burr Oak's chief operating officer and stated that Burr Oak had to pay out more than $15 million from 2007 to 2012 to cover obligations under Newell A. Franks's estate plan. He also stated that the board of directors felt that Burr Oak needed to establish an ambitious expansion plan to remain competitive. Defendants additionally argued that the failure to pay dividends affected all the shareholders equally and that it therefore could not be oppressive to plaintiffs. In short, they maintained that there was no evidence that the board's exercise of business judgment was feigned or a mere subterfuge. As pertinent to this appeal, defendants also argued that plaintiffs failed to state a claim against LeeAnn McConnell because she was not a director of Burr Oak and did not participate in any of the decisions at issue.

On June 30, 2014, plaintiffs moved for partial summary disposition on their claim of shareholder oppression. Plaintiffs maintained that the undisputed evidence showed that defendants tried to implement an unfair stock-redemption plan and wrongfully withheld the payment of dividends for the purpose of squeezing the nonvoting stock holders out of the corporation. They argued that the wrongful conduct established as a matter of law that defendants engaged in shareholder oppression. They further stated that defendants' admission that they had an obligation to buy the minority shareholders shares at fair value, which did not include discounts for marketability or lack of control, estab-

lished that the trial court had to order a buyout at fair value with no discounts.

Defendants opposed plaintiffs' motion for partial summary disposition, arguing that the evidence showed, at the very least, that whether defendants acted with sound business judgment when they elected not to distribute dividends was a contested matter. They also maintained that whether Burr Oak had sufficient reserves to pay dividends was a contested matter. They supported their position with another affidavit by Brian McConnell in which he made averments concerning the financial condition of Burr Oak during 2012 and 2013 and its ability to pay dividends.

On July 21, 2014, plaintiffs filed a brief in opposition to defendants' motion for summary disposition and moved for summary disposition of their claim for shareholder oppression under MCR 2.116(I). In part, plaintiffs argued and presented evidence that LeeAnn McConnell, contrary to her affidavit, did play a significant role in the management of Burr Oak as part of the controlling family faction. As for the claim that defendants had not engaged in any oppressive conduct, plaintiffs argued that the evidence showed that defendants implemented an aggressive stock-redemption program in which they offered an unfair price after deliberately manipulating and misrepresenting the fair value of the stock. They made the offer after wrongfully withholding dividends in order to bully the minority shareholders into accepting a suppressed value. Plaintiffs presented evidence that the obligations that Burr Oak had arising from Newell A. Franks's estate ended in mid-2012 and that Burr Oak had significant cash reserves with which to both expand its operations and pay a significant dividend. This evidence, they maintained, showed that defendants did not withhold dividends for a legitimate reason.

On December 1, 2014, the trial court held a hearing on the various motions that were before it. The trial court started the hearing by stating that it was denying defendants' motion for summary disposition because there were "issues that do suggest that there was infringement of the minority shareholders[.]" It went on, however, and stated that it found "infringement of the minority shareholders' rights." The trial court indicated that it was unsure what the remedy should be and stated that it wanted input from an independent expert to determine how to remedy the situation. The trial court stated that it wanted the parties to agree on an expert but said that it would appoint one if they could not agree. The trial court also stated that it would set a date for a two-day hearing to address the remedy. When asked to clarify its ruling, the trial court indicated that it was not granting plaintiffs' motion "just yet" on the issue of liability. But it also stated that it was not sure whether there were issues of material fact regarding plaintiffs' motion for partial summary disposition. On December 3, 2014, the trial court entered an order denying defendants' motion for summary disposition and reserving its ruling on the remaining motion. As pertinent to this appeal, the court subsequently instructed the parties to brief an appropriate remedy for shareholder oppression and indicated that it did not think that dissolution was a proper remedy.

The trial court subsequently held a hearing on October 21, 2016, to consider plaintiffs' original motion for partial summary disposition. The trial court surveyed the evidence indicating that the controlling shareholders were not, in fact, dealing fairly with the nonvoting shareholders. On the basis of that evidence, it then found "that there has been suppression of the minority shareholder[s]." For that reason, the trial court stated, it would grant plaintiffs' motion for summary disposi-

tion. The trial court determined that the appropriate remedy was to compel the corporation to buy the nonvoting members' shares at a price to be determined after an evidentiary hearing. Defendants moved for reconsideration in November 2016. As they had throughout the pendency of the lower-court proceedings, defendants stated their belief that the trial court could not find oppression and select a remedy without holding an evidentiary hearing. The trial court denied the motion for reconsideration in January 2017.

A trial on the issue of plaintiffs' remedy was held on May 2, 2017. Plaintiffs' expert, certified public accountant Thomas Frazee, testified generally about his valuation of Burr Oak. He opined that plaintiffs' shares in Burr Oak were worth $26,826,736. After Frazee testified, plaintiffs rested and defendants moved for a directed verdict. They argued that Frazee's testimony and report were insufficient to establish the value of plaintiffs' shares because he did not discount the value for marketability. The trial court denied the motion. Brian McConnell, Burr Oak's president and chief operating officer, testified for the defense and stated that he had worked for Burr Oak for 26 years. He stated that the three classes of stock came into being because Newell A. Franks wanted to create different classes to transfer as gifts for dividend purposes. The individuals who owned the voting shares ended up purchasing those shares whereas the other classes were all gifts. Although they often referred to the nonvoting shareholders as the "minority shareholders," the holders of the Class B and C shares actually owned 52% of the company. Newell A. Franks established the Class B and C shares in the 1980s so that he could pay dividends to those whom he gifted Class C shares without paying himself a dividend as the owner of the Class B shares.

Brian McConnell stated that Newell A. Franks sold his voting shares for $280 per share in 2006, the year before he died in 2007. The highest price ever requested for shares of Burr Oak was $356.22 per share, which was substantially less than the $712 per share calculated by Frazee. Brian opined that the company was not worth $50 million. He stated his belief that Burr Oak would be vulnerable if it became highly leveraged. The trial court, however, precluded him from testifying about the debt load that Burr Oak might be able to carry. Michael Oliphant testified on behalf of the defense as an expert certified public accountant. He opined that plaintiffs' shares were worth $398 per share. He, however, discounted the shares for marketability. The mathematical value based on the company's valuation would be $632 per share.

On July 25, 2017, the trial court held a hearing to state its ruling. The trial court adopted plaintiffs' proposed findings of fact and found that plaintiffs' shares were worth $712 per share. The trial court specifically held that it could not apply a discount to lower the fair value of the shares. The trial court subsequently signed an order requiring Burr Oak to purchase plaintiffs' shares within two years at a price of $712 per share. The trial court's order provided that Burr Oak would pay equitable interest and plaintiffs' attorney fees as well. On December 28, 2017, the trial court entered a stipulated order dismissing plaintiffs' remaining claims without prejudice. It further provided that its order requiring redemption would be stayed pending defendants' appeal. The trial court later entered an order dismissing plaintiffs' remaining claims with prejudice. Defendants now appeal as of right.

II. ANALYSIS

We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

In considering a motion for summary disposition, the trial court is not permitted to "weigh the evidence or make determinations of credibility . . . ." *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 480; 776 NW2d 398 (2009). When opposing a properly supported motion for summary disposition under MCR 2.116(C)(10), the nonmoving party cannot rely on mere allegations or denials in his or her pleadings to establish a question of fact. *Quinto*, 451 Mich at 362. Rather, the nonmoving party must present evidence that establishes that there is a genuine issue of disputed fact on the issue raised by the moving party. *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).

This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

A. THE CREDIBILITY EXCEPTION TO SUMMARY DISPOSITION

Defendants rely on the decision in *White v Taylor Distrib Co, Inc*, 275 Mich App 615; 739 NW2d 132 (2007), aff'd 482 Mich 136 (2008), and indirectly on the decision in *Vanguard Ins Co v Bolt*, 204 Mich App 271; 514 NW2d 525 (1994), for the proposition that a court cannot grant summary disposition on a claim, such as the one stated under MCL 450.1489, when the claim involves motive or intent as an element. These decisions appear to state a rule that summary disposition cannot be granted when an essential element of the claim or defense involves motive or intent. The majority in *White*, for example, stated that the grant of summary disposition is " 'especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial.' " *White*, 275 Mich App at 625, quoting *Vanguard*, 204 Mich App at 276. However, if those statements are accepted at face value, summary disposition would rarely be appropriate because one could almost always argue that a finder of fact might disbelieve a witness's testimony involving an essential element of a claim or defense. A review of the authorities, however, shows that Michigan does not apply a rule precluding summary disposition whenever a claim or defense involves an individual's motive or intent.

The majority of the decisions citing a credibility exception to the grant of summary disposition, like the one described in *White*, trace their origin to the plurality opinion by Justice SOURIS in *Durant v Stahlin*, 375

Mich 628; 135 NW2d 392 (1965). See, e.g., *White*, 275 Mich App at 625, citing *Vanguard*, 204 Mich App at 276, in turn citing *Metro Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988), *Crossley v Allstate Ins Co*, 139 Mich App 464, 468; 362 NW2d 760 (1984), and *Brown v Pointer*, 390 Mich 346, 354; 212 NW2d 201 (1973), citing *Durant*, 375 Mich at 647-648 (opinion by SOURIS, J.). In *Durant*, a Republican politician, Richard Durant, sued several other Republicans, including Richard Van Dusen; Arthur Elliott, Jr.; and George Romney, for allegedly trying to prevent his re-election through improper methods, including a conspiracy that led to libel against him. *Id*. at 634-635 (opinion by ADAMS, J.). Durant produced proofs showing that a letter was published in newspapers with the signature of John H. Stahlin, which accused Durant of being the leader of an extremist group that resorted to bribery and threats of physical violence, among other things. *Id*. at 636. Van Dusen, Elliott, and Romney moved for summary disposition under the prior court rules and supported their motions with their own affidavits. *Id*. at 636-637. In their affidavits, they denied knowing about or participating in the creation and publication of the letter. *Id*. The trial court agreed that Durant's claims against these three defendants must be dismissed. *Id*. at 634-635.

Writing for himself and two other justices, Justice ADAMS stated in the lead opinion that Durant failed to present any admissible evidence "by deposition, affidavit or otherwise" from which "it could be found that the defendants participated in any way in the preparation or publication of [the letter] or in the purported conspiracy surrounding its preparation and publication." *Id*. at 638-639. Because Durant failed to present any admissible evidence to rebut the movants' affidavits, Justice ADAMS concluded that the trial court properly

dismissed Durant's claims against those defendants under then GCR 1963, 117.3. *Id*. at 640.

Justice SOURIS, who wrote for himself and two other justices as well, agreed that the trial court's decision to dismiss was proper, but wrote separately to explain that summary disposition under those circumstances should be rare. *Id*. at 640-658 (opinion by SOURIS, J.). Justice SOURIS wrote that he was concerned by a "disturbing misapprehension among members of the bench and bar concerning the propriety of peremptory disposition of cases by summary judgment prior to trial as provided by our recently adopted rule, GCR 1963, 117." *Id*. at 642. This procedure, he cautioned, "strikes at the very heart of a litigant's right to determination of his legal dispute in an adversary judicial proceeding[.]" *Id*. at 644. For that reason, the procedure should be put to "very limited use[.]" *Id*. Relying on federal authorities, including Judge Frank's opinion in *Arnstein v Porter*, 154 F2d 464 (CA 2, 1946), Justice SOURIS agreed that summary judgment would be inappropriate in cases in which, "notwithstanding the opposing party's failure to attempt even to discredit the honesty of [an] affiant by counter-affidavits or other proofs," the affiant's credibility is "crucial to [the] decision of a disputed fact issue . . . ." *Durant*, 375 Mich at 647-648 (opinion by SOURIS, J.). This was especially true, he stated, for matters that are " 'peculiarly within defendant's knowledge.' " *Id*. at 648, quoting *Arnstein*, 154 F2d at 469, 471.

Turning to the motion at issue, Justice SOURIS recognized that Van Dusen, Elliott, and Romney did not challenge the fact of the libel, but instead challenged Durant's ability to establish their participation in the libel. *Durant*, 375 Mich at 655 (opinion by SOURIS, J.). Durant, however, did not respond to the motion with

any admissible evidence "from the depositions taken or from any other source to establish that if permitted to go to trial there would be any genuine issue of material fact to be decided by a jury or by the judge trying the case without a jury." *Id*. at 658. For that reason, Justice SOURIS agreed that the trial court properly granted the motion for summary disposition. *Id*.

Since the decision in *Durant*, courts have slowly but steadily moved away from the notion that summary disposition should be disfavored. In Federal Practice and Procedure, for example, the authors identify Judge Frank of the Second Circuit, whose views Justice SOURIS approved in *Durant*, as "the principal proponent of a very strict approach to summary judgment" and state that he "usually was able to find an issue of credibility lurking in the cases brought before that court." See 10A Wright, Miller, & Kane, Fed Practice & Procedure (4th ed), § 2726, p 443. Judge Frank's application of the exception was, in the authors' view, extreme: "The effect of the approach adopted by Judge Frank in these cases would be to deny summary judgment whenever the motion depended on facts presented by affidavit—a restriction that would cripple the summary-judgment procedure." *Id*. at 444. None of the circuits has adopted Judge Frank's position; instead, "[t]he general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment." *Id*. at 444-445. In modern federal practice, the nonmoving party may not rely on the fact that a jury might disbelieve a witness's testimony to establish a question of fact that precludes summary disposition. See *Anderson v Liberty Lobby, Inc*, 477 US 242, 256; 106 S Ct 2505; 91 L Ed 2d 202 (1986) (rejecting the respondents' contention that summary judgment is inappropriate whenever state of mind is at issue). The same is true in Michigan.

Michigan courts were formerly required to be "liberal" in finding that a genuine issue of material fact exists and only granted summary disposition when the court was convinced that it was *impossible* for the claim or defense to be supported at trial. *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973). However, our Supreme Court has disavowed the continuing validity of that standard, *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), and it has further stated that a party may not avoid summary disposition by promising to produce evidence at trial, *Maiden*, 461 Mich at 121. Rather, the nonmoving party must identify evidence that puts the affiant's or the deponent's credibility at issue to avoid summary disposition. See, e.g., *Debano-Griffin v Lake Co*, 493 Mich 167, 180-181; 828 NW2d 634 (2013) (stating that the plaintiff presented evidence that called into question a witness's credibility and that because the proffered justification for the act was established by that witness, there was an issue of fact for the finder of fact that precluded summary disposition); see also *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142-143; 753 NW2d 591 (2008) (affirming this Court's decision because the defendant's own statements were inconsistent, which put at issue his credibility regarding whether he had experienced a sudden emergency).

To the extent that this Court's decisions seem to apply an absolute exception to the application of summary disposition premised on the mere possibility that a jury might disbelieve an essential witness, as first articulated in *Durant*, the application of that rule is limited to those situations in which the moving party relies on subjective matters that are exclusively within the knowledge of its own witness and those in which the witness would have the motivation to testify to a version of events that are favorable to the moving

party. See *White*, 275 Mich App at 630. This is not such a case. As will be discussed in this opinion, plaintiffs presented evidence that if left unrebutted would establish that defendants engaged in shareholder oppression within the meaning of MCL 450.1489(1) and (3) and that they did so with the requisite intent. For that reason, the trial court could properly grant summary disposition on liability if defendants did not establish a question of fact on the issue of intent. The evidence also called into question whether defendants' proffered business reasons were merely pretexts for unlawful shareholder oppression.

B. THE EQUITY EXCEPTION TO SUMMARY DISPOSITION

On appeal, defendants also assert that it was improper for the trial court to grant summary disposition in this case because it involved an equitable action. Our Supreme Court has stated that traditional equity actions do not lend themselves to summary disposition because actions in equity may involve numerous questions that must be determined by the trial court sitting in equity in order to shape a proper decree. *Sun Oil Co v Trent Auto Wash, Inc*, 379 Mich 182, 191; 150 NW2d 818 (1967). Notably, our Supreme Court did not state in *Sun Oil* that summary disposition was *never* appropriate in cases involving equity. Rather, it opined that summary disposition was inappropriate under the facts of that case. See *id*. The cause of action brought under MCL 450.1489 includes elements that can readily be tested in a motion for summary disposition using ordinary proofs, even if a court sitting in equity might need to take evidence to craft a proper decree. MCL 450.1489(1) and (3). Additionally, the decision in *Sun Oil* occurred before adoption of the current rules governing summary disposition, and our Supreme Court

has since rejected the prior practice, which disfavored summary disposition unless the trial court determined that it was impossible for a claim to be supported by evidence at trial. *Maiden*, 461 Mich at 120-121. Rather, the Court reiterated that summary disposition is appropriate unless the nonmoving party demonstrates that there are issues that must be decided by the finder of fact. *Id*. at 121 ("A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial."). And this Court has determined that a trial court properly grants summary disposition in favor of a plaintiff on an equitable claim when the material facts are not in dispute. See, e.g., *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 386; 761 NW2d 353 (2008) (affirming a trial court's decision to grant summary disposition in favor of the plaintiff in an action to reform a deed). Accordingly, if the material facts are undisputed, a trial court may be warranted in granting summary disposition on one or more elements of a claim under MCL 450.1489(1). MCR 2.116(C)(10).

C. SHAREHOLDER-OPPRESSION CLAIM: NATURE AND ELEMENTS

In this case, plaintiffs sued defendants—in relevant part—for taking acts in violation of MCL 450.1489, which is commonly referred to as the "shareholder-oppression statute[.]" *Madugula v Taub*, 496 Mich 685, 697; 853 NW2d 75 (2014). In that statute, the Michigan Legislature provided a cause of action to redress certain wrongs by those in control of a closely held corporation when the acts interfere with a shareholder's property rights:

> A shareholder may bring an action in the circuit court of the county in which the principal place of business or

> registered office of the corporation is located to establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder. [MCL 450.1489(1).]

In *Madugula*, 496 Mich at 707-711, our Supreme Court explained that the cause of action available under MCL 450.1489 is similar to historical shareholder-derivative claims against directors or those in control of a corporation to remedy fraud, illegality, abuses of trust, or other oppressive conduct. It also noted that the common law allowed an aggrieved shareholder to bring a claim for dissolution in a court of equity to remedy oppressive conduct. The Court recognized that the Legislature enumerated remedies under the statute that were traditionally equitable and also did not limit the trial court's authority to grant relief to those enumerated remedies. Rather, the Legislature provided courts with broad authority to fashion an appropriate remedy, which, it stated, was consistent with practice under equity. *Id*. at 711-714. On the basis of these observations, the Court held that a claim under MCL 450.1489 sounded in equity and must be tried before a court sitting in equity. *Id*. at 714-715. Consequently, in this case, plaintiffs' claim under MCL 450.1489 was an equitable claim.

The Legislature expressed its intent to apply the shareholder-oppression statute to remedy harms against shareholders of closely held corporations whose shares were not readily marketable. See MCL 450.1489(2) (providing that the cause of action does not apply to a "shareholder whose shares are listed on a national securities exchange or regularly traded in a market maintained by 1 or more members of a national or affiliated securities association"). As this Court has recognized, the shareholders of a closely held corpora-

tion frequently expect to obtain pecuniary benefits from their shares by working for the corporation or participating in its management, rather than by selling the shares. *Franchino v Franchino*, 263 Mich App 172, 184; 687 NW2d 620 (2004). Notwithstanding that recognition, the Court in *Franchino* interpreted a prior version of MCL 450.1489(3)[2] and concluded that the Legislature did not intend to protect shareholders from acts to terminate their employment or participation in the management of the closely held corporation:

> Michigan's statute neither explicitly protects minority shareholders' interests as employees or directors, nor is it silent on the issue. Rather, the Legislature amended the statute to explicitly state that minority shareholders could bring suit for oppression only for conduct that "substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (emphasis added). To construe the statute in a way that allows plaintiff to sue for oppression of his interests as an employee and director would ignore the Legislature's decision to insert the phrase "as a shareholder" and render the phrase nugatory, which is contrary to a fundamental rule of statutory construction. Accordingly, we hold that the trial court correctly concluded that MCL 450.1489(3) does not allow shareholders to recover for harm suffered in their capacity as employees or board members. [*Franchino*, 263 Mich App at 185-186 (some citations omitted).]

After the decision in *Franchino*, the Legislature amended MCL 450.1489(3) to specifically provide that willfully unfair and oppressive conduct could include termination of employment or other acts that disproportionately interfered with a shareholder's interests. See 2006 PA 68. MCL 450.1489(3) now provides:

> As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a sig-

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[2] See MCL 450.1489, as amended by 2001 PA 57.

> nificant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

On appeal, plaintiffs challenge defendants' argument that MCL 450.1489 requires proof of intent. Plaintiffs acknowledge that the statute provides that plaintiffs must show that defendants engaged in "willfully unfair and oppressive" acts, but they disagree whether the term "willfully" requires proof that defendants subjectively intended their acts to be unfair and oppressive to plaintiffs as shareholders. Plaintiffs rely on the fact that the Legislature defined " 'willfully unfair and oppressive conduct' [to] mean[] a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3). More specifically, they note that the definition of "willfully unfair and oppressive conduct" in MCL 450.1489(3) does not include any particular intent. Plaintiffs contend that it does not matter whether defendants intended their actions to be unfair and oppressive to plaintiffs as shareholders. Because the statute does not require proof of intent, plaintiffs maintain that the trial court could properly grant summary disposition in their favor because (1) the undisputed evidence showed that defendants took actions that substantially interfered with their interests as shareholders and (2) it is irrelevant whether defendants had a legitimate business reason for doing so.

Plaintiffs' preferred interpretation of the statute would transform the shareholder-oppression statute into a strict-liability statute, which does not comport with the language used by the Legislature. In MCL 450.1489(1), the Legislature identified three classes of wrongful acts for which it wished to create a remedy; that is, it created a remedy for "acts" that were "illegal, fraudulent, or willfully unfair and oppressive . . . ." By grouping these terms together, the Legislature indicated that the terms are of the same class or character and have related meaning. *Atlantic Cas Ins Co v Gustafson*, 315 Mich App 533, 541; 891 NW2d 499 (2016) (recognizing that under the "interpretive canon" *noscitur a sociis*, "words grouped in a list should be given related meanings") (quotation marks and citation omitted). Performing an illegal act ordinarily encompasses some malevolent intent. See *People v Janes*, 302 Mich App 34, 41; 836 NW2d 883 (2013) (observing that Michigan's common law requires that "every conviction for an offense required proof that the defendant committed a criminal act (*actus reus*) with criminal intent (*mens rea*)"). Similarly, fraud encompasses a malevolent intent: it is "an intentional perversion or concealment of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing or to surrender a legal right." *Barkau v Ruggirello*, 113 Mich App 642, 647; 318 NW2d 521 (1982).[3] The Legislature's decision to group "willfully unfair and oppressive" acts with acts that are illegal or fraudulent strongly suggests that the Legislature required proof of an intent to act in a manner that was

[3] This Court is not required to follow the rule of law established by this Court in an opinion published before November 1, 1990. MCR 7.215(J)(1). However, this Court may consider decisions published before November 1, 1990, as persuasive authority. *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

unfair and oppressive to the shareholder.[4] Additionally, the use of the term "willfully" reinforces this conclusion. An act is willfully done when taken "with the intent to do something specific," that is, the action is undertaken with "the specific intent to bring about the particular result the statute seeks to prohibit." *In re Erwin*, 503 Mich 1, 10-11; 921 NW2d 308 (2018), mod 503 Mich 876 (2018) (citation omitted). Because the statute refers to "acts" by the directors or persons in control that were—in relevant part—"willfully unfair and oppressive," our reading of MCL 450.1489(1) leads us to conclude that the Legislature has required proof that the directors or persons in control performed the "acts" and that those acts were done to bring about an unfair and oppressive result. *In re Erwin*, 503 Mich at 10-11.

The Legislature continued to refer to " 'willfully unfair and oppressive' " activities in MCL 450.1489(3), but it did not refer to "acts" that were "willfully unfair and oppressive"; instead, it defined " 'willfully unfair

[4] In interpreting a similar statute that referred to "illegal, oppressive, or fraudulent" actions, the Supreme Court of Texas held that by grouping the term "oppressive" with illegal and fraudulent, the Legislature signified that the term "oppressive" should be construed to include acts that were at least as serious as illegal or fraudulent acts. It also concluded that it could not construe the term in a way that ignored the director or manager's fiduciary duty to exercise his or her business judgment for the benefit of the corporation rather than a sole shareholder. From these considerations, it held that the term "oppressive" necessarily required proof that the director or manager had acted with the intent to harm a shareholder's interests. *Ritchie v Rupe*, 443 SW3d 856, 868-871 (Tex, 2014); cf. *Baur v Baur Farms, Inc*, 832 NW2d 663, 673-674 (Iowa, 2013) (interpreting the term "oppressive" as used in a statute that applied to "illegal, oppressive, or fraudulent" acts to mean that the act—without regard to intent—frustrated the minority shareholder's reasonable expectations under the circumstances). Although foreign authorities are not binding on this Court concerning an issue of state law, they may be persuasive. *Finazzo v Fire Equip Co*, 323 Mich App 620, 631; 918 NW2d 200 (2018).

and oppressive conduct.' " MCL 450.1489(3). The term "conduct" does not appear in MCL 450.1489(1). This Court must assume that the Legislature used the term "conduct" rather than "acts" for a reason. See, e.g., *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993) (stating that courts cannot assume that the Legislature was mistaken when it omitted from one statute a term that it used in a different statute). This Court must also read the statute as a harmonious whole. See *Macomb Co Prosecuting Attorney v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) (noting that a statute must be read as a harmonious whole). The Legislature may have used the term "conduct" to define a category of acts that if done willfully—as otherwise required under MCL 450.1489(1)—would amount to a willfully unfair and oppressive act. See, e.g., *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 281; 649 NW2d 84 (2002) (stating that MCL 450.1489(1) provides a cause of action to remedy "acts" that amount to an "ongoing pattern of oppressive misconduct") (quotation marks and citation omitted).

If this Court were to treat the definition of "willfully unfair and oppressive conduct" provided under MCL 450.1489(3) as a substitute for the terms "acts" that "are . . . willfully unfair and oppressive" stated in MCL 450.1489(1), this Court would in effect read the term "willfully" out of MCL 450.1489(1). This Court must avoid a construction that renders part of the statute surplusage or nugatory. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). Because the Legislature grouped "willfully unfair and oppressive" with "illegal" and "fraudulent" in MCL 450.1489(1), we cannot lightly adopt a construction that transforms the last category—"willfully unfair and oppressive"—into a form of strict liability. Therefore, we hold that with

regard to acts that are willfully unfair and oppressive, the complaining shareholder must prove that the directors or persons in control of the corporation engaged in a "continuing course of conduct" or took "a significant action or series of actions" that substantially interfered with the interests of the shareholder as a shareholder and that they did so with the intent to substantially interfere with the "interests of the shareholder as a shareholder." MCL 450.1489(1); MCL 450.1489(3). Thus, a defendant can avoid liability by showing that he or she did not have the requisite intent when he or she took the acts that interfered with the shareholder's interests. Consequently, we conclude that defendants could establish a question of fact on this element by proffering evidence from which a finder of fact could conclude that defendants' actions, though the actions may have substantially interfered with the shareholder's interests as a shareholder, were nevertheless done for a legitimate business reason and otherwise not done with the intent to harm the shareholder's interests as a shareholder.

Under this construction of the statutory scheme, to make out a claim of shareholder oppression in violation of MCL 450.1489(1), plaintiffs had to allege and be able to prove: (1) that they were shareholders of the corporation; (2) that defendants were "directors" or "in control of the corporation"; (3) that defendants engaged in acts; and (4) that those acts were "illegal, fraudulent, or willfully unfair and oppressive" to the corporation or to them as shareholders. See MCL 450.1489(1). To the extent that plaintiffs maintained that defendants' acts were willfully unfair and oppressive to them as shareholders, they had to be able to prove that the acts amounted to a "continuing course of conduct or a significant action or series of actions that substantially" interfered with their interests as shareholders

and that defendants took those acts with the intent to interfere with their interests as shareholders. MCL 450.1489(3).

D. THE BUSINESS-JUDGMENT RULE

Defendants also argued before the trial court and continue to argue on appeal that their decision to retain cash and refrain from paying out dividends cannot serve as evidence of shareholder oppression because their decisions are protected by the business-judgment rule. Our Supreme Court has explained that courts generally will not substitute their judgment for that of directors concerning dividend policies in the absence of evidence that the policy was fraudulent or done in bad faith. *In re Butterfield Estate*, 418 Mich 241, 255; 341 NW2d 453 (1983). This is because courts are reluctant to intervene in the affairs of corporate bodies absent a clear showing of actual or impending wrong. *Reed v Burton*, 344 Mich 126, 130; 73 NW2d 333 (1955). Under the business-judgment rule, courts refrain from interfering in matters of business judgment and discretion unless the directors or officers "are guilty of willful abuse of their discretionary powers" or act in bad faith. *Id*. at 131 (quotation marks and citation omitted).

In this case, plaintiffs did not ask the trial court to review the soundness of defendants' business decisions. Rather, they alleged and presented evidence that defendants' decisions were not taken for legitimate business reasons but were, instead, taken to defraud or oppress plaintiffs' interests as shareholders. Under MCL 450.1489(1) and MCL 450.1489(3), the Legislature identified acts by directors or persons of a corporation that are inherently wrongful and would warrant court intervention. Accordingly, a shareholder

necessarily overcomes the business-judgment rule by presenting evidence to establish the elements of a claim under the shareholder-oppression statute because that statute identifies wrongful conduct and provides a remedy for it. *Reed*, 344 Mich at 130-131; see also *Wayne Co Prosecuting Attorney v Nat'l Mem Gardens*, 366 Mich 492, 496; 115 NW2d 312 (1962) (stating that the business-judgment rule applies only "where there has been no fraud, misconduct, or abuse of discretion by the officers and directors"). Accordingly, the business-judgment rule does not prohibit a court from reviewing the totality of the evidence when evaluating defendants' business decisions—including their dividend policy—to determine whether the evidence showed that defendants formulated their policy in bad faith and as part of a plan to commit acts amounting to shareholder oppression under MCL 450.1489(1). For this reason, we reject defendants' arguments that the trial court could not consider defendants' dividend policy, their failure to divulge Gosling's valuation, or the fairness of their $62 per share offer when considering whether defendants engaged in shareholder oppression.

E. SUMMARY DISPOSITION: LIABILITY

On appeal, defendants argue that the trial court erred by granting summary disposition in favor of plaintiffs because genuine issues of material fact existed with respect to whether defendants' alleged actions met the requirements of MCL 450.1489(1). We agree.

In their motion for summary disposition, plaintiffs asserted that the undisputed facts showed that defendants took acts that were illegal, fraudulent, or willfully unfair and oppressive within the meaning of

MCL 450.1489(1) and that under MCL 450.1489(1)(e), the appropriate remedy was to order redemption of the shares at fair value. It was undisputed that plaintiffs did not have any voting rights as shareholders of Burr Oak, were not employed by Burr Oak, were not directors, and had no role in the management of the corporation. Thus, it was undisputed that plaintiffs' ability to derive pecuniary benefit from their shares depended on the acts of the voting shareholders who had exclusive control over Burr Oak. Plaintiffs presented evidence that Burr Oak had consistently paid dividends to the nonvoting shareholders throughout the years with the exception of the past few years after the death of Newell A. Franks. The evidence showed that plaintiffs had not been receiving the only benefit that ownership of their Class B and C shares had provided before the events at issue; namely, the payment of regular dividends.

Plaintiffs also presented evidence that permitted an inference that by 2012, defendants had embarked on a plan to devalue plaintiffs' shares. Plaintiffs showed that Burr Oak was financially sound and had completed a multiyear debt-reduction plan, which included the completion of the obligations arising from Newell A. Franks's estate. Plaintiffs cite a January 2012 e-mail by Newell A. Franks II in which he noted that Burr Oak had the resources to pay a $1.2 million dividend or to repurchase Class B and C shares. The evidence nevertheless showed that although Burr Oak could return to paying dividends, as was its historical practice, defendants caused Burr Oak to continue withholding the payment of dividends under circumstances that could be indicative of shareholder oppression.

Plaintiffs presented e-mail communications between David Franks, Newell A. Franks II, and Brian McConnell that showed that they had embarked on a

plan to purchase the Class B and C shares in September 2011 and that they understood the value of those shares to be anywhere from approximately $250 per share to $332 per share. They also identified testimony by Newell A. Franks II in which he agreed that the board of directors intended to implement a program to buy out the shareholders in 2012. Plaintiffs presented an e-mail in which Newell A. Franks II wrote to David Franks and Brian McConnell, acknowledging that the nonvoting shares had a value of $352 per share but stating that he suspected that certain shareholders might take less for "cash today." This e-mail permitted an inference that Newell A. Franks II understood that they might take advantage of the Class B and C shareholders' need for "cash today" to repurchase the shares at a discount.

Plaintiffs identified evidence that Gosling prepared an updated valuation for the redemption plan at the request of Newell A. Franks II and that Gosling valued the shares at $356.22 with substantial discounts for marketability; if one did not apply any discounts, the approximate value would be $598 per share using Gosling's valuation of Burr Oak. Plaintiffs demonstrated that defendants did not disclose the revised valuation before offering plaintiffs just $62 per share at a time when the Class B and C shareholders had received no dividends for years. They further cited e-mails between Brian McConnell, David Franks, and Newell A. Franks II that suggested that the $62 per share offer was not premised on any actual or reasonable valuation and that they wanted to conceal that fact from the Class B and C shareholders. They also cited Gosling's deposition testimony—in which he admitted that he sent Newell A. Franks II an e-mail informing him that the $62 per share offer was a good offer considering that the shares had no value if the

board of directors was not issuing dividends and would not otherwise repurchase the shares—as evidence that defendants knew that their actions were devaluing the Class B and C shares and were trying to take advantage of that fact. Plaintiffs further presented evidence that defendants made two additional offers to repurchase shares at increasingly higher values after plaintiffs balked at the offer of $62 per share. Notably, there was evidence that the shareholders had in the past received *annual* dividend payments that were on par with the one-time offer to purchase the shares at $62 per share; stated another way, defendants' offer of $62 per share was akin to an offer to pay one last dividend in exchange for plaintiffs' agreement to relinquish their ownership interests. Plaintiffs argued in the trial court that this evidence suggested that the $62 per share offer was done in bad faith.

Taken together, this evidence established that defendants acted in concert to take acts that were willfully unfair and oppressive to plaintiffs as shareholders. See MCL 450.1489(1) and MCL 450.1489(3). The evidence, if left unrebutted, showed that plaintiffs could only realize value in their shares if Burr Oak issued dividends or purchased their shares. The evidence further established that Burr Oak had not been paying dividends for years, which left plaintiffs without income from their shares for a substantial period. The evidence showed that defendants knew that the Class B and C shares had a substantial value when considered in light of Burr Oak's actual market value and historical dividend practices, but the evidence showed that they also understood that they could—in effect—devalue those shares by refusing to pay dividends. The evidence showed that defendants then made an extremely low offer to purchase the Class B and C shares after obtaining a report that strongly

suggested that the shares were worth hundreds of dollars more per share. In the absence of evidence to justify the $62 per share offer or to establish a legitimate business reason for refusing to pay dividends despite the company's ability to pay and historical practices, the evidence cited by plaintiffs established that defendants collectively took acts that substantially interfered with plaintiffs' interests as shareholders—their right to receive reasonable dividend payments or to sell their shares at a fair value—and that they did so with the intent to substantially interfere with those shareholder rights. Plaintiffs thus made a properly supported motion for summary disposition on the issue of liability under MCL 450.1489(1), and for that reason, they were entitled to summary disposition unless defendants responded and identified evidence that established that there was a question of fact on the issue of liability. See *Barnard Mfg*, 285 Mich App at 370.

In their own motion for summary disposition, defendants proffered evidence that Burr Oak had legitimate business reasons for withholding the payment of dividends. Defendants cited an affidavit by Brian McConnell in which he averred that Burr Oak was required to retire significant debt related to the estate of Newell A. Franks, which was the reason that Burr Oak had not paid dividends for several years. He further averred that after the estate obligations were finally paid in 2012, the board determined that the best way to maximize the value of the shareholders' shares was to expand Burr Oak's facilities. Brian McConnell stated that Burr Oak had in the past missed delivery expectations and that it needed to expand to meet market expectations. For these reasons, he averred, the board decided not to pay dividends in order to retain cash to meet its needs even after the board paid its obligations related to Newell A. Franks's estate.

In their memorandum in opposition to plaintiffs' motion for partial summary disposition, defendants reasserted the business reasons stated in Brian McConnell's affidavit as evidence that defendants' actions were not fraudulent or willfully unfair and oppressive. They also supplemented his affidavit with a second affidavit. In the supplemental affidavit, Brian McConnell averred that Burr Oak made approximately $8.5 million in improvements after it met its obligations related to Newell A. Franks's estate. He also explained that Burr Oak's net cash position was actually lower than its total cash on hand. He offered that Burr Oak's net cash position was actually in the negative as of June 2014. Defendants also presented evidence that they eventually offered to purchase plaintiffs' shares at $248 per share, which, they stated, was reasonably based on an earlier offer. They presented evidence that they eventually disclosed Gosling's valuation report to plaintiffs and asserted that plaintiffs had the information available to assess the value of their own shares. Defendants argued that the evidence showed that they did not take acts that were fraudulent or willfully unfair and oppressive. Instead, they made legitimate business decisions related to the operation of Burr Oak.

Defendants' evidence, if believed, would support a finding that defendants caused Burr Oak to hold its cash, rather than pay dividends to its shareholders, for legitimate business reasons and not with the intent to substantially interfere with plaintiffs' interests as shareholders. MCL 450.1489(3). Their evidence also permitted an inference that the board made the various offers to purchase plaintiffs' shares as part of a legitimate bargaining tactic and not as an attempt to force plaintiffs to sell their shares at a severe discount under the pressure created by the failure to pay dividends. Accordingly, defendants established a ques-

tion of fact as to whether their acts were fraudulent or willfully unfair and oppressive within the meaning of MCL 450.1489(1) and MCL 450.1489(3). Because the trial court could not resolve questions of fact on a motion for summary disposition, *White*, 275 Mich App at 625, the trial court erred when it granted plaintiffs' motion for summary disposition.

F. SUMMARY DISPOSITION: REMEDY

Defendants also argue on appeal that the trial court erred when it selected a remedy despite the fact that there were numerous questions of fact implicating the proper remedy. We agree.

The Legislature provided that a court hearing a shareholder-oppression claim has broad authority to fashion a remedy for the shareholder oppression:

> If the shareholder establishes grounds for relief, the circuit court may make an order or grant relief as it considers appropriate, including, without limitation, an order providing for any of the following:
>
> (a) The dissolution and liquidation of the assets and business of the corporation.
>
> (b) The cancellation or alteration of a provision contained in the articles of incorporation, an amendment of the articles of incorporation, or the bylaws of the corporation.
>
> (c) The cancellation, alteration, or injunction against a resolution or other act of the corporation.
>
> (d) The direction or prohibition of an act of the corporation or of shareholders, directors, officers, or other persons party to the action.
>
> (e) The purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts.

> (f) An award of damages to the corporation or a shareholder. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued, or within 2 years after the shareholder discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. [MCL 450.1489(1).]

As our Supreme Court has recognized, the statute provides that a trial court may refuse to grant any relief, even though the shareholder might have established acts of shareholder oppression, if the equities warrant the refusal. See *Madugula*, 496 Mich at 711. As already noted, our Supreme Court has held that a claim of shareholder oppression sounds in equity. *Id*. Defendants in this case presented evidence that—if believed—would permit an inference that they chose to withhold dividends for legitimate business reasons. They also presented evidence that Burr Oak needed to make improvements to remain competitive. This evidence, even if this Court were to conclude that it did not establish a question of fact on the issue of liability, implicated the potential for alternative relief. Additionally, defendants maintained that Burr Oak would not be able to purchase plaintiffs' shares at full value in the short term without harming the company. They further noted that the company employs hundreds of employees in the local community whose welfare could be impacted.

A drastic remedy—such as the forced purchase of the Class B and C shares at a price and over a term that threatens the viability of the business—clearly implicates the interests of innocent third parties. We acknowledge that the trial court had broad discretion to fashion a remedy to fit the equities of the case. MCL 450.1489(1). However, it could have ordered the payment of dividends, could have converted the Class B

and C shares into voting shares, could have ordered the appointment of a disinterested director or directors, or provided other relief necessary to correct and prevent oppressive conduct short of a forced purchase plan that might harm Burr Oak as a going concern. See, e.g., *Stott Realty Co v Orloff*, 262 Mich 375, 381; 247 NW 698 (1933) (recognizing the trial court's "ample power" to provide relief for "substantially all corporate ills"); MCL 450.1489(1). Even if the trial court determined that a forced purchase plan best served all the affected parties, it might have been persuaded by the evidence that the sale should be structured in a way that better preserved the integrity of Burr Oak as a going concern. In any event, given the conflicting evidence before the trial court, it could not decide as a matter of law what remedy best fit the equities of the case. Accordingly, the trial court additionally erred by granting summary disposition on the remedy because the record had not been developed sufficiently to permit the court to select an appropriate remedy. See *White*, 275 Mich App at 625; MCR 2.116(C)(10).[5]

G. MCL 450.1489(1)(e)

Defendants next argue that the trial court erred in its valuation of the shares at issue and that it ought to have discounted the price for the shares on the basis of marketability and lack of control. We disagree.[6]

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[5] To the extent defendants also argue that the trial court erred by not allowing them to depose Eric Larson, the independent expert with regard to the remedy in this case, we will not address this claim of error. Although defendants asserted this claim in the statement of questions presented, they did not address it in any way in their brief on appeal. By failing to analyze this issue, defendants have abandoned it on appeal. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[6] While we have concluded that the trial court improperly granted summary disposition in favor of plaintiffs, we address this issue for the benefit of the trial court on remand if necessary.

One of the several possible remedies for shareholder oppression stems from MCL 450.1489(1)(e), which allows for "[t]he purchase at fair value of the shares of a shareholder, either by the corporation or by the officers, directors, or other shareholders responsible for the wrongful acts." It is noteworthy that the Legislature referred to "fair value" rather than "fair market value." "Fair market value" generally refers to "the amount of money that a ready, willing, and able buyer would pay for the asset on the open market[.]" *Wolfe-Haddad v Oakland Co*, 272 Mich App 323, 326; 725 NW2d 80 (2006). A fair market value would, therefore, take into consideration the fact that a ready, willing, and able buyer might discount the value of the shares on the basis of limitations inherent in the shares.

In interpreting their respective shareholder-oppression statutes, some foreign authorities recognize that it is unfair to discount the value of shares in the context of shareholder oppression because the discounts would, in effect, allow the majority to force out the minority without paying a fair share of the enterprise's value. For that reason, those authorities have interpreted "fair value" to have a technical meaning that is different from "fair market value." See, e.g., *HMO-W, Inc v SSM Health Care Sys*, 234 Wis 2d 707, 717-723; 2000 WI 46; 611 NW2d 250 (2000) (surveying authorities and concluding that fair value should not be treated as synonymous with fair market value); *Colombia Mgt Co v Wyss*, 94 Or App 195, 202-206; 765 P2d 207 (1988) (noting that there are "no hard and fast rules for determining the fair value" of corporate shares and concluding that a minority discount was not appropriate in that case to discern the "fair value" of corporate stock because the statute at issue "is not designed to produce the equivalent of a sale on the open market; rather, it is a legislative remedy for

minority shareholders who find their interests threatened by significant corporate changes and who may have no other recourse"). Nevertheless, although they recognize that those discounts are generally inappropriate in the context of shareholder oppression, some jurisdictions have recognized that what constitutes a fair value depends on the circumstances of each case. See, e.g., *Brynwood Co v Schweisberger*, 393 Ill App 3d 339, 353; 913 NE2d 150 (2009) ("Some of the factors that may be relevant to a determination of fair value [of corporate stock] include the stock's market price, the corporation's earning capacity, the investment value of the shares, the nature of the business and its history, the economic outlook of the business and the industry, the book value of the corporation, the corporation's dividend paying capacity, and the market price of stock of similar businesses in the industry. Although 'fair value' is not synonymous with 'fair market value,' fair market value is another relevant factor to be considered.") (citations omitted); *Balsamides v Protameen Chemicals, Inc*, 160 NJ 352, 374-377; 734 A2d 721 (1999) (recognizing that fair value is not synonymous with fair market value and stating that discounts are generally not appropriate except when fairness and equity warrant the application of a discount); *Robblee v Robblee*, 68 Wash App 69, 77-80; 841 P2d 1289 (1992) (surveying cases and holding that a minority discount was not justified under the facts).

In our opinion, the Legislature used the term "fair value" to distinguish the remedy from purchase at "fair market value." Nevertheless, nothing within the statute precludes a trial court from considering fair market value when determining fair value. See, e.g., *Morley Bros v Clark*, 139 Mich App 193, 197-198; 361 NW2d 763 (1984) (stating that the trial court did not err when it determined the value of shares under a different

statute by using various valuation methods, including a net-asset approach and a market-value approach). Likewise, the statutory scheme as a whole does not preclude a trial court from applying discounts when crafting a remedy. See MCL 450.1489.

In providing for relief under MCL 450.1489(1), the Legislature stated that a trial court could "order or grant relief as it considers appropriate[.]" The Legislature further provided that the relief "may" include "without limitation" the "purchase at fair value of the shares of a shareholder[.]" MCL 450.1489(1)(e). The Legislature did not define "fair value." However, by stating that the trial court "may" order the purchase of the shares at issue at "fair value" "without limitation," the Legislature indicated that trial courts were not required to order such relief, but may do so if appropriate. Stated differently, the Legislature gave the trial court broad authority to fashion its remedy to suit the equities of the case—that is, to fashion a remedy that was "appropriate" under the circumstances. MCL 450.1489(1). Therefore, while the trial court has the authority under MCL 450.1489(1)(e) to order that defendants purchase plaintiffs' respective shares at "fair value," nothing within the statutory scheme *requires* the trial court to value the shares in any particular way. Given the Legislature's broad grant of authority to craft a remedy for shareholder oppression under MCL 450.1489(1), we conclude that a trial court is required to order an "appropriate" remedy, which may include an order to purchase shares at "fair value" or at any other value that the court concludes is appropriate under the totality of the circumstances. In this case, the trial court had the authority to value the shares without discounts under MCL 450.1489(1)(e) but was not *required* to do so. Because the trial court had authority to value the shares in any way that was

equitable under the totality of the circumstances, the trial court erred to the extent that it felt *compelled* to value the shares without any discounts. See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016) (stating that a trial court necessarily abuses its discretion when it premises its remedy on an error of law). For the benefit of the trial court on remand, if plaintiffs are successful in their claims and the court again chooses to order the purchase of the shares, we take this opportunity to clarify that it retains the discretion to value the shares in any way it determines appropriate under the totality of the circumstances, including a valuation at fair value as described in this opinion.

H. DEFENDANTS' REMAINING ARGUMENTS ON APPEAL

Defendants next argue that the trial court erred by denying their motion for summary disposition of plaintiffs' claims against LeeAnn McConnell. We disagree.

In their amended complaint, plaintiffs alleged for their seventh claim that each defendant participated in all the wrongful conduct alleged in the first six claims by knowingly and deliberately aiding and abetting each other in the commission of the wrongful conduct described in those claims. Our Supreme Court has held that multiple persons may be liable in tort for a single harm under a concert-of-action theory; under that theory, a plaintiff need only provide evidence that the defendants were jointly engaged in tortious activity that resulted in the plaintiff being harmed. *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). A defendant can also be held liable for a tort committed by some other person under a civil-conspiracy theory if the defendant combined with another person or persons by some concerted action "to

accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013) (quotation marks and citation omitted).

In response to defendants' motion for summary disposition of the claims against LeeAnn McConnell, plaintiffs provided evidence that LeeAnn McConnell repeatedly voted her shares in support of her own family members' control of Burr Oak; she also repeatedly voted to have her husband, her father, and her brothers serve as the directors. Plaintiffs also presented evidence that LeeAnn McConnell stated that she played an important role in determining the direction that Burr Oak would take, even though she was not a director or officer. In an e-mail, LeeAnn McConnell acknowledged Jeffrey Franks's desire to be appointed as a director, but she stated that there were "issues, past and present" with the Franks family that had to be worked out first. She further wrote that she had promised her grandfather that she would ensure that the Burr Oak companies would remain part of the Sturgis community. She indicated that she would continue to do the " 'heavy lifting' " to see to it that the legacy continued. Plaintiffs further cited testimony by Richard Franks in which he testified that LeeAnn McConnell, along with the other defendants, "besieged" him with questions about selling his stock.

A reasonable finder of fact, viewing this evidence in the light most favorable to the nonmoving party, *Maiden*, 461 Mich at 120, could conclude that LeeAnn McConnell knowingly acted in concert with the other defendants to oppress the nonvoting members' interests as shareholders by repeatedly supporting their membership on the board and actively working behind

the scenes to further their agenda. However, because there was a question of fact as to whether LeeAnn McConnell participated in the acts of shareholder oppression by the other defendants, *Abel*, 418 Mich at 338, the trial court did not err when it denied defendants' motion for summary disposition of the claims against LeeAnn McConnell, *Barnard Mfg*, 285 Mich App at 369.[7]

III. CONCLUSION

The trial court's March 27, 2018 order dismissing this action with prejudice is reversed. We also reverse the trial court's October 24, 2016 order granting plaintiffs' motion for summary disposition regarding oppression and the appropriate remedy, and vacate its August 31, 2017 order requiring Burr Oak to purchase plaintiffs' shares within two years for $712 per share. We remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

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[7] Given our disposition of this appeal we decline to address defendants' cursory remaining arguments, not included in their statement of the issues on appeal, addressing the trial court's award of attorney fees and interest to plaintiffs. *Seifeddine v Jaber*, 327 Mich App 514, 521; 934 NW2d 64 (2019).

PEOPLE v ALLEN

Docket No. 343225. Submitted August 13, 2019, at Detroit. Decided October 1, 2019, at 9:00 a.m. Reversed and remanded 507 Mich 597 (2021).

Erick R. Allen was convicted by a jury of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). On July 12, 2017, Allen was arrested for possession of cocaine while on parole for a separate offense not related to the instant case. On July 13, 2017, he was released on his own recognizance. After missing a court hearing, Allen was rearrested on August 16, 2017, and on August 17, 2017, the district court set a cash or surety bond of $5,000. On August 31, 2017, Allen posted bond and was released from jail. However, Allen was arrested again on September 5, 2017, after he tested positive for cocaine, and a parole detainer was issued by the Michigan Department of Corrections (MDOC) asking the Monroe County Jail to hold Allen. On September 8, 2017, the trial court set a cash or surety bond of $25,000, but Allen remained in custody through his conviction for possession of cocaine on January 8, 2018, and his sentencing hearing for that offense on March 1, 2018. The trial court, Michael A. Weipert, J., sentenced Allen as a fourth-offense habitual offender, MCL 769.12, to 30 to 180 months in prison, with zero days credit for time served. Allen argued on appeal that he was entitled to jail credit for the time he spent in jail between July 12, 2017, and July 13, 2017; August 16, 2017, and August 31, 2017; and September 5, 2017, and March 1, 2018.

The Court of Appeals *held*:

1. Under MCL 769.11b, a person who is convicted of a crime and has served time in jail before sentencing because of being denied or unable to furnish bond is entitled to credit against the sentence imposed by the trial court for the time served before sentencing. There is an exception to this rule, however. In *People v Idziak*, 484 Mich 549 (2009), the Supreme Court held that the jail credit statute is not applicable, pursuant to MCL 791.238(2), when a parolee violates the terms of parole and a warrant is issued for his or her arrest. On the date of the arrest for the new criminal offense, the parolee resumes serving the sentence for the previous conviction. Since a parolee in this situation is not being

held because of being denied or unable to furnish bond, MCL 769.11b is not applicable. However, *Idziak* did not directly address the situation in this case, when a parolee is held before sentencing because he is unable to furnish bond and no parole detainer has been issued. Nevertheless, the Court's analysis in *Idziak* applies to circumstances in which the MDOC has issued a detainer and when it has not, as in this case. Therefore, regardless of whether a detainer has been issued for a parolee who has been arrested, the parolee continues to serve the original sentence and is not entitled to credit for time served toward the sentence for the new offense.

2. Trial counsel was not ineffective for failing to raise the issue of jail credit because the issue lacked merit, so Allen was not prejudiced by counsel's alleged failure.

Affirmed.

CAMERON, J., concurring, agreed with the majority that under *People v Idziak*, 484 Mich 549 (2009), parolees may not receive jail credit under MCL 769.11b, but wished to examine the merits of the prosecution's argument that Allen was entitled to partial jail credit under the statute for the time that he was incarcerated due solely to his inability to furnish bond. The plain, unambiguous language of MCL 769.11b provides that "any person" who serves time in jail because he or she has been denied or is unable to post bond is entitled to jail credit against his or her future sentence. However, in *Idziak*, the Supreme Court held that the jail credit statute does not apply to parolees because parolees are always considered to be under the jurisdiction of the MDOC. Therefore, any time a parolee is rearrested and incarcerated, he or she is not incarcerated because of being denied or unable to furnish bond, but because the parolee has resumed serving the original sentence. The prosecution argued that when a parole detainer is placed on a parolee, the jail credit statute does not apply because the parolee is being held in jail on the parole detainer, not because of being denied or unable to furnish bond. However, as in this case, the MDOC does not always choose to place a detainer when a parolee is arrested for a new offense. Therefore, according to the prosecution, Allen is entitled to jail credit because he was jailed for 15 days following his rearrest on August 16, 2017, for no other reason than his inability to furnish bond. While the prosecutor's argument was entirely consistent with the plain language of MCL 769.11b, the Court's holding in *Idziak* allows no room to apply the statute to parolees.

SENTENCING — JAIL CREDIT — PAROLEES — PAROLE DETAINERS.

Under the jail credit statute, a parolee who is held before sentencing because he or she is unable to furnish bond is not entitled to

jail credit for time served before sentencing even if a parole detainer has not been issued (MCL 769.11b).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael G. Roehrig*, Prosecuting Attorney, and *Jonathan A. Jones*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker* and *Lindsay A. Ponce*) for defendant.

Before: BECKERING, P.J., and SAWYER and CAMERON, JJ.

PER CURIAM. Defendant appeals as of right following his jury trial conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 30 to 180 months' imprisonment with zero days' credit for time served. We affirm.

On July 12, 2017, defendant was arrested for possession of cocaine, and on July 13, 2017, he was released on his own recognizance. Defendant was on parole at the time of his arrest. Defendant was rearrested on August 16, 2017, for missing a court hearing, and on August 17, 2017, the district court set a cash or surety bond of $5,000. On August 31, 2017, defendant was released from jail after posting bond.

On September 5, 2017, defendant was arrested again because he tested positive for cocaine. Also on that date, a parole detainer was signed asking the Monroe County Jail to hold defendant "until further notice." On September 8, 2017, the trial court set a cash or surety bond of $25,000. On January 8, 2018, defendant was convicted by jury of possession of less than 25 grams of cocaine. Defendant remained in jail

until his sentencing hearing on March 1, 2018, when he was sentenced to 30 to 180 months' imprisonment with no jail credit.

Defendant argues that he is entitled to jail credit for time served between July 12, 2017, and July 13, 2017; between August 16, 2017, and August 31, 2017; and between September 5, 2017, and March 1, 2018, and that trial counsel was ineffective for failing to argue that defendant was entitled to jail credit for these periods of time. We disagree.

A party preserves an issue for appeal when it raises the issue in the trial court and the court considers the issue. *People v Fyda*, 288 Mich App 446, 460 n 35; 793 NW2d 712 (2010). Defendant did not argue in the trial court that he was entitled to any jail credit. Thus, this issue is unpreserved for appeal. *Id*.

"To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id*. at 356. This Court reviews de novo issues of statutory interpretation. *People v Beard*, 327 Mich App 702, 707 n 3; 935 NW2d 118 (2019).

The statute addressing jail credit for time served while awaiting sentencing provides:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant

> credit against the sentence for such time served in jail prior to sentencing. [MCL 769.11b.]

In *People v Idziak*, 484 Mich 549, 552; 773 NW2d 616 (2009), our Supreme Court announced that there is an exception to the jail credit statute:

> We hold that, under MCL 791.238(2),[1] the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply.

This case presents a question that *Idziak* did not squarely address. What happens when a parolee is held before sentencing because he is unable to furnish bond and no parole detainer is in effect?[2] Here, defendant was jailed between July 12, 2017, and

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[1] MCL 791.238(2) provides:

> A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served. The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution.

[2] In his brief on appeal, defendant states that he was never held on a parole detainer. The prosecutor, however, maintains that a parole detainer was issued on September 5, 2017. Because we conclude that defendant is not entitled to credit for time served regardless whether there was a detainer issued, we need not address this discrepancy. Moreover, while the prosecutor concedes that defendant is entitled to credit for 17 days served before the detainer was issued, we decline to accept that concession as it is erroneous.

July 13, 2017, and between August 16, 2017, and August 31, 2017, before, according to the prosecutor, a parole detainer was signed after defendant's arrest on September 5, 2017. While *Idziak* clearly holds that defendant is not entitled to jail credit from the time the parole detainer was signed on September 5, 2017, until the date of his sentencing on March 1, 2018, *Idziak* does not specifically address whether defendant is entitled to jail credit for his earlier periods of jail time.

But the *Idziak* Court did observe that when a parolee is arrested on a new offense, and is lodged in jail, the parolee is considered to still be serving his original sentence:

> While on parole, the prisoner "shall be considered to be serving out the sentence imposed by the court," MCL 791.238(6), but he "remain[s] in the legal custody and under the control of the department," MCL 791.238(1). When there has been a "probable violation of parole," the DOC may issue a warrant for the parolee's return. MCL 791.238(1). Moreover, if "reasonable grounds" exist to believe that the parolee violated his parole, he may be "arrested without a warrant and detained in any jail of this state." MCL 791.239.
>
> Under MCL 791.238(2), a "prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services . . . *is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment,*" but the "time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served." (Emphasis added.) Because a paroled prisoner is considered to be serving his sentence as long as he remains in compliance with the terms of his parole, MCL 791.238(6), *except* "from the date of the declared violation to the date of the prisoner's availability for return to an institution," MCL 791.238(2), the second part of MCL 791.238(2) establishes that the time *after* "the date of the prisoner's availability

> for return to an institution" *is* to be counted as time served against the parolee's original sentence. For a prisoner paroled and arrested again in Michigan, the parolee's "date of . . . availability" is effectively the date of his arrest. See *Browning v Michigan Dep't of Corrections*, 385 Mich 179, 188-189; 188 NW2d 552 (1971). The phrase "date of . . . availability" indicates that the parolee resumes serving his earlier term of imprisonment when arrested and detained in jail even though he has not yet been returned to the physical custody of the DOC. [*Idziak*, 484 Mich at 564-566 (citations omitted).]

The Court's discussion covers both the circumstances in which the DOC has issued a detainer and when it has not. That is, in either scenario, because the parolee is subject to arrest for a parole violation without a warrant, the parolee continues to serve his original sentence. In sum, while *Idziak* may not have squarely addressed the detainer issue, its analysis covers both circumstances in which a detainer is issued and in which one was not issued. And, in either case, the parolee is not entitled to any credit for time served on the new offense.

Furthermore, because the issue lacks merit, trial counsel was not ineffective for failing to raise the issue, as there was no prejudice to defendant. *People v Shaw*, 315 Mich App 668, 672; 892 NW2d 15 (2016).

Affirmed.

BECKERING, P.J., and SAWYER, J., concurred.

CAMERON, J. (*concurring*). This case poses a straightforward question: are parolees entitled to receive credit for the time they serve in jail under MCL 769.11b if they were denied bond or could not furnish bond on a new offense, or is the jail credit statute inapplicable to them because they are parolees? I agree with the

majority that Michigan Supreme Court precedent prevents parolees from ever receiving jail credit under MCL 769.11b. However, I write separately to examine the merit of the prosecution's assertion on appeal that defendant, who is a parolee, is entitled to partial jail credit under MCL 769.11b for the time he was incarcerated due solely to his inability to furnish bond.

Jail credit is governed by MCL 769.11b, and statutes are interpreted according to their plain language. *People v Barrera*, 278 Mich App 730, 736; 752 NW2d 485 (2008). Where the language of the statute is unambiguous, it must be applied as written. *Id*.

MCL 769.11b provides as follows:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Therefore, the plain and unambiguous language of MCL 769.11b provides that "any person" who serves time in jail because he is unable to post bond or is denied bond for the offense of which he is convicted is statutorily entitled to have the time he served in jail in relation to the "offense of which he is convicted" deducted from his future sentence.

However, in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009), our Supreme Court held that the jail credit statute does not apply to parolees. More specifically, the *Idziak* Court held the following:

> [W]e hold that the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony,

> the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond" for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply. [*Id*. at 562-563.]

In other words, the time a parolee serves in jail before being sentenced on a new offense can only be credited against the balance of the parolee's remaining prison sentence—never against the sentence for the new offense that actually caused the defendant to be incarcerated in jail. The *Idziak* Court's rationale for not applying the jail credit statute to parolees is based on the notion that parolees are always considered to be under the jurisdiction of the Michigan Department of Corrections (MDOC); and, when parolees are arrested for a new offense, they automatically resume serving the balance of their prison sentence. See *id*. at 564-565. Thus, the *Idziak* Court reasoned that any time parolees are incarcerated for a new offense, they are incarcerated not because they were "denied or unable to furnish bond" for the new offense of which they are convicted, but instead because they have actually resumed serving their prison sentence. See *id*. at 566-567. Under this framework, a parolee is continually serving his or her sentence until he or she has fulfilled the maximum sentence or is discharged from parole.[1]

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[1] The exception to this rule is that a parolee stops receiving credit on his or her prison sentence when the parolee violates parole and the MDOC issues a parolee arrest warrant.

> A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and

The prosecution's argument that defendant is entitled to partial jail credit under MCL 769.11b requires an understanding of parole detainers and how the MDOC uses them. Simply put, when a parolee is arrested for committing a new offense while on parole, the MDOC can issue a warrant for the parolee's return, MCL 791.238(1),[2] or cause the parolee to be detained "in any jail of this state," MCL 791.239.[3]

> is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served. The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution. [MCL 791.238(2).]

Although not addressed in *Idziak*, there is a considerable difference between MDOC arrest warrants issued under MCL 791.238(2) and MDOC parole detainers like the one issued in this case. An MDOC arrest warrant authorizes the arrest of suspected parole violators who are not already in custody. Our Legislature has made the clear policy decision that these not-in-custody parolees shall not receive credit against their prison sentence because they are considered to be "escaped prisoners." Parole detainers, on the other hand, are issued by the MDOC in order to ensure that county jails detain parolees who are already in jail until the parole hold is removed.

[2] MCL 791.238(1) provides, in relevant part, the following: "The deputy director of the bureau of field services, upon a showing of probable violation of parole, may issue a warrant for the return of any paroled prisoner."

[3] MCL 791.239 provides the following:

> A probation officer, a parole officer, a peace officer of this state, or an employee of the department other than a probation or parole officer who is authorized by the director to arrest parole violators may arrest without a warrant and detain in any jail of this state a paroled prisoner, if the probation officer, parole officer, peace officer, or authorized departmental employee has reasonable grounds to believe that the prisoner has violated parole or a warrant has been issued for his or her return under [MCL 791.238].

In practice, this means that jails will not release parolees with a parole detainer regardless of whether the parolees have furnished the bond necessary for their release. The prosecution argues that when a parole detainer is placed on a parolee, the jail credit statute simply does not apply because the parolee is being held in jail on the parole detainer, not "because of being denied or unable to furnish bond." MCL 769.11b. I wholeheartedly agree with the prosecution that the plain language of the jail credit statute precludes defendant from receiving jail credit after the parole detainer was placed on him by the MDOC.

However, as this case demonstrates, the MDOC does not always choose to place a detainer when a parolee is arrested for a new offense. In this case, the MDOC chose not to immediately place a detainer on defendant when he was arrested for committing a new offense while on parole. Instead, the MDOC opted to allow defendant the opportunity to complete a drug rehabilitation program. Because the district court issued defendant a personal recognizance bond, defendant was released from jail the following day, and he began participating in the program. However, after defendant missed several court dates, the district court issued a warrant for defendant's arrest. Defendant was rearrested and served an additional 15 days in jail; defendant served that jail time, according to the prosecution, "for no other reason than his inability to furnish bond." Defendant eventually posted bond and was released from jail to again participate in drug treatment. He was arrested less than a week later because he tested positive for cocaine. The MDOC placed a parole detainer on defendant the same day, and it remained in effect until the time of defendant's sentencing.[4] On appeal, the prosecution "con-

[4] After defendant was bound over to the circuit court, the court ordered defendant to post a cash or surety bond in the amount of $25,000.

cedes . . . that [defendant] is entitled to [17 days of jail credit] as there was no parole detainer at that time, and [defendant] was being held solely because he could not furnish bond."

While I believe that the prosecution's argument is entirely consistent with the plain and unambiguous language of the jail credit statute, I must concur with the majority that *Idziak*'s holding allows no room to apply MCL 769.11b to parolees.

PEOPLE v KATZMAN

Docket No. 345173. Submitted September 4, 2019, at Detroit. Decided October 3, 2019, at 9:00 a.m. Vacated in part and leave denied in part 505 Mich 1053 (2020).

Mark S. Katzman was convicted following a bench trial in the Oakland Circuit Court, Rae Lee Chabot, J., of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). During an undercover drug-trafficking investigation, police officers purchased fentanyl and cocaine from Jessica Engisch, and Engisch told the officers that she could get drugs from defendant. Ultimately, the officers executed a search warrant on Engisch's motel room; the officers found cocaine and seized Engisch's cell phone pursuant to the search warrant. The following day, a police officer responded to a text message on Engisch's phone that defendant had sent to Engisch; the officer, posing as Engisch, sent defendant a text message that told defendant to come to Engisch's motel room. When defendant arrived, the officers questioned him about his possible participation in a drug-trafficking incident. Defendant admitted that he was at the motel to pick up his money from various cocaine sales. Defendant was subsequently arrested and charged with two counts of delivery of less than 50 grams of cocaine. Defendant moved to suppress the statements he made to the police admitting that he had sold cocaine to Engisch, arguing that the statements were illegally obtained in violation of US Const, Ams IV, V, and XIV and Const 1963, art 1, §§ 11 and 17 because the search warrant did not allow officers to send a "fraudulent message" to defendant, because defendant had a reasonable expectation of privacy in the text-message exchange with Engisch, and because the police officer trespassed on defendant's property by causing a text message to appear on his cell phone. Defendant was convicted and sentenced to three days in jail and one year of probation for each conviction. Defendant appealed.

The Court of Appeals *held*:

1. US Const, Am IV and Const 1963, art 1, § 11 protect against unreasonable searches and seizures. The United States and Michigan Constitutions are coextensive in this regard. An individual may challenge an alleged Fourth Amendment violation if he or she can show that under the totality of the circumstances he or she had

a legitimate expectation of privacy in the area searched and that his or her expectation of privacy was one that society is prepared to recognize as reasonable. A defendant bears the burden of establishing that he or she has standing to invoke the Fourth Amendment's protections. Factors relevant to the determination of standing include ownership, possession, control of the area searched or item seized, historical use of the item, and ability to regulate access. The right to be free from unreasonable searches and seizures is personal, and the right cannot be invoked by a third party. In this case, the only area searched was Engisch's cell phone, which was searched through the execution of a lawful search warrant. While defendant had a legitimate expectation of privacy in the contents of his own cell phone, and while cell phones are recognized as "effects" for Fourth Amendment purposes, defendant's cell phone never was searched, nor was any information seized from it. Defendant, as a third party to the search, seizure, and subsequent use of Engisch's cell phone, could not demonstrate any ownership, possession, control, historical use, or ability to regulate Engisch's cell phone. Once defendant sent the initial text message to Engisch's cell phone, he no longer had an expectation of privacy in the text-message exchange. Accordingly, because defendant failed to show that he had a legitimate expectation of privacy in the area searched, defendant lacked standing to invoke the Fourth Amendment's protections.

2. Defendant's argument that the police officer trespassed on his property by causing a text message to appear on his cell phone was without merit. The text message that the police officer sent to defendant did not constitute a "digital trespass" under the United States Supreme Court's decision in *United States v Jones*, 565 US 400 (2012) (holding that the government's physical intrusion on the defendant's "effect" by placing a GPS tracking device on the defendant's vehicle constituted a "search" within the meaning of the Fourth Amendment), because in this case, a device was not physically attached to defendant's cell phone in order to track defendant's movement or private conversations. Rather, the text message that defendant received from law enforcement amounted to an electronic communication that did not occupy an actual physical space on defendant's personal property. Because the text message that defendant received from law enforcement did not constitute a physical trespass on his effect, defendant's reliance on *Jones* was misplaced. The proper inquiry was whether defendant had a reasonable expectation of privacy.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Marilyn J. Day*, Assistant Prosecuting Attorney, for the people.

Rockind Law (by *Noel Erinjeri*) for defendant.

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

JANSEN, P.J. Defendant, Mark Stanford Katzman, appeals as of right his June 7, 2018 bench-trial convictions of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*). Defendant was sentenced on July 24, 2018, to three days in jail and one year of probation for each conviction. We affirm.

I. RELEVANT FACTUAL BACKGROUND

This case arises from an undercover drug-trafficking investigation conducted by Farmington Hills Police Sergeant Eric Buckberry. Through a confidential informant, Sergeant Buckberry and other police officers were introduced to Jessica Engisch. On multiple occasions, the officers purchased fentanyl and cocaine from Engisch. During these transactions, Engisch told the officers that she could get drugs such as cocaine, marijuana, and heroin from defendant. Ultimately, the police officers executed a search warrant on Engisch's motel room. The officers found cocaine and seized Engisch's cell phone pursuant to the search warrant. The following day Sergeant Buckberry responded to a text message from defendant, as if he were Engisch, telling defendant that he could come to Engisch's motel room. When defendant arrived at Engisch's motel room, the police officers questioned him about his possible participation in a drug-trafficking incident.

Defendant admitted that he was at the motel to pick up his money from a cocaine sale the night before as well as from another sale a few weeks before. Defendant was arrested, transported to the Oakland County Jail, and charged with two counts of delivery of less than 50 grams of cocaine.

In the trial court, defendant moved to suppress his statements made to the police admitting that he had sold cocaine to Engisch. Defendant argued that the statements should be suppressed because they were illegally obtained in violation of US Const, Ams IV, V, and XIV and Const 1963, art 1, §§ 11 and 17. Defendant contended that although the search warrant allowed the police officers to search Engisch's cell phone, it did not allow them to use it to send a "fraudulent message" to defendant. Defendant further asserted that he had a reasonable expectation of privacy in the text-message exchange with Engisch and that the police trespassed on his personal effects by causing the text message to appear on his cell phone. The trial court denied defendant's motion to suppress, and this appeal followed.

II. MOTION TO SUPPRESS STATEMENTS

Defendant's argument on appeal relates to the trial court's denial of his motion to suppress his statements to the police admitting that he sold cocaine. Defendant argues that the trial court incorrectly denied his motion to suppress evidence because the search warrant only allowed the police officers to search the cell phone, not use it. We disagree. This Court reviews a trial court's ruling at a suppression hearing de novo. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). This Court reviews the trial court's findings of fact for clear error. *Id*.

We consider the standing question first because it presents the threshold issue of whether defendant can even assert a violation of the Fourth Amendment. We hold that defendant lacks standing to invoke protection from an unreasonable search or seizure as to Engisch's cell phone under US Const, Am IV and Const 1963, art 1, § 11 and that the trial court therefore did not err when it determined that law enforcement's search and use of Engisch's cell phone was proper. We also conclude that even if defendant had standing, his claimed Fourth Amendment violation nevertheless would fail.

A. STANDING

> The United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Fourth Amendment of the United States Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The corresponding provision of the Michigan Constitution provides, in part, "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures." Const 1963, art 1, § 11. [*People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016).]

The United States and Michigan Constitutions are coextensive in this regard. *People v Slaughter*, 489 Mich 302, 311; 803 NW2d 171 (2011).

To invoke the Fourth Amendment's protections, a defendant bears the burden of establishing that he or she has standing[1] to do so. *Mahdi*, 317 Mich App at 459.

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[1] The United States Supreme Court in *Rakas v Illinois*, 439 US 128, 140; 99 S Ct 421; 58 L Ed 2d 387 (1978), "dispens[ed] with the rubric of

An individual "may challenge an alleged Fourth Amendment violation if she can show under the totality of the circumstances that she had a legitimate expectation of privacy in the area searched and that her expectation of privacy was one that society is prepared to recognize as reasonable." *People v Mead*, 503 Mich 205, 214; 931 NW2d 557 (2019), citing *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984).[2] In this case, the only area searched was Engisch's cell phone, which was done through execution of a lawful search

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standing" in the Fourth Amendment context and stated that "the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing . . . ." However, use of the term "standing" still persists in search and seizure contexts. *People v Mead*, 503 Mich 205, 213 n 2; 931 NW2d 557 (2019). Essentially, rather than framing it as a standing issue, the question can be expressed as whether the defendant has stated a substantive Fourth Amendment claim on which relief may be granted. *Id*.

[2] The "area searched" language, which derives directly from *Rakas*, 439 US at 148-149, is not a geographic descriptor but rather delineates the circumstances under which a defendant may challenge a search. *Rakas* was describing a defendant's privacy expectation in a car's glove box, which is appropriately referred to as "an area" of the car. But the "area searched" language is properly understood as "a determination of whether the disputed search and seizure has infringed an *interest* of the defendant which the Fourth Amendment was designed to protect." *Mead*, 503 Mich at 213 n 2 (quotation marks and citation omitted; emphasis added). The "interest" of a defendant does not turn on location; as the United States Supreme Court famously observed, " 'the Fourth Amendment protects people, not places.' " *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967). Indeed, in the same string citation in which it cited *Rakas*, the *Mead* Court also cited *Smith*, 420 Mich 1. *Mead*, 503 Mich at 213. *Smith* held that "before a defendant may attack the propriety of a search or seizure, that search or seizure must have infringed upon an interest of the defendant which art 1, § 11 was designed to protect. In making this determination, the court must decide whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable." *Smith*, 420 Mich at 28; see also *Katz*, 389 US at 353 ("[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and sei-

warrant. Defendant certainly had a legitimate expectation of privacy in the contents of his own cell phone. See *Rakas* 439 US at 144 n 12 ("[O]ne who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude."). And courts have recognized that a cell phone is an "effect" for Fourth Amendment purposes. See *United States v Gardner*, 887 F3d 780, 784 (CA 6, 2018) (recognizing a cell phone as an "effect" protected by the Fourth Amendment); cf. *United States v Wurie*, 728 F3d 1, 14 (CA 1, 2013) (noting that "[t]oday, many Americans store their most personal 'papers' and 'effects,' U.S. Const. amend. IV, in electronic format on a cell phone, carried on the person"), aff'd sub nom *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

In this case, defendant's cell phone never was searched, and no information was seized from it. "The right to be free from unreasonable searches and seizures is personal, and the right cannot be invoked by a third party." *Mahdi*, 317 Mich App at 458-459; see also *Rakas*, 439 US at 134 ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). Factors relevant to the determination of standing, as noted, include ownership, possession, control of the area searched or item seized, historical use of the item, and ability to regulate access. *Mahdi*, 317 Mich App at 458-459. Defendant, as a third party to the search, seizure, and subsequent use of Engisch's cell phone, cannot demon-

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zures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

strate and has not demonstrated any ownership, possession, control, historical use, or ability to regulate Engisch's cell phone. Once defendant sent the initial text message to Engisch's cell phone, he no longer had an expectation of privacy in the text-message exchange. See *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). As noted, defendant bears the burden of establishing standing in order to invoke the Fourth Amendment's protections. *Mahdi*, 317 Mich App at 459. Defendant has not met his burden. Defendant referred to *State v Hinton*, 179 Wash 2d 862; 319 P3d 9 (2014), in which the Washington Supreme Court determined that a police officer's use of a third party's cell phone to ultimately arrest another individual violated the Washington Constitution. However, *Hinton* lends no support to the standing issue. A Washington Supreme Court decision is not binding on this Court; it is, at most, persuasive authority. *Travelers Prop Cas Co of America v Peaker Servs, Inc*, 306 Mich App 178, 188; 855 NW2d 523 (2014). *Hinton* is not persuasive on this point because it is factually dissimilar in that the police officers in that case did not have a search warrant for the third party's cell phone. *Hinton*, 179 Wash 2d at 865. Moreover, *Hinton* was decided under the Washington Constitution, which the court noted "is qualitatively different from the Fourth Amendment and provides greater protections." *Id*. at 868. By contrast, as already discussed, the Fourth Amendment and Article 1, § 11 of the 1963 Michigan Constitution are coextensive. *Slaughter*, 489 Mich at 311.[3]

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[3] Defendant also cites *People v Dziura*, unpublished per curiam opinion of the Court of Appeals, issued December 15, 2015 (Docket No.

Therefore, defendant has failed to show that he had a legitimate expectation of privacy in the area searched. As a result, defendant lacks standing to invoke the Fourth Amendment's protections, and his argument fails.

B. TRESPASS

Even if we were to find that defendant had standing to challenge the search, we nevertheless would reject his argument. Defendant argues that Sergeant Buckberry trespassed on his property by causing a text message to appear on his cell phone.

Defendant relies on the "trespass test" set out in *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012), to argue that the text message he received from law enforcement constituted a "digital trespass," resulting in a violation of his Fourth Amendment rights. In *Jones*, police officers attached a GPS tracking device to the defendant's vehicle and used the device to monitor the vehicle's movements. *Id*. at 402-403. The Supreme Court determined that the government's physical intrusion on the defendant's "effect" constituted a "search" within the meaning of the Fourth Amendment. *Id*. at 404-405. The Court's reasoning in *Jones* was based on the fact that the government "physically occupied private property for

323003), p 4, to argue that consent is a prerequisite to an officer using an individual's cell phone. Of course, *Dziura*, as an unpublished opinion, is not binding on us. MCR 7.215(C)(1). Moreover, *Dziura* turned on a consent analysis, as consent is an exception to the warrant requirement, and there was no search warrant in that case. Therefore, given the facts, the search in *Dziura* was valid only if consent was properly obtained. Here, consent is irrelevant because the police officers had a valid search warrant for Engisch's cell phone. Furthermore, unlike the police officers in *Dziura*, the police officers here did not use defendant's cell phone at all.

the purpose of obtaining information" without a search warrant. *Id*. at 404. The same reasoning does not apply here because a device was not physically attached to defendant's cell phone in order to track defendant's movement or private conversations. Rather, the text message that defendant received from law enforcement amounted to an electronic communication that did not occupy an actual physical space on defendant's personal property. Because the text message that defendant received from law enforcement did not constitute a physical trespass on his effect, defendant's reliance on *Jones* is misplaced. The proper inquiry is whether defendant had a reasonable expectation of privacy. See *id*. at 411 ("Situations involving merely the transmission of electronic signals without trespass . . . [are] subject to" the reasonable expectation of privacy test.).

Affirmed.

CAMERON and TUKEL, JJ., concurred with JANSEN, P.J.

PIONEER STATE MUTUAL INSURANCE COMPANY v MICHALEK

Docket Nos. 344567 and 344577. Submitted September 4, 2019, at Lansing. Decided October 3, 2019, at 9:05 a.m.

Justin Agresti filed a premises-liability action in the Berrien Circuit Court against Stephen and Barbara Michalek, his grandparents, claiming that he was injured when he rode his bicycle into a hole in the ground on their property in November 2011. The Michaleks signed a statement attesting that family members had dug a hole on their property in July 2011 in order to repair the septic system and that the hole was left open until November 2011, when Agresti rode his bicycle into it. At the time of the injury, the Michaleks' property was insured under a homeowner's policy issued by Pioneer State Mutual Insurance Company. Pioneer retained counsel on behalf of the Michaleks in the premises-liability action and asserted a defense based on the open and obvious danger doctrine. Pioneer later filed the underlying action seeking to void coverage under a fraud provision in the homeowner's policy. According to Pioneer, the Michaleks' claim that there was a hole on their property that was left unfilled from July 2011 to November 2011 was false. Following a bench trial, the trial court found that the Michaleks had made fraudulent representations to Pioneer that voided the policy, and it entered judgment in favor of Pioneer on July 17, 2017. The Michaleks and Agresti moved for reconsideration, but the trial court denied their motion. The Michaleks and Agresti appealed the trial court's denial of their motion in the Court of Appeals, which dismissed the motion for lack of jurisdiction because the trial court's order was not a final order under MCR 7.202(6). The Michaleks then filed a delayed application for leave to appeal the trial court's July 17, 2017 judgment in the Court of Appeals, which denied the application for "lack of merit on the grounds presented." Pioneer moved in the trial court for attorney fees and costs, pursuant to MCL 600.2591 and MCR 2.114(F). The trial court, John M. Donahue, J., granted the motion and ruled that attorney fees were warranted on the basis of its previous conclusion in the bench trial that the Michaleks had committed fraud. The Michaleks and Agresti separately appealed the trial court's order, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The Court of Appeals was precluded from considering the issues previously asserted by the Michaleks in their delayed application for leave to appeal the July 17, 2017 judgment because it lacked jurisdiction. Appellants stated in their claims of appeal that the order they were appealing by right was the trial court's June 19, 2018 order awarding attorney fees. Although a postjudgment order granting attorney fees is a final order that may be appealed pursuant to MCR 7.202(6)(a)(iv), under MCR 7.203(A)(1), the appeal is limited to the portion of the order of which there is an appeal of right. Therefore, any issue outside of those challenging the award of attorney fees was beyond the Court of Appeals' jurisdiction. Additionally, even if the Court of Appeals had jurisdiction over these issues, the law-of-the-case doctrine would have precluded the Court from considering them given that the Court had already determined that they lacked merit when denying the Michaleks' delayed application for leave to appeal, and the appellants did not show a change in the material facts or in the relevant law.

2. The trial court did not clearly err by finding pursuant to MCL 600.2591 and MCR 2.114(F) that the Michaleks' defense of Pioneer's fraud action was frivolous. The trial court's determination was based on its conclusions following the bench trial that the Michaleks had acted fraudulently and that they knew they had engaged in fraud yet still put up a defense. The trial court made detailed findings of fact following the bench trial, and its findings were sufficient to explain why it determined that the Michaleks' defense was frivolous.

3. The trial court did not err by failing to hold an evidentiary hearing as to the reasonableness of the attorney fees requested by Pioneer. The Michaleks did not request a hearing to resolve any disputed facts, nor did they contest the reasonableness of the rates requested. Rather, they challenged only the trial court's finding of fraud and made other legal objections to the award of attorney fees. Therefore, there was no need for the trial court to hold a hearing to allow the Michaleks to contest the reasonableness of the award because they were not challenging that aspect of the decision. Although the Michaleks requested a hearing in their motion for reconsideration, the motion was too late to preserve the request.

Affirmed.

Schenk, *Boncher & Rypma* (by *Frederick J. Boncher* and *Tyler E. Osburn*) for Stephen and Barbara Michalek.

RizzoDay, PC (by *Devin R. Day*) for Pioneer State Mutual Insurance Company.

LAWFM (by *Frank B. Melchiore*) for Justin Agresti.

Before: MURRAY, C.J., and METER and FORT HOOD, JJ.

MURRAY, C.J. These consolidated appeals are from a final order awarding attorney fees to plaintiff, Pioneer State Mutual Insurance Company, in a case where the trial court found after a bench trial that insurance fraud was committed by defendants, Stephen A. Michalek and Barbara M. Michalek. Intervening plaintiff, Justin B. Agresti, appeals the same order by right. We affirm.

I. BACKGROUND

In November 2011, Agresti was injured while riding his bicycle at defendants' (his grandparents) lakefront property in Dowagiac. At the time of the injury, the property was insured pursuant to a homeowner's policy issued by Pioneer. Agresti sued defendants in a separate premises-liability action. Defendants signed a statement in the Agresti litigation in which they stated that members of defendants' family dug a hole on the property on July 4, 2011, to fix a faulty septic pump and then failed to refill the hole upon departing the property. Defendants asserted that the hole remained unfilled in November 2011, when Agresti rode his bicycle into it and injured himself. Pioneer retained counsel for defendants in the Agresti litigation, and counsel advanced a challenge to defendants' duty of

care (or lack thereof) by asserting the defense that the hole was an open and obvious danger.

After the trial court denied defendants' motion for summary disposition in the Agresti litigation, Pioneer commenced this action to void coverage under a fraud provision in the homeowner's policy. Pioneer alleged that defendants misrepresented that they dug a hole on their property and left the hole open until November 2011. Following a bench trial, the trial court issued an opinion on March 15, 2017, finding that defendants had made fraudulent representations to Pioneer that voided the policy. Appellants moved for reconsideration of the trial court's decision, but before addressing that motion, the trial court entered a judgment in favor of Pioneer on July 17, 2017. Before the trial court entered judgment, Pioneer filed a motion for attorney fees and costs on June 9, 2017. On August 15, 2017, the trial court denied appellants' motion for reconsideration of the March opinion.

On September 5, 2017, defendants filed a claim of appeal in this Court, appealing the August 15, 2017 trial court order denying their motion for reconsideration. The following day, Agresti also filed a claim of appeal from the trial court's August 15, 2017 order. This Court dismissed defendants' appeal for lack of jurisdiction because the August 15, 2017 order was not a final order under MCR 7.202(6)(a).[1] In doing so, this Court noted that the July 17, 2017 judgment "appears to be a final order." This Court dismissed Agresti's claim of appeal for the same reason.[2]

Two days after this Court dismissed the appeals for lack of jurisdiction, appellants again moved for a new

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[1] *Pioneer State Mut Ins Co v Michalek*, unpublished order of the Court of Appeals, entered September 26, 2017 (Docket No. 339991).

[2] *Pioneer State Mut Ins Co v Michalek*, unpublished order of the Court of Appeals, entered September 26, 2017 (Docket No. 340016).

trial or relief from judgment. Then, before the trial court addressed and decided the motions, defendants filed in this Court an application for delayed appeal of the trial court's July 17, 2017 judgment. On the same day, the trial court held a motion hearing to address appellants' second motions for a new trial or relief from judgment, but it did not rule on the motions.

On May 18, 2018, this Court denied defendants' application for delayed appeal of the July 17, 2017 judgment "for lack of merit on the grounds presented."[3] Thereafter, the trial court entered an order granting Pioneer's motion for attorney fees and costs. The trial court held that, given its previous finding that defendants committed fraud, attorney fees were warranted under MCR 2.114(F). Defendants and Agresti separately appealed the order by right, and this Court consolidated the appeals.[4]

II. CHALLENGES TO THE JULY 17, 2017 JUDGMENT

Defendants advance several issues in this appeal that are unrelated to the award of attorney fees and that they previously asserted in their application for delayed appeal of the July 17, 2017 judgment. This Court denied that application for lack of merit in the grounds presented. Pioneer argues that consideration of these issues is barred by the law of the case doctrine. Pioneer is correct, but there is an additional jurisdictional ground that precludes us from considering these challenges to the July 17, 2017 judgment.

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[3] *Pioneer State Mut Ins Co v Michalek*, unpublished order of the Court of Appeals, entered May 18, 2018 (Docket No. 340967).

[4] *Pioneer State Mut Ins Co v Michalek*, unpublished order of the Court of Appeals, entered August 7, 2018 (Docket Nos. 344567 and 344577).

We first address the jurisdictional issue.[5] In their claims of appeal, appellants identified the order that they are appealing by right as the June 19, 2018 order regarding attorney fees and costs. In their docketing statements, they noted that the order was a postjudgment order. Under MCR 7.202(6)(a)(iv), a postjudgment award of attorney fees is a final order from which a claim of appeal can be taken. However, MCR 7.203(A)(1) limits an appeal under MCR 7.202(6)(a)(iv) "to the portion of the order with respect to which there is an appeal of right," meaning that these appeals only pertain to the award of attorney fees. Consequently, any issue outside those challenging the award of attorney fees goes beyond our jurisdiction over these appeals.

Second, even if we had jurisdiction, Pioneer is correct: the law of the case doctrine would preclude our consideration of the issues arising out of the July 17, 2017 judgment. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id*. "The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Id*. The doctrine applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

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[5] Neither party raised this issue, but because it is jurisdictional we can do so without the parties first doing so. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002).

In exercising the discretion afforded it when reviewing an application for leave to appeal, *Great Lakes Realty Corp v Peters*, 336 Mich 325, 328; 57 NW2d 901 (1953), the Court has numerous options: it can grant the application and hear the case on the merits, deny the application, enter peremptory relief, or take any other action deemed appropriate. See MCR 7.205(E)(2). If the assigned panel determines that an application (late or otherwise) from a final order should be denied, the panel often—as was done here—indicates that it is for "lack of merit on the grounds presented." In contrast to interlocutory applications for leave to appeal from nonfinal orders, where the Court generally does not express an opinion on the merits, applications for delayed appeal address whether to allow an appeal (filed after the 21-day period has elapsed) on a merits challenge to a final order. Hence, when we deny an application from a noninterlocutory order for lack of merit in the grounds presented, the order means what it says—it is on the merits of the case.[6] Consistent with this conclusion, this Court has previously applied the law of the case doctrine to orders denying applications for "lack of merit in the grounds presented." See *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983), *People v Hayden*, 125 Mich App 650, 662-663; 337 NW2d 258 (1983), and *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981).

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[6] If a panel decides to deny an application challenging an interlocutory nonfinal order, it typically uses language indicating that the application was denied because the Court was not persuaded that immediate appellate review was necessary. There is no merits language in those denial orders because no merits determination was made; instead, the panel has simply determined appellate intervention was not necessary at the time. As a result, parties are still free to challenge these interlocutory orders when appealing the final order. See *Dean v Tucker*, 182 Mich App 27, 31; 451 NW2d 571 (1990).

The first four issues raised in defendants' and Agresti's appeal briefs were raised in defendants' prior application for delayed appeal from the July 17, 2017 judgment. Additionally, appellants have not shown a change in the material facts or an intervening change in the relevant law. Because this Court previously denied defendants' application for delayed appeal "for lack of merit on the grounds presented," even if we had jurisdiction to address the merits challenge to the July 17, 2017 judgment, we would not address the merits of those issues under the law of the case doctrine.[7] See *id*.; see also *Locricchio v Evening News Ass'n*, 438 Mich 84, 109 & n 13; 476 NW2d 112 (1991).

III. ATTORNEY FEES

As to the merits of the final order they did appeal of right, appellants argue that the trial court erred in awarding attorney fees and in the amount of the fees awarded. This Court reviews a trial court's award of attorney fees and costs for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*. This Court reviews for clear error a trial court's factual findings underlying its fee award, including a finding that a claim or a defense was frivolous. See *Ladd v Motor City Plastics Co*, 303 Mich App 83, 103; 842 NW2d 388 (2013). "A decision is clearly erroneous when, although there may be evidence to support it, we

[7] We reject appellants' arguments that this Court lacked jurisdiction to deny defendants' delayed application for leave to appeal in Docket No. 340967. See MCR 7.205(G); MCR 7.203(B)(5). Similarly, the arguments that this Court lacks jurisdiction to address these appeals are devoid of merit. See MCR 7.202(6)(a)(iv); MCR 7.203(A)(1).

are left with a definite and firm conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

A. FRIVOLOUS DEFENSE

Without holding a hearing, but after briefing by the parties, the trial court entered an order granting Pioneer's motion for attorney fees. The trial court awarded attorney fees pursuant to both MCL 600.2591 and MCR 2.114(F)[8] on the basis of its finding at the bench trial that defendants had engaged in fraud.

"Generally, awards of costs and attorney fees are recoverable only where specifically authorized by a statute, a court rule, or a recognized exception." *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012) (quotation marks, brackets, and citations omitted). MCL 600.2591 grants, and MCR 2.114(F) had granted, "a court the authority to award sanctions in the form of attorney fees and costs to a prevailing party if an action or defense is deemed 'frivolous.' " *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010). MCL 600.2591(3) defines "frivolous" as follows:

> (a) "Frivolous" means that at least [one] of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

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[8] MCR 2.114 was repealed effective September 1, 2018. 501 Mich cclxxviii, ccxcv through ccxcvi (2018). The substantive provisions of MCR 2.114 have been incorporated into MCR 1.109. Because MCR 2.114 was in effect at the time the trial court awarded sanctions, we make reference to that rule.

(*iii*) The party's legal position was devoid of arguable legal merit.

The trial court's finding of frivolousness was based on its conclusions following the bench trial that defendants acted fraudulently, and that they knew they had engaged in fraud yet still put up a defense. "The determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008) (quotation marks and citation omitted). The trial court found that the defense was frivolous at the time it was asserted—i.e., at the time defendants responded to Pioneer's complaint, and throughout the proceedings. The trial court conducted a three-day bench trial on the fraud issue and made detailed findings of fact after trial, and its reference to those findings was sufficient to explain why it found the defense of these claims to be frivolous. Although "the mere fact that [a party] did not ultimately prevail on its legal position" does not per se render that position frivolous, *id*. at 487, the trial court's findings went beyond a mere rejection of defendants' legal position.

In applying this deferential standard of review, and given the fact-specific nature of the case and the trial court's findings, we hold that the trial court did not clearly err in finding that defendants' defense was frivolous.

B. REASONABLENESS OF FEES AND COSTS

Under MCR 2.114, if a trial court determined that a claim was frivolous in violation of MCR 2.114(F), sanctions were mandatory under MCR 2.114(E), which provided as follows:

> 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.

Similarly, MCR 2.625(A)(2) provides that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides, in relevant part, as follows:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

"[T]he burden of proving the reasonableness of the requested fees rests with the party requesting them." *Smith*, 481 Mich at 528-529 (opinion by TAYLOR, C.J.). "When requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005). In determining the reasonableness of a requested fee, a trial court should "consider the totality of special circumstances applicable to the case at hand." *Smith*, 481 Mich at 529 (opinion by TAYLOR, C.J.). The Supreme Court has

provided nonexclusive factors to guide a trial court in determining the reasonableness of attorney fees. See *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281-282; 884 NW2d 257 (2016).

The trial court awarded Pioneer the hours it requested, but it reduced the hourly rate from the requested $240 an hour to the billed rate of $140 an hour. In doing so, the trial court did not make any findings of fact with respect to the reasonableness of the requested fees or the number of hours expended on the proceeding. Instead, it adopted the analysis set forth in Pioneer's brief, which had attached to it detailed billings, affidavits, and a state bar survey of the average rates in the relevant community.

The Michigan Supreme Court has explained:

> In considering the time and labor involved . . . the court must determine the reasonable number of hours expended by each attorney. The fee applicant must submit detailed billing records, which the court must examine and opposing parties may contest for reasonableness. The fee applicant bears the burden of supporting its claimed hours with evidentiary support. If a factual dispute exists over the reasonableness of the hours billed or hourly rate claimed by the fee applicant, the party opposing the fee request is entitled to an evidentiary hearing to challenge the applicant's evidence and to present any countervailing evidence. [*Smith*, 481 Mich at 532 (opinion by TAYLOR, C.J.) (citation omitted).]

Although Pioneer's motion was properly supported, in their response brief, defendants did not contest the reasonableness of the hourly rate or the number of hours expended, nor did they request a hearing to resolve any disputed facts. Rather, defendants exclusively challenged the trial court's findings of fraud after trial and made other legal objections to the award of attorney fees. Thus, there was no need for the trial

court to hold a hearing to allow defendants to contest the reasonableness of the requested fees because, based on their submissions, they were not challenging that aspect of Pioneer's request. *Id*. And, although defendants did make a request for an evidentiary hearing in their motion for reconsideration, that motion was simply too late to preserve the request. See *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009) ("This issue was not raised until plaintiff filed his motion for reconsideration. Where an issue is first presented in a motion for reconsideration, it is not properly preserved."). The trial court does not abuse its discretion by rejecting arguments made in a motion for reconsideration that could have been made in response to the original motion. *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012) ("Ordinarily, a trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided.").

The trial court did not clearly err in finding that the defense was frivolous, and it did not abuse its discretion in awarding attorney fees.

Affirmed. Plaintiff-appellee may tax costs.

METER and FORT HOOD, JJ., concurred with MURRAY, C.J.

PEOPLE v PROPP

Docket No. 343255. Submitted September 4, 2019, at Lansing. Decided October 3, 2019, at 9:10 a.m. Vacated in part, reversed in part, and remanded ___ Mich ___ (2021).

Robert L. Propp was convicted following a jury trial in the Saginaw Circuit Court, Darnell Jackson, J., of first-degree premeditated murder, MCL 750.316(a)(1), for which he was sentenced, as a fourth-offense habitual offender, MCL 769.12, to a mandatory term of life in prison without the possibility of parole, MCL 750.316(1). It was undisputed that defendant killed the victim by constricting her airway. Defendant had given several different accounts to the police regarding her death. First, defendant told a police officer that he had found the victim unresponsive in her bed and, at that time, made no claims that he had choked the victim. Defendant then told a different police officer that defendant and the victim had been arguing in bed and that the victim elbowed him, the victim fell off the bed, defendant fell on top of the victim, and a dresser fell on both of them while defendant had his hands on the victim's neck. Finally, before trial, defendant presented the argument that the victim's death was actually the accidental result of erotic asphyxiation, and defendant moved for the appointment of a state-funded expert witness on the practice, arguing that such an expert would assist the jury in understanding why people engage in erotic asphyxiation and its associated risks. The court denied defendant's request, concluding that there were no facts in the record to support defendant's assertion that the victim died as a result of erotic asphyxiation. The prosecution moved to introduce evidence of defendant's prior acts of domestic violence against the victim as well as stalking behaviors, the majority of which came in the form of statements the victim made to friends and family members. The prosecution also sought to introduce evidence that defendant sexually abused his ex-wife during their marriage. The court granted the prosecution's motion to admit the evidence in its entirety. At trial, defendant testified that the victim had asked defendant to choke her while they had sex, that he and the victim fell off the bed, that a dresser fell on top of them, and that the victim was unconscious when defendant got up. Defendant testified that he had not been concerned about the victim's unconscious state because the victim

often passed out when they engaged in erotic asphyxiation. The jury convicted defendant, and the trial court sentenced him to life in prison without the possibility of parole. Defendant appealed.

The Court of Appeals *held*:

1. When a trial court analyzes an indigent defendant's request for government funds to procure an expert, it must consider the following factors: (1) the private interest that will be affected by the action of the state, (2) the governmental interest that will be affected if the safeguard is to be provided, and (3) the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided. With respect to the first two factors, in criminal cases, both defendants and the government share an interest in fair and accurate adjudication. Accordingly, in such cases, the third factor, regarding the probable value of the requested safeguard, is typically the determinative factor as to whether the defendant is entitled to government funds to obtain an expert. Under the third factor, a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. In this case, defendant sought appointment of an expert in order to assert the affirmative defense that the victim died accidentally while she and defendant engaged in erotic asphyxiation. The trial court correctly determined that defendant failed to demonstrate a factual basis for the defense because there was no evidence that the victim's death occurred as a result of erotic asphyxiation. Defendant had not made any statements during any of his police interviews that the victim's injuries were the result of erotic asphyxiation. Moreover, the testimony of the victim's sister and two other witnesses suggested that defendant and the victim were not getting along at the time of the victim's death and that defendant had engaged in stalking behaviors. For the trial court to conclude that there was a substantial basis for the erotic-asphyxiation defense, the trial court would have been required to ignore a significant amount of evidence from other witnesses that supported defendant's own contradictory statement that he choked the victim while the two were fighting. Given the significant evidence in the record at the time, defendant's mere assertion that the victim's death was the result of erotic asphyxiation—an assertion that was made for the first time well over a year after the investigation and proceedings in this case were initiated—was not sufficient to provide a substantial basis for the defense such that a state-funded expert

was necessary. Furthermore, the trial court's decision to bar defendant's expert witness did not result in a fundamentally unfair trial. Defendant waived his claim that he was denied the opportunity to present a defense because despite the trial court's indication that it would consider defendant's ability to call an expert witness after defendant established a basis for that testimony, defendant failed to call an expert witness. However, even reaching the merits of the argument, the record established that an additional expert was not necessary for defendant to present his claim that the victim died from erotic asphyxiation because the prosecution's expert pathologist testified that he was familiar with the practice of erotic asphyxiation and defense counsel failed to elicit any testimony from the pathologist. Accordingly, defendant failed to establish that another expert witness would have provided defendant with evidence beyond what was available through the prosecution's expert pathologist.

2. Defendant was not entitled to relief on equal-protection grounds. Defendant argued that the requirement that he establish a substantial basis for his defense in order to be entitled to expert funds violated his right to equal protection because nonindigent defendants are not required to make a similar showing before presenting the testimony of retained experts. Defendant's claim was unpreserved because he raised it for the first time on appeal, and defendant could not show that error requiring reversal had occurred with regard to this argument.

3. MCL 768.27b(1) provides, in pertinent part, that in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under MRE 403. The only limiting provision of MCL 768.27b is that the evidence is subject to analysis under MRE 403, and importantly for the purposes of this case, the Legislature explicitly chose to include MRE 403 as a limiting rule of evidence and chose not to include any other rules of evidence. The Legislature intended for evidence to be admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence. Therefore, the trial court did not err and did not abuse its discretion by admitting the statements from the victim's friends and family members.

4. MRE 403 provides that although it may be relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

delay, waste of time, or needless presentation of cumulative evidence. With respect to specifically analyzing other-acts evidence admitted pursuant to MCL 768.27b under the MRE 403 balancing test, a court must make two distinct inquiries. First, the court must decide whether introduction of the defendant's other-acts evidence at trial was unfairly prejudicial. Then, the court must apply the balancing test and weigh the probativeness or relevance of the evidence against the unfair prejudice. After completing the second inquiry, the court can determine whether the trial court abused its discretion by allowing the defendant's prior bad acts into evidence. In this case, the ex-wife's testimony did not inject extraneous considerations and was highly relevant. The ex-wife testified that defendant sexually assaulted her, was verbally abusive, and engaged in stalking behaviors. These allegations were highly relevant and probative because they spoke directly to defendant's propensity to commit domestic violence against women, particularly women with whom he is in a relationship. Moreover, even assuming arguendo that this evidence was unduly prejudicial, there was a substantial amount of other evidence that defendant committed domestic violence against the victim, including defendant's own admissions to the police that he choked the victim during a fight. Accordingly, defendant was not entitled to relief because defendant could not establish that to the extent that his ex-wife's testimony was unduly prejudicial, it was also more probable than not that it was outcome-determinative.

Affirmed.

MURRAY, C.J., concurring, agreed with the majority's decision to affirm defendant's conviction and sentence but would affirm for different reasons. First, Judge MURRAY would have concluded that defendant satisfied the first part of the reasonable-probability standard because defense counsel provided a sufficient demonstration of a substantial basis for the defense by informing the trial court that the medical examiner's testimony would be that the victim died from strangulation, that defendant and the victim had previously been a couple, that erotic asphyxiation is a somewhat unknown defense in Michigan, that the proposed expert would be able to testify about the practice of erotic asphyxiation, and that individuals can die through the practice. However, no error requiring reversal occurred on this issue because it was not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial. The testimony of the prosecution' expert, in conjunction with defendant's testimony about the circumstances surrounding the

victim's death, presented the jury with a full and complete picture regarding the circumstances surrounding the victim's death. Second, Judge MURRAY did not read the reference in MCL 768.27b(1) to MRE 403 to mean that all other rules of evidence are inapplicable. MCL 768.27b(1) not only explicitly invokes MRE 403, but it also implicitly invokes MRE 401 and 402. Relevancy is determined under MRE 401, and relevant evidence is admissible under MRE 402. Thus, MCL 768.27b(1) does not preclude consideration of any rule of evidence other than MRE 403. MCL 768.27b sets forth a substantive legislative policy choice—similar to that in MCL 768.27a—that propensity evidence can and should be used in prosecuting the listed crimes (taking the opposite presumption from that in MRE 404b), subject to an analysis under MRE 403. But that substantive policy decision does not address—and does not eliminate—the need for courts to test the reliability of the evidence used to prove the defendant's propensity.

CRIMINAL LAW — DOMESTIC VIOLENCE — SEXUAL ASSAULT — OTHER-ACTS EVIDENCE — ADMISSION OF HEARSAY STATEMENTS.

MCL 768.27b(1) provides that except as provided in MCL 768.27b(4), in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under MRE 403; MCL 768.27b permits the admission of hearsay statements that fall within the scope of the statute; the Legislature intended for evidence to be admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, *Nathan J. Collison*, Chief Appellate Attorney, and *Carmen R. Fillmore*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Douglas W. Baker* and *Steven D. Helton*) for defendant.

Before: MURRAY, C.J., and METER and FORT HOOD, JJ.

FORT HOOD, J. Defendant appeals as of right his jury conviction of first-degree premeditated murder, MCL 750.316(a)(1), for which he was sentenced, as a fourth-offense habitual offender, MCL 769.12, to a mandatory term of life in prison without the possibility of parole, MCL 750.316(1). Defendant contends on appeal that (1) the trial court violated defendant's rights to due process and equal protection by denying defendant's motion for the appointment of an expert witness and denying his ability to present a defense, and (2) the trial court abused its discretion by permitting the introduction of hearsay and unduly prejudicial other-acts evidence. We affirm.

I. BACKGROUND

It is undisputed that defendant killed the victim by constricting her airway. The sole issue is whether defendant did so with the intent to kill her, or, as defendant claims, whether the victim's death occurred accidentally while she and defendant were engaged in erotic asphyxiation.[1] On the morning of July 6, 2016, defendant called 911 to report that he had discovered the victim unresponsive in her bed. When emergency responders arrived, they found defendant attempting to administer chest compressions to the victim. The victim's body, however, was stiff and cold to the touch, and the emergency responders informed defendant that the victim was deceased. Defendant proceeded to

[1] This is the first Michigan case to reach this Court dealing with erotic asphyxiation as a defense to a charge of murder. The term has been defined as "the practice of choking during a sexual encounter as a way to restrict oxygen flow and enhance sexual arousal," Boni-Saenz, *Sexual Advance Directives*, 68 Ala L Rev 1, 2 (2016), or "near suffocation . . . that heightens sexual pleasure," Comment, *The "Rough Sex" Defense*, 80 J Crim L & Criminology 557, 559 (1989).

describe a number of different versions of the events that occurred on the night preceding and the morning of the victim's death.

At defendant's preliminary examination, an officer testified that he responded to defendant's 911 call and testified that when he arrived on the scene, defendant told him that defendant had become concerned when the victim did not answer her phone that morning, so defendant went to the victim's house and discovered that her car was still there when she was supposed to be at work. Defendant stated that he found the back door of the victim's house forced open and found the victim unresponsive in her bed. Defendant made no claims that he had choked the victim at that time. That officer also noted that defendant had a black eye, which defendant explained came from a bar fight the night before.

A second officer also spoke with defendant on the day of the victim's death. Defendant purportedly told that officer that the victim's back door had not been forced open and that defendant himself pried the door open with a crowbar. Defendant told the officer that on the night before the victim died, defendant and the victim were lying in the victim's bed when they began arguing. Defendant stated that the victim elbowed him in the eye, causing his black eye and a physical altercation. During the altercation, the victim fell off the bed, defendant fell on top of her, and then a dresser fell on both of them. Defendant stated that he had his hand on the victim's neck and that he "pressed down" with his weight. When the victim stopped moving, defendant figured she was unconscious, and so he picked her up, put her back on the bed, and left.

Before trial, defendant presented the argument that the victim's death was the accidental result of

erotic asphyxiation. Defendant moved for the appointment of a state-funded expert witness on the practice, arguing that such an expert would assist the jury in understanding why people engage in erotic asphyxiation and its associated risks. Defendant noted as a basis for his defense that the victim did not have any defensive wounds or other injuries to suggest that she died during a struggle. The trial court denied defendant's request for appointment of such an expert, however, concluding that there were no facts in the record to support defendant's assertion that the victim died as a result of erotic asphyxiation. The only facts in the record that explained the victim's injuries were defendant's statements to the police that the victim died when she and defendant fell out of bed during a fight while defendant had his hand on her throat.

The prosecution also filed their own pretrial motion, seeking to introduce evidence of defendant's prior acts of domestic violence against the victim as well as stalking behaviors. The prosecution alleged that defendant repeatedly called and texted the victim, drove by her house, and appeared uninvited at places the victim went. The majority of the evidence of defendant's prior acts came in the form of statements the victim made to friends and family members. The prosecution also sought to introduce evidence that defendant sexually abused his ex-wife during their marriage. Defendant argued that the testimony of the victim's friends and family members was inadmissible hearsay and that the testimony of defendant's ex-wife was inadmissible under MRE 403 because it was more prejudicial than probative. The trial court disagreed and granted the prosecution's motion to admit the evidence in its entirety.

At trial, defendant testified that on the night that the victim died, she asked him to choke her while they had sex. In the process of doing so, defendant and the victim fell off the bed and a dresser fell on top of them. Defendant was unsure of how long he and the victim were on the floor with the dresser on top of them and his hand on her throat, but when he got up, the victim was unconscious. Defendant testified that he was not concerned about this because the victim often passed out when they engaged in erotic asphyxiation and defendant believed that she was still alive when he left her house shortly after. Defendant stated that he did not initially tell the police that he choked the victim because he was embarrassed and ashamed. The jury convicted defendant of first-degree premeditated murder, and the trial court sentenced him to mandatory life in prison without the possibility of parole.

II. DUE PROCESS

Defendant first contends that the trial court violated defendant's rights to due process by denying defendant's motion for the appointment of an expert witness and subsequently prohibiting any testimony from that witness. We disagree.

We review de novo, as an issue of constitutional law implicating a defendant's due-process rights, the trial court's grant or denial of a defendant's request for state funds to retain an expert. See *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999). We must consider whether, in light of defendant's explanation as to why the requested expert was necessary for his defense, the trial court should have determined that state funds were required to afford defendant a fair opportunity to confront the prosecution's evidence and present his

defense. See *People v Kennedy*, 502 Mich 206, 226-227; 917 NW2d 355 (2018).[2]

A. WHETHER DEFENDANT WAS ENTITLED TO A STATE-FUNDED EXPERT WITNESS

At the time that the trial court denied defendant's request for appointment of an expert witness, issues pertaining to the funding of experts at state expense were governed by MCL 775.15[3] and *People v Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003), overruled by *Kennedy*, 502 Mich at 222-223. *Tanner* held

[2] We note the prosecution's assertion that defendant failed to establish indigence for the purpose of retaining a state-funded expert witness. Defendant was originally appointed counsel on the basis of his indigence, and although he later retained counsel, there is no evidence that defendant's financial circumstances changed during the pendency of the case. See *People v Arquette*, 202 Mich App 227, 230; 507 NW2d 824 (1993). We are confident that the mere retention of counsel by an indigent defendant does not deprive that defendant of the ability to seek the funding of an expert at state expense. In any event, whether defendant properly established indigence has no bearing on the outcome of this case.

[3] MCL 775.15 provides, in relevant part:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial . . . and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may . . . make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

that under MCL 775.15, "to obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *Tanner*, 469 Mich at 442-443 (quotation marks omitted), citing *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995), overruled by *Kennedy*, 502 Mich at 222-223. The *Kennedy* Court recently clarified, however, "that MCL 775.15 does not apply in [the] context" of an indigent defendant's request for appointment of an expert. *Kennedy*, 502 Mich at 210.

"MCL 775.15, by its express terms, does not provide for the appointment of expert witnesses." *Id*. at 222. In addition, "the statute, which only contemplates 'testimony,' falls short of the constitutional standard set forth in *Ake*,[4] which clearly requires the assistance of an expert in conducting an appropriate examination and in evaluation, preparation, and presentation of the defense." *Id*. at 223 (quotation marks, brackets, and citation omitted). We have no doubt that *Kennedy* applies because, although *Kennedy* was decided after defendant's trial, "it is well-established that a new rule for the conduct of criminal prosecutions that is grounded in the United States Constitution applies retroactively to all cases . . . pending on direct review or not yet final." *People v Lonsby*, 268 Mich App 375, 389; 707 NW2d 610 (2005).

Following *Kennedy*, an indigent defendant's entitlement to state funds to pay for an expert is analyzed under the due-process framework outlined in *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985). *Kennedy*, 502 Mich at 225. Now, when a trial court analyzes an indigent defendant's request for government funds to procure an expert, it must consider the following factors:

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[4] *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985).

> (1) "the private interest that will be affected by the action of the State," (2) "the governmental interest that will be affected if the safeguard is to be provided," and (3) "the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." [*Id*. at 215, quoting *Ake*, 470 US at 77.]

With respect to the first two factors, in criminal cases, both defendants and the government share an interest in "fair and accurate adjudication." *Kennedy*, 502 Mich at 215-216 (quotation marks and citation omitted). Accordingly, in such cases, the third factor, regarding the probable value of the requested safeguard, is typically the determinative factor as to whether the defendant is entitled to government funds to obtain an expert. See *id*. at 216-220. In terms of the showing that the defendant must make under this factor, *Kennedy* adopted the reasonable-probability standard articulated in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987). *Id*. at 226. *Moore* held:

> [I]f a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. *By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense* . . . . In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the

> court why the particular expert is necessary. [*Moore*, 809 F2d at 712 (emphasis added).]

In particular, *Kennedy* held that in order to be entitled to government funds to obtain an expert, "a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial." *Kennedy*, 502 Mich at 228 (quotation marks and citation omitted).

In this case, defendant sought appointment of an expert in order to assert the affirmative defense that the victim died accidentally while she and defendant engaged in erotic asphyxiation. Accordingly, defendant was required to demonstrate a "substantial basis for the defense." See *Moore*, 809 F2d at 712. Defense counsel argued that there was a basis for the defense because, although the victim unequivocally died from neck compression, she did not have defensive wounds indicative of a struggle. Defense counsel further argued that an expert would "give some validity to" defendant's claim that he was not particularly concerned when the victim lost consciousness because people who engage in erotic asphyxiation often lose consciousness during the act.

The trial court determined that defendant failed to demonstrate a factual basis for the defense because there was no evidence that the victim's death occurred as a result of erotic asphyxiation. The record supports that conclusion. At the time that defendant moved for appointment of an expert, the only evidence in the record that defendant had choked the victim came from his statement to Detective Joseph McMillan. In that statement, defendant admitted that he and the victim got into a fight, during which the victim fell off

the bed, defendant fell on top of her, and a dresser fell on top of both of them. Defendant did not make any statements during any of his police interviews that the victim's injuries were the result of erotic asphyxiation. Moreover, the testimony of the victim's sister suggested that defendant and the victim were not getting along at the time of the victim's death, that defendant had engaged in stalking behaviors—including coming to the victim's home and knocking on her windows at night—and that defendant's behavior was "escalating very fast." Another sister of the victim testified that the victim once told her that the victim was "going to die young," and when the sister asked why, the victim responded, "I don't know, maybe [defendant] will kill me."

Other testimony in evidence relating to the prosecution's motion in limine indicated that witnesses had seen multiple altercations between the victim and defendant. Two witnesses testified that they once saw defendant chase the victim down the road in a car, seemingly attempting to run her off the road. One witness observed injuries on the victim's arms, neck, and face shortly before the victim decided to break up with defendant. Another witness testified that the victim once told her that the defendant "chocked [sic] her, and [the victim] didn't think he was going to stop, [and] she was starting to see spots when he finally let her go." According to that witness, while defendant was choking the victim, he stated, "[S]ee how easy it would be for me to shut you up[?]"

For the trial court to conclude that there was a substantial basis for the erotic-asphyxiation defense, the trial court would have been required to ignore a significant amount of evidence from other witnesses that supported defendant's own contradictory state-

ment that he choked the victim while the two were fighting. Given the significant evidence in the record at the time, defendant's mere assertion that the victim's death was the result of erotic asphyxiation—an assertion that was made for the first time well over a year after the investigation and proceedings in this case were initiated—was not sufficient to provide a substantial basis for the defense such that a state-funded expert was necessary. See *Kennedy*, 502 Mich at 227, citing *Moore*, 809 F2d at 712. Nevertheless, assuming for the sake of argument that defendant should have been entitled to an expert witness, we note that the denial of an expert did not result in a fundamentally unfair trial.

B. WHETHER BARRING DEFENDANT'S EXPERT RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL

Defendant contends that denial of his motion for a state-funded expert and the prohibition of testimony from that expert barred defendant from presenting a meaningful defense and resulted in a fundamentally unfair trial. We disagree.

As an initial matter, defendant has arguably waived any suggestion that his trial was unfair because he was denied a meaningful opportunity to present a defense. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). Waiver "extinguishe[s] any error," and "[o]ne who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights . . . ." *Id*. (quotation marks and citation omitted). In this case, the trial court denied defendant's request for funds to retain an expert witness on the practice of erotic asphyxiation and prohibited defendant from

presenting such expert testimony. Before trial began, the prosecution objected to defendant's proposed witness, Dr. Zubin Mistry, "based on the court's prior ruling," and the trial court stated that the witness would not "be allowed to be called at this point in time." Defense counsel stated, "[W]e understand that we have to develop evidence to justify th[e] expert witness being called, but we are assuming that we will," and the trial court responded, "We'll cross that bridge when we get to it." Thereafter, defendant never sought to call Dr. Mistry or any other expert witnesses.

By failing to call an expert witness, despite the trial court's indication that it would consider defendant's ability to do so after defendant established a basis for that testimony, defendant waived his claim that he was denied the opportunity to present a defense. See *Carter*, 462 Mich at 215. Despite defendant's apparent waiver, under the circumstances—including the possibility that defendant could not call the expert for financial reasons after state funding was denied, the constitutional implications of this case, and the gravity of the offense—we elect to reach the merits of the argument, and we note that the record establishes that an additional expert was not necessary for defendant to present his claim that the victim died from erotic asphyxiation.

"This Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). The Due Process Clause of the Fourteenth Amendment "require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense." *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006) (quotation marks and citation omitted). The right to present a defense en-

compasses "[t]he right to offer the testimony of witnesses," *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967), as well as defense counsel's ability "to argue a reasonable inference from the evidence adduced at trial," *People v Stokes*, 312 Mich App 181, 207; 877 NW2d 752 (2015), vacated in part on other grounds 501 Mich 918 (2017). The right to present a defense further protects a defendant's ability to "put before a jury evidence that might influence the determination of guilt" and to have access to exculpatory evidence. *Anstey*, 476 Mich at 460 (quotation marks and citation omitted).

In this case, defendant fails to explain how he was denied a meaningful opportunity to present his defense because defendant was, in fact, able to present the exact defense he sought to introduce through an expert. Defense counsel stated during his opening statement that defendant and the victim engaged in erotic asphyxiation, the victim lost consciousness—which "wasn't unusual for her"—and it appeared to a layperson that the victim was still breathing. Defendant then testified at length to all those things. Defendant testified about the manner in which he and the victim engaged in erotic asphyxiation on the night of her death and why. Defendant also testified that the victim asked him to choke her. Defendant explained that he was not concerned when the victim lost consciousness because it was a "normal" occurrence when defendant and the victim engaged in that form of "extreme sex." Defendant further explained that he did not tell the police that he and the victim engaged in erotic asphyxiation on the night she died because he "was ashamed," because he did not want to expose the "sex that [they] had," because defendant was "very conservative" with respect to talking about his sexual life, and because the victim "wanted it to be that way."

Moreover, defense counsel was able to continue to present the defense through the prosecution's expert pathologist. When asked by defense counsel whether, under the circumstances, the victim's death could have resulted from erotic asphyxiation, the expert pathologist stated, "Yeah, it's possible." Defense counsel then referenced the exchange in his closing argument. We note that in his motion for appointment of an expert, defendant claimed that an expert was also necessary to explain to the jury the prevalence of erotic asphyxiation, why a person would engage in it, and the reality of participants passing out or even dying from the practice. However, although defense counsel cross-examined the prosecution's expert pathologist regarding erotic asphyxiation and he testified that he was familiar with the practice, defense counsel notably did not attempt to elicit any testimony from the expert pathologist related to the aforementioned ideas. He asked no questions regarding what erotic asphyxiation involves, why people might engage in the activity, how common it is, or how often it results in injury or death.

Defendant does not argue that his trial counsel was ill prepared or ineffective, nor does defendant provide any reason why the prosecution's expert pathologist, who was familiar with erotic asphyxiation, could not explain the practice. Accordingly, we note that defendant has failed to establish that another expert witness would have provided defendant with evidence beyond what was available through the prosecution's expert pathologist. Defendant failed to establish that the trial court's denial of a state-funded expert witness deprived defendant of the opportunity to present his erotic-asphyxiation defense and failed to establish that either the denial of his motion or the initial prohibition

of expert testimony on erotic asphyxiation resulted in a fundamentally unfair trial.

III. EQUAL PROTECTION

Defendant also suggests on appeal that the requirement that he establish a substantial basis for his defense in order to be entitled to expert funds violated his right to equal protection because nonindigent defendants are not required to make a similar showing before presenting the testimony of retained experts. We disagree.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011) (quotation marks and citation omitted). Defendant raises his equal-protection challenge for the first time on appeal, and, accordingly, his claim is unpreserved. This Court reviews an unpreserved claim of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order to demonstrate error requiring reversal, the defendant must show that an error occurred, that the error was clear and obvious, and that the error prejudiced the defendant such that the error "affected the outcome of the lower court proceedings." *Id*.

Neither this Court nor our Supreme Court has held that requiring an indigent defendant to demonstrate a substantial basis for his defense before he is entitled to state funds to procure an expert violates equal protection. To the contrary, *Kennedy* concluded that "the standard articulated in *Moore* strikes the right balance between requiring too much or too little of a defendant seeking the appointment of an expert . . . ." *Kennedy*, 502 Mich at 227-228. Moreover, we note that other

than alleging a violation of equal protection in his statement of questions presented on appeal, there is actually no application of the clause or the substantial jurisprudence surrounding it in defendant's brief.

Defendant cites *Ake* for the idea that "simply as a result of his poverty, a defendant [cannot be] denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake*, 470 US at 76. Defendant also cites *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997), for the idea that "fundamental fairness requires that the state not deny [indigent defendants] an adequate opportunity to present their claims fairly within the adversary system." (Quotation marks and citation omitted.) Both these statements refer to the Due Process Clause. *Ake*, 470 US at 76; *Leonard*, 224 Mich App 569. And, as noted in *Ake*, although due process and equal protection are related, they involve separate inquiries. *Ake*, 470 US at 76 n 3.

We also note defendant's single citation of *People v Loyer*, 169 Mich App 105, 123-124; 425 NW2d 714 (1988). We are aware of *Loyer*'s holding that within the context of MCL 775.15, it was a violation of equal protection for a trial court to require an indigent defendant seeking witness fees to disclose, "in the presence of the prosecution, the names and addresses of the witnesses, as well as why such witnesses [were] material to his cause . . . ." *Id*. at 124. As explained in detail earlier, MCL 775.15 does not apply to this case, and while we would concede that a defendant is not required to present his case to the prosecution in order to obtain appointment of an expert witness, there is no doubt that a defendant is at least required to establish a substantial basis for his defense. *Kennedy*, 502 Mich at 227.

In any event, "it is not the duty of this Court to discover and rationalize the basis for defendant's claims . . . ." *People v Jurewicz*, 329 Mich App 377, 393; 942 NW2d 116 (2019), citing *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "[N]or may [a defendant] give only cursory treatment with little or no citation of supporting authority." *Kelly*, 231 Mich App at 640-641. With all this in mind, defendant has not established plain error with respect to his equal-protection claim, let alone a prejudicial error that affected the outcome of the proceedings, and he is not entitled to relief on equal-protection grounds.

IV. MCL 768.27b AND THE MICHIGAN RULES OF EVIDENCE

Defendant lastly contends that the trial court abused its discretion by permitting the introduction of hearsay and unduly prejudicial other-acts evidence. Defendant challenges the admission of other-acts evidence of domestic violence on two bases: first, he claims that MCL 768.27b(1) does not allow the admission of hearsay evidence; and second, he claims that evidence presented by defendant's ex-wife was substantially more prejudicial than probative. We disagree with defendant's interpretation of MCL 768.27b(1) and conclude that the statute permits the introduction of certain hearsay statements so long as they satisfy the balancing test of MRE 403. We also disagree that the evidence presented by defendant's ex-wife was unduly prejudicial.

With respect to defendant's first argument—that a number of the witnesses' statements at trial were inadmissible hearsay—we conclude that MCL 768.27b allows for such testimony. We review questions of statutory interpretation de novo. *People v Mansour*, 325 Mich App 339, 345; 926 NW2d 26 (2018). "[O]ur

goal in interpreting a statute 'is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language.' " *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013), quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *People v Perry*, 317 Mich App 589, 604; 895 NW2d 216 (2016) (quotation marks and citation omitted).

This Court also reviews de novo the "preliminary question of law, which is whether a rule of evidence precludes admissibility . . . ." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). This Court reviews a "trial court's admission of evidence of other bad acts for an abuse of discretion. A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194 (2008) (citation omitted). In order to be entitled to relief for a preserved nonconstitutional error, the defendant must establish "that it is more probable than not that the error was outcome-determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

MCL 768.27b(1) provides, in pertinent part:

> [I]n a criminal action in which the defendant is accused of an offense involving domestic violence . . . , evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

This "prior-bad-acts evidence of domestic violence can be admitted at trial because a full and complete picture of a defendant's history tends to shed light on the

likelihood" that a domestic-violence crime was committed. *People v Cameron*, 291 Mich App 599, 610; 806 NW2d 371 (2011) (quotation marks, alterations, and citation omitted). Under MCL 768.27b, evidence of a defendant's prior bad acts of domestic violence is admissible "as long as the evidence satisfies the 'more probative than prejudicial' balancing test of MRE 403 . . . ." *Id*.

Defendant primarily contends that MCL 768.27b must be read *in pari materia* with MCL 768.27a and MCL 768.27c. MCL 768.27a(1) provides, in relevant part, "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27c(1), on the other hand, authorizes the admission of hearsay statements related to the "infliction or threat of physical injury upon the declarant" in cases in which the defendant is accused of an offense involving domestic violence. Defendant argues that reading MCL 768.27b in the context of its sister statutes requires a determination that other-acts evidence admissible under MCL 768.27b is still subject—in addition to MRE 403—to hearsay evidentiary rules. Indeed, we have noted that because of the similarities in the language of MCL 768.27a and 768.27b, "we believe that the Michigan Legislature intended the same policy" considerations to underlie both statutes. *Cameron*, 291 Mich App at 610. However, more recently, in holding that evidence admissible under MCL 768.27a—which involves the admission of other-acts offenses committed against minors—*was* subject to "other ordinary rules of evidence, such as those pertaining to hearsay and privilege," our Supreme Court specifically distinguished

MCL 768.27a from MCL 768.27b. *People v Watkins*, 491 Mich 450, 485; 818 NW2d 296 (2012).

In *Watkins*, the primary issue was whether, like MCL 768.27b, evidence generally admissible under MCL 768.27a was also subject to exclusion under MRE 403. *Id*. at 481. In determining that MCL 768.27a was not only subject to MRE 403 but also to the other rules of evidence, our Supreme Court reasoned:

> The argument against applying MRE 403 to evidence admissible under MCL 768.27a comes not from the text of either MRE 403 or MCL 768.27a, but from the text of MCL 768.27b, which pertains to other-acts evidence in domestic violence cases. MCL 768.27b provides that "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, *if it is not otherwise excluded under Michigan rule of evidence 403*." It is this emphasized portion of the statute that has generated disagreement surrounding whether MRE 403 applies to MCL 768.27a.
>
> Unlike MCL 768.27b, MCL 768.27a does not explicitly mention MRE 403 . . . . Accordingly, it is argued that if the Legislature expressly made other-acts evidence under MCL 768.27b subject to MRE 403 in cases of domestic violence, then the failure to mention MRE 403 in MCL 768.27a indicates that the Legislature did not intend MRE 403 to apply with regard to other-acts evidence in cases involving sexual misconduct against minors. We reject the invitation to draw this inference.
>
> Significantly, the Legislature did not draft these statutes simultaneously. MCL 768.27a was enacted by 2005 PA 135, which became effective January 1, 2006, whereas MCL 768.27b was enacted by 2006 PA 78, which became effective March 24, 2006. The Legislature's "silence" from which it is urged we draw an inference occurred in the earlier enactment. It is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through

> silence in an earlier enactment, which is only "silent" by virtue of the subsequent enactment. [*Id*. at 481-482 (alterations in original).]

The Court ultimately noted that "because MCL 768.27a makes no specific mention of MRE 403, . . . the Legislature intended that MRE 403 not apply to other-acts evidence admissible under the statute." *Id*. at 483. Had the Legislature intended otherwise, it "could have expressly exempted evidence admissible under MCL 768.27a from analysis under MRE 403, but it did not." *Id*. In this case, defendant would have us conclude the same with respect to MCL 768.27b and hold that if the Legislature intended MCL 768.27b to permit the admission of hearsay statements, the Legislature could have expressly exempted evidence admissible under the statute from analysis under the hearsay rules of evidence. As it happens, however, the Legislature did just that.

The *Watkins* Court went on to express additional differences between MCL 768.27a and MCL 768.27b:

> First, the Legislature used the permissive term "may" in MCL 768.27a but not in MCL 768.27b. Under MCL 768.27a, "evidence that the defendant committed another listed offense against a minor *is admissible*," but the statute goes on to provide that such evidence "*may* be considered for its bearing on any matter to which it is relevant." When the statute is read as a whole, the phrase "is admissible" is qualified by the phrase "may be considered," thereby indicating that admissibility remains subject to some level of discretion on the part of the trial court. As this Court has explained, "courts should give the ordinary and accepted meaning to . . . the permissive word 'may' unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." [*Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).] Because there is no indication in MCL 768.27a that "may" should

> be interpreted contrary to its generally accepted meaning, the term is permissive, not mandatory. By providing that evidence admissible under MCL 768.27a "*may* be considered," the Legislature necessarily contemplated that evidence admissible under the statute need not be considered in all cases and that whether and which evidence would be considered would be a matter of judicial discretion, as guided by the rules of evidence. The most obvious rule available to guide courts in exercising this discretion is MRE 403.
>
> By contrast, MCL 768.27b contains no permissive language. MCL 768.27b(1) simply provides that "evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant . . . ." Perhaps it was [its] choice to omit the permissive language [from MCL 768.27b] that prompted the Legislature to qualify the admissibility of other-acts evidence under MCL 768.27b with the language "if it is not otherwise excluded under Michigan rule of evidence 403." [*Watkins*, 491 Mich at 483-484.]

In other words, with the language of MCL 768.27a in mind, because MCL 768.27b contains no permissive language, it would seem the Legislature intended to limit the discretion of the trial court to exclude evidence under the statute. The *only* limiting provision of MCL 768.27b is that the evidence is still subject to analysis under MRE 403, and importantly for the purposes of this case, the Legislature explicitly chose to include MRE 403 as a limiting rule of evidence and chose *not* to include any other rules of evidence.

An analogous situation was also true in *Watkins*:

> Second, we must give effect to the prefatory clause "[n]otwithstanding [MCL 768.27]" contained in MCL 768.27a but absent from MCL 768.27b. MCL 768.27a provides, "Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant

> committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." The specific mention of MCL 768.27, and no other rule or principle of evidence, is significant. . . .
>
> * * *
>
> Giving effect to the statute's reference to MCL 768.27, MCL 768.27a means that other-acts evidence in cases involving sexual misconduct against a minor "may be considered for its bearing on any matter to which it is relevant" *notwithstanding* that MCL 768.27 limits the admissibility of other-acts evidence to consideration for noncharacter purposes. MCL 768.27a does not apply "notwithstanding any rule or principle of evidence," but only "[n]otwithstanding [MCL 768.27]." Put simply, we cannot interpret the prefatory phrase "[n]otwithstanding [MCL 768.27]" to mean "notwithstanding [MCL 768.27] and MRE 403." We similarly refuse to read into MCL 768.27a a legislative intent to foreclose the application of other ordinary rules of evidence, such as those pertaining to hearsay and privilege.
>
> In sum, . . . we must give effect to the permissive term "may" and the phrase "[n]otwithstanding [MCL 768.27]" that are present in MCL 768.27a but absent from MCL 768.27b. For all these reasons, we hold that MRE 403 applies to evidence admissible under MCL 768.27a. [*Id*. at 485-486 (alterations in original).]

In *Watkins*, our Supreme Court was clear that we could not rob the reference in MCL 768.27a to MCL 768.27 of its meaning by holding that while MCL 768.27a was explicitly unaffected by MCL 768.27, it was implicitly unaffected by the rules of evidence. The same logic applies to MCL 768.27b. The statute provides that evidence is admissible unless "otherwise excluded under Michigan rule of evidence 403," not that evidence is admissible unless "otherwise excluded under any rule of evidence." Thus, while we agree that MCL 768.27b

and MCL 768.27a should be read *in pari materia*, we disagree with defendant's reading of the statutes.

Defendant also notes that we must consider MCL 768.27b within the context of MCL 768.27c. Defendant contends that our interpretation of the former will render the latter nugatory. We disagree.

MCL 768.27c provides, in pertinent part:

> (1) Evidence of a statement by a declarant is admissible if all of the following apply:
>
> (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.
>
> (b) The action in which the evidence is offered under this section is an offense involving domestic violence.
>
> (c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.
>
> (d) The statement was made under circumstances that would indicate the statement's trustworthiness.
>
> (e) The statement was made to a law enforcement officer. [MCL 768.27c(1).]

Indeed, as defendant notes in his brief on appeal, MCL 768.27c explicitly authorizes the admission of hearsay statements related to "infliction or threat of physical injury upon the declarant" in cases in which the defendant is accused of an offense involving domestic violence. However, unlike MCL 768.27b, for statements to be admissible under MCL 768.27c, the statements must have been made "at or near the time of the infliction or threat of physical injury," "under circumstances that would indicate [their] trustworthiness," and "to a law enforcement officer." MCL 768.27c(1)(c), (d), and (e). Defendant aptly notes that the conditions

contained in MCL 768.27c(1) provide safeguards to ensure the trustworthiness of hearsay statements admitted under the statute, while MCL 768.27b(1) provides none of the same precautions. Defendant suggests that if hearsay statements are admissible under MCL 768.27b, then MCL 768.27c serves no purpose.

Defendant ignores an important difference between the two statutes. MCL 768.27b applies in cases of domestic violence to other-acts evidence that *also* involves domestic violence. MCL 768.27b(1). On the other hand, MCL 768.27c permits a wider range of statements to be introduced in domestic-violence cases: statements involving the narration, description, or explanation of "the infliction or threat of physical injury upon the declarant." MCL 768.27c(1)(a). One statute applies to evidence of domestic violence in domestic-violence cases, and one statute applies to evidence of *general physical violence* in domestic-violence cases. There is sound logic in the Legislature's decision to provide for broad admissibility under the former rule while constraining the latter to assure the reliability of evidence of other acts of *general physical violence* because those acts tend to be less relevant than other acts of *domestic violence* in establishing a defendant's propensity to commit *acts of domestic violence*. See *People v Railer*, 288 Mich App 213, 219-220; 792 NW2d 776 (2010) (noting that MCL 768.27b supersedes the prohibition in MRE 404(b)(1) on other-acts evidence to show the defendant's propensity to commit a domestic-violence offense).

We also note that defendant's argument with respect to MCL 768.27c contains an inherent contradiction. Defendant concedes that general hearsay rules of evidence do not apply to evidence admissible under MCL 768.27c, and he argues that fact as a primary reason

MCL 768.27b *should* remain subject to hearsay rules. However, both MCL 768.27b and MCL 768.27c lack the permissive language of MCL 768.27a that might afford a trial court discretion to exclude evidence otherwise admissible under the statutes, and what is more, MCL 768.27c does not contain language to ensure that evidence admissible under the statute is also subject to any other court rule, such as MRE 403. Accepting defendant's interpretation of MCL 768.27c at face value—that by its plain language, the statute is not subject to hearsay rules—defendant gives no logical explanation of how we could interpret the plain language of MCL 768.27b—which explicitly incorporates *only* MRE 403—any differently.

Given all the above, we conclude that the Legislature intended for evidence to be admissible under MCL 768.27b regardless of whether it might be otherwise inadmissible under the hearsay rules of evidence.[5] Having concluded that MCL 768.27b permits the ad-

[5] As an aside, and although defendant does not raise the issue on appeal, we note that our holding does not render MCL 768.27b unconstitutional pursuant to Const 1963, art 6, § 5 by impeding the Supreme Court's authority to establish, modify, amend, and simplify the practice and procedure in the courts of this state. In *Watkins*, our Supreme Court noted:

> [S]tatutory rules of evidence that reflect policy considerations limited to "the orderly dispatch of judicial business," i.e., court administration, are procedural and violate Const 1963, art 6, § 5. But statutory rules of evidence that reflect policy considerations "over and beyond matters involving the orderly dispatch of judicial business" are substantive, and in the case of a conflict with a court rule, the legislative enactment prevails. [*Watkins*, 491 Mich at 474.]

With respect to MCL 768.27b, the Legislature clearly had policy concerns relevant to domestic-violence cases that went beyond the orderly dispatch of judicial business, and the statute is therefore constitutional as a substantive rule of evidence. See *id*. at 473-475.

mission of a certain category of hearsay statements in cases involving domestic violence, and with defendant raising no other argument with respect to the hearsay statements admitted at his trial, we need not address whether they were admissible under MRE 403. We conclude that the trial court made no errors of law in admitting the statements and did not abuse its discretion.

Defendant does argue, however, that testimony from his ex-wife that defendant sexually assaulted her during the course of their marriage was inadmissible under MRE 403. Defendant claims that this evidence was substantially more prejudicial than probative given the dissimilarity between defendant's assaults on his ex-wife and the facts of this case, particularly in light of the fact that the prosecution did not allege in this case that the victim was sexually assaulted. We disagree.

MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

With respect to specifically analyzing other-acts evidence admitted pursuant to MCL 768.27b under the MRE 403 balancing test, we have held:

> [T]his Court must make two distinct inquires under the balancing test of MRE 403. First, this Court must decide whether introduction of [the defendant's] prior-bad-acts evidence at trial was unfairly prejudicial. Then, this Court must apply the balancing test and weigh the probativeness or relevance of the evidence against the unfair prejudice. Upon completion of this second inquiry, this Court can determine whether the trial court abused its

> discretion in allowing [the defendant's] prior bad acts into evidence. [*Cameron*, 291 Mich App at 611 (quotation marks and citation omitted).]

Notably, "[e]vidence offered against a criminal defendant is, by its very nature, prejudicial to some extent." *People v Meissner*, 294 Mich App 438, 451; 812 NW2d 37 (2011). Unfair prejudice, however, specifically "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Cameron*, 291 Mich App at 611 (quotation marks and citation omitted). This Court has held that while the testimony of a defendant's former girlfriends "about [the] defendant's physical abuse and threats to kill them . . . was certainly damaging and prejudicial," it was also "highly relevant to show [the] defendant's tendency to assault [the victim] as charged" and therefore admissible. *Railer*, 288 Mich App at 220-221.

In this case, the ex-wife's testimony did not inject extraneous considerations and was highly relevant. See *Cameron*, 291 Mich App at 611. The ex-wife testified that at one point in their roughly 11-month relationship, defendant sexually assaulted her on a weekly basis. She testified that defendant was verbally abusive and that after the ex-wife and defendant divorced, defendant began engaging in stalking behaviors, even once attempting to break into the ex-wife's home by prying her basement window open with a knife. These allegations were highly relevant and probative because they spoke directly to defendant's propensity to commit domestic violence against women, particularly women with whom he is in a relationship. See *Railer*, 288 Mich App at 219-220. Moreover, even assuming arguendo that this evidence was unduly prejudicial, there was a

substantial amount of other evidence that defendant committed domestic violence against the victim, including defendant's *own admissions* to the police that he choked the victim during a fight. In light of all the evidence, defendant has not established that to the extent that his ex-wife's testimony was unduly prejudicial, it was also more probable than not that it was outcome-determinative. Accordingly, defendant is not entitled to relief. See *Lukity*, 460 Mich at 496.

V. CONCLUSION

The trial court did not err by denying defendant's request for appointment of an expert on the practice of erotic asphyxiation because defendant failed to show the trial court that he had a substantial basis for that defense. Defendant further failed to establish that denial of his motion to appoint an expert witness denied him the ability to present a defense and led to a fundamentally unfair trial. With respect to his vague equal-protection claim, defendant failed to flesh out his arguments with citation of appropriate legal authority and failed to establish plain error. We also conclude as a matter of first impression that MCL 768.27b permits the admission of hearsay statements that fall within the scope of the statute, and the trial court therefore did not abuse its discretion by admitting hearsay statements under the same. Finally, the testimony of defendant's ex-wife was highly probative, but even assuming that it was unduly prejudicial, defendant cannot show that it was more probable than not that the error was outcome-determinative.

Affirmed.

METER, J., concurred with FORT HOOD, J.

MURRAY, C.J. (*concurring*). I concur in the decision to affirm defendant's conviction and sentence. However, for the reasons explained briefly below, my reasons for doing so are somewhat different than those utilized by the majority.

First, with respect to the appointment of a defense expert witness at the state's expense, I would conclude that defendant satisfied the first part of the "reasonable probability" standard from *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), adopted by the Supreme Court in *People v Kennedy*, 502 Mich 206, 226-228; 917 NW2d 355 (2018). In adopting the *Moore* reasonable-probability standard, the *Kennedy* Court held that " 'a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.' " *Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712.

Several courts have recognized that the process of evaluating the "reasonable probability" standard is a "dynamic one" that is, naturally, very case specific. *Moore v State*, 390 Md 343, 369; 889 A2d 325 (2005). This case is neither heavy on the facts nor on the science or legal theories presented. In both defendant's motion and supporting brief, as well as at the motion hearing, defense counsel informed the trial court about "the nature of the crime and the evidence linking [defendant] to the crime," *Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712 (quotation marks omitted), by indicating that defendant was being prosecuted for murder and that his defense was that he accidentally killed the victim through erotic asphyxiation. Defense counsel also provided a sufficient demonstration of a "substantial basis for the defense," *Kennedy*, 502 Mich at 227,

quoting *Moore*, 809 F2d at 712 (quotation marks omitted), by informing the trial court that the medical examiner's testimony would be that the victim died from strangulation, that defendant and the victim had previously been a couple, that erotic asphyxiation is a somewhat unknown defense in Michigan, that the proposed expert would be able to testify as to the practice of erotic asphyxiation, and that individuals can die through the practice. Although this information is not nearly as detailed as that provided by the defendant in *Ake v Oklahoma*, 470 US 68, 86 & n 12; 105 S Ct 1087; 84 L Ed 2d 53 (1985), the *Ake* Court specifically noted that it was not expressing an "opinion as to whether any of these factors [set forth by defendant], alone or in combination, is necessary to make this finding." Because a reading of *Ake*, *Moore*, and *Kennedy* does not lead to the conclusion that defendant's burden of production is an overly burdensome one, I would hold that defendant satisfied the first portion of the reasonable-probability standard adopted in *Kennedy*.

However, as the majority concluded, in the end it is not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial. *Kennedy*, 502 Mich at 227. As ably recounted by the majority, in front of the jury the prosecution's expert recognized the practice of erotic asphyxiation and that the victim's death could have resulted from that practice. This testimony, in conjunction with defendant's testimony about the circumstances surrounding the victim's death, presented the jury with a full and complete picture regarding the circumstances surrounding the victim's death, or at least defendant's version as to how it occurred. See *Stephens v Kemp*, 846 F2d 642, 646-647 (CA 11, 1988). As a result, no error requiring reversal occurred on this issue.

Second, with respect to whether hearsay evidence is admissible under MCL 768.27b without meeting the requirements of the rules of evidence, I do not read the reference in MCL 768.27b(1) to MRE 403 to mean that all other rules of evidence are inapplicable. There are several reasons for this conclusion. For one, MCL 768.27b(1) not only explicitly invokes MRE 403, but it also implicitly invokes MRE 401 and 402 by stating that "evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is *relevant* . . . ." Of course, relevancy is determined under MRE 401, and relevant evidence is admissible under MRE 402. Thus, contrary to the majority's conclusion, MCL 768.27b(1) does not preclude consideration of *any* rule of evidence other than MRE 403.[1]

Additionally, our Court has previously concluded that this very statute did not " 'lower the . . . value of the evidence needed to convict a defendant' " and "does not permit conviction on less evidence or *evidence of a lesser quality*." *People v Schultz*, 278 Mich App 776, 778; 754 NW2d 925 (2008) (emphasis added), quoting *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). As the *Schultz* Court held, "MCL 768.27b did not change the burden of proof necessary to establish the crime, ease the presumption of innocence, *or downgrade the type of evidence necessary to support a conviction*." *Schultz*, 278 Mich App at 778 (emphasis added). The majority's construction of MCL 768.27b

[1] MCL 768.27b(3) specifically states that the section "does not limit or preclude . . . consideration of evidence under any other . . . rule of evidence . . . ." This would seem to answer the question presented. Although this provision is written toward ensuring that propensity evidence can still be admitted under other rules, the literal language allows courts to consider other rules of evidence when addressing propensity evidence.

runs contrary to our declaration in *Schultz* that the statute does not downgrade the type of evidence necessary to support a conviction. Instead, what MCL 768.27b does is set forth a substantive legislative policy choice—similar to that in MCL 768.27a—that propensity evidence can and should be used in prosecuting the listed crimes (taking the opposite presumption from that in MRE 404b), subject to an analysis under MRE 403.[2] See *People v Meissner*, 294 Mich App 438, 451-452; 812 NW2d 37 (2011). But that substantive policy decision does not address—and does not eliminate—the need for courts to test the reliability of the evidence used to prove the defendant's propensity. Nothing in the statute suggests that the Legislature was requiring courts to dispense with the other rules of evidence that relate to the quality of the evidence admitted at trial. See *People v Watkins*, 491 Mich 450, 487; 818 NW2d 296 (2012); *Schultz*, 278 Mich App at 778. See also *People v Uribe*, 499 Mich 921, 922 (2016).[3]

Finally, although the *Watkins* Court refused to read additional limitations into the single restriction contained in the introductory section of MCL 768.27a, the Court additionally refused "to read into MCL 768.27a a legislative intent to foreclose the application of other

[2] In other words, this statutory provision was a rejection of the principles of MRE 404(b) by allowing admission of relevant propensity evidence in these types of cases but acceptance of the ability of trial courts to determine whether such evidence was more prejudicial than probative. This, of course, is within the proper power of the Legislature. See, e.g., *People v Babcock*, 244 Mich App 64, 89; 624 NW2d 479 (2001) (HOOD, J., concurring) (recognizing that the Legislature can adopt some portions of caselaw while rejecting other parts), rev'd on other grounds 469 Mich 247 (2003).

[3] Although there are certain differences between MCL 768.27a and MCL 768.27b, the two statutes are closely aligned with the same policy considerations. *People v Cameron*, 291 Mich App 599, 609-610; 806 NW2d 371 (2011).

ordinary rules of evidence, such as those pertaining to hearsay and privilege." *Watkins*, 491 Mich at 485.

The prosecution concedes[4] on appeal that certain evidence was inadmissible hearsay but also correctly argues that defendant's conviction should still be affirmed because the evidence otherwise properly admitted was more than adequate for the jury to convict defendant. Defendant's statements to the police, defendant's testimony at trial regarding what he claims led to the victim's death, and the acknowledgment by the prosecution's expert of the dangers of erotic asphyxiation were all presented to the jury, and in combination that evidence was more than sufficient for the jury to find defendant guilty beyond a reasonable doubt. For these reasons, I concur in the majority's decision to affirm defendant's conviction and sentence.

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[4] Indeed, the prosecution does not even argue that MCL 768.27b(1) allows for consideration of hearsay evidence. Instead, the prosecution argues that even setting aside the hearsay presented to the jury, the otherwise admissible evidence was more than enough to convict defendant, so any error in the admission of this evidence was harmless.

PEOPLE v ANDERSON
PEOPLE v FERRER
PEOPLE v GERENCER
PEOPLE v JACKSON
PEOPLE v KAHRIMAN
PEOPLE v PENNY
PEOPLE v THOMAS
PEOPLE v TOLIVER
PEOPLE v SINGLETON
PEOPLE v HILLYER

Docket Nos. 343272 through 343281. Submitted July 10, 2019, at Grand Rapids. Decided October 15, 2019, at 9:00 a.m.

Defendants were former certified nursing aids or assistants (CNAs) who were charged with intentionally falsifying medical records, MCL 750.492a. Defendants worked at the Grand Rapids Home for Veterans (GRHV), a residential and skilled nursing facility for military veterans and their spouses; these veterans and their spouses were referred to as "members." Some of the members at the GRHV suffered from serious psychiatric problems or dementia, which caused them to be at risk for eloping from the facility or harming themselves or others while unattended. Defendants were required to perform member location checks in the skilled nursing units at least every two hours to ensure that the members were present in their rooms or located elsewhere in the unit. To record that member location checks had been performed, CNAs were required to complete a "member location sheet" that listed the patients' names and the times that the checks were to be performed, and included a space for the CNA's initials. After an audit of the GRHV by the Michigan Office of the Auditor General, defendants were found to have failed to perform member location checks while falsely reporting that they had done so on the member location sheets. Defendants were subsequently charged with violating MCL 750.492a(1). The district court declined to bind defendants over for trial, concluding that member location sheets were not medical records as defined by the Medical Records Access Act (MRAA), MCL 333.26261 *et seq*. The Kent Circuit Court, Mark A. Trusock, J., agreed with the district court and affirmed the district court's decision to dismiss the

cases. The circuit court further held that the member location sheets were not medical records as defined by the MRAA because they contained the names of multiple members, were stored in a central location instead of in individual members' health records, and were not maintained for seven years as required by MCL 333.20175(1) of the Public Health Code (PHC), MCL 333.1101 *et seq*. The prosecution sought leave to appeal; the Court of Appeals granted the applications and consolidated the cases.

The Court of Appeals *held*:

1. The member location sheets were medical records for purposes of MCL 750.492a. MCL 333.26263(i) of the MRAA defines "medical record" as "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.16213(7)(a) and MCL 333.20175a(5)(a) of the PHC similarly define "medical record." The PHC, the MRAA, and MCL 750.492a should be read *in pari materia*. These statutes work together to ensure patients' access to accurate medical records. The PHC ensures that records are preserved for a minimum of seven years, the MRAA allows patients to obtain or examine their medical records, and MCL 750.492a ensures the accuracy of medical records by criminalizing the falsification, alteration, or destruction of those records. Although "medical record" is not defined by MCL 750.492a, it is defined by the PHC and the MRAA, and there is no reason that the Legislature would intend for a different definition to apply to MCL 750.492a. The member location sheets are medical records as defined by the MRAA because they contained recorded information that pertained to a patient's healthcare and were recorded in the process of caring for the patient's health. Caring for the medical conditions of the members who needed skilled nursing care required regular observation of those members, and thus performance of that observation related to the patients' healthcare. The fact that the GRHV did not treat the member location sheets as medical records as required by the PHC is not controlling as to whether the documents were medical records. To hold otherwise would be to allow healthcare providers to determine whether a document is a medical record based on how the document is treated by the provider.

2. MCL 750.492a is a specific-intent statute. Therefore, the prosecution was required to prove that defendants knew the member location sheets were medical records. The statute prohibits "intentionally" or "willfully" placing misleading or inaccu-

rate information in a patient's medical record. These words indicate a specific-intent crime. Accordingly, in order to convict a defendant under MCL 750.492a, the prosecution must establish that the healthcare provider knew that the document being falsified was a medical record. In the absence of such knowledge, a healthcare provider would not be acting with the necessary specific intent under the statute.

Reversed and remanded for further proceedings.

SAWYER, J., dissenting, disagreed that the magistrate had abused her discretion by refusing to bind defendants over for trial, and he did not believe that it was necessary to decide whether member location sheets constituted medical records under MCL 750.492a in order to determine whether defendants should have been bound over. Even if the sheets are properly considered medical records, their falsification did not fall within the scope of the statute. The false statements indicating that member location checks had been performed were not statements "regarding the diagnosis, treatment, or cause of a patient's condition" as required for conviction under MCL 750.492a. There was no evidence that the member location sheets were used by a physician to diagnose a patient, determine a course of treatment, or ascertain the cause of a patient's condition. Rather, the evidence only supported the conclusion that the member location checks were a safety measure. While such checks are an important part of operating the GRHV, false statements regarding those checks were not included in the scope of MCL 750.492a. Judge SAWYER would have affirmed the decisions of the lower courts.

1. CRIMINAL LAW — PLACING INACCURATE INFORMATION IN MEDICAL RECORDS — WORDS AND PHRASES — "MEDICAL RECORD."

MCL 750.492a should be read *in pari materia* with the Medical Records Access Act (MRAA), MCL 333.26261 *et seq*., and the Public Health Code (PHC), MCL 333.1101 *et seq*., such that the statutory definitions of the term "medical record" in the MRAA and the PHC should be used in interpreting MCL 750.492a.

2. STATUTORY INTERPRETATION — MCL 750.492a — CRIMINAL INTENT — SPECIFIC INTENT.

MCL 750.492a provides that a healthcare provider who intentionally, willfully, or recklessly places misleading or inaccurate information in a patient's medical record is guilty of a felony; "intentionally" and "willfully" indicate that violation of the statute is a

specific-intent offense that requires the prosecution to prove that the healthcare provider knew that the document being falsified was a medical record.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Brendan Maturen*, Assistant Prosecuting Attorney, for the people.

Gerald R. Lykins for Eric Anderson, Jasmine Ferrer, Cary Gerencer, Lolitta Jackson, Emina Kahriman, Doris Penny, Sequoyah Thomas, Tyisha Toliver, and Sheryl Hillyer.

State Appellate Defender (by *Adrienne N. Young*) for Roconda Singleton.

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

SHAPIRO, J. Defendants are former nursing aids or assistants charged with intentionally falsifying medical records, MCL 750.492a. The district court declined to bind over defendants, concluding that the "member location sheets" that they allegedly falsified were not "medical records" as that term is defined by the Medical Records Access Act (MRAA), MCL 333.26261 *et seq*. The circuit court agreed and affirmed the district court's decision to dismiss these 10 consolidated cases. The prosecution appeals by leave granted, arguing that the lower courts erred by holding that the member location sheets were not medical records. We agree. The member location checks that defendants were required to perform were part of the healthcare provided to the patients by the facility that employed defendants. Because the member location sheets constitute recorded information pertaining to that care, they are medical records under the MRAA, which we conclude must be read *in pari materia* with MCL

750.492a. However, we also conclude that to convict defendants of intentionally or willfully falsifying medical records in violation MCL 750.492a, the prosecution must prove that they knew that the member location sheets were medical records. We remand to the district court so that it can determine whether the prosecution can establish probable cause on that element.

I

Defendants were certified nurse aides (CNAs) or certified nursing assistants (CENAs)[1] employed by a staffing company and assigned to the Grand Rapids Home for Veterans (GRHV), a residential and skilled nursing facility for military veterans and their spouses; these veterans and their spouses were known as "members." Many of the relevant patients in the skilled nursing units suffered from serious psychiatric problems or dementia and, as a result, might elope or create a risk of harm to themselves or others in the facility while unattended. CNAs working at the GRHV were required to perform member location checks for the skilled nursing units at least every two hours to verify that the members were present in their rooms and, if not, to verify that they were elsewhere in the unit.

Member location sheets were a simple grid. The patients' names were listed vertically and the times at which checks were to be performed were listed horizontally. Thus, for each patient listed there was a box to be completed reflecting whether or not a location check was performed for each time period. Each time a CNA performed a member location check, the CNA was

[1] The parties appear to use the acronyms CNA and CENA interchangeably. We use the acronym CNA throughout this opinion for consistency.

to place his or her initials in the box for the corresponding patient and time. As long as a CNA laid eyes on a member, they could initial the appropriate box on the member location sheet. The parties stipulated prior to the preliminary examination that the member location sheets were not maintained in a member's personal medical chart, but instead in a central location. The parties also stipulated that the GRHV destroyed the location sheets after six months. Under the Public Health Code (PHC), MCL 333.1101 *et seq*., a healthcare facility must retain a patient's records for at least seven years. MCL 333.20175(1).

The member location sheets at issue in this case were filled out completely, appearing to show that all member location checks had been completed. However, during a performance audit of the GRHV, the Michigan Office of the Auditor General determined on the basis of video surveillance tapes that defendants had not performed certain location checks as reported in the corresponding member location sheets.

On the basis of this discovery, the Health Care Fraud Division of the Attorney General's Office opened an investigation into the GRHV. As a result of this investigation, each defendant was charged with one count of intentionally placing false information in a medical record or chart in violation of MCL 750.492a(1). That statutory provision provides, in pertinent part, that

> a health care provider or other person, knowing that the information is misleading or inaccurate, shall not intentionally, willfully, or recklessly place or direct another to place in a patient's medical record or chart misleading or inaccurate information regarding the diagnosis, treatment, or cause of a patient's condition. [MCL 750.492a(1).]

The statute goes on to provide, "A health care provider who intentionally or willfully violates this subsection is guilty of a felony." MCL 750.492a(1)(a).

The preliminary examination was held over the course of three days. The GRHV's director of nursing, Paula Bixler, testified regarding the varying levels of cognitive impairment and physical restrictions of the members in the skilled nursing units. Bixler explained that the purpose of the member location checks was to ensure the member's health, safety, and well-being; specifically, to ensure that members were not wandering and that they had not eloped off the unit. She testified that the purpose of the member checks was not specifically to look for member incontinence, but CNAs would be expected to address such a situation if they noticed it. Also, if a CNA noticed that a member had fallen or was experiencing a medical emergency, they were required to alert a nurse.

Following the preliminary examination, the district court found probable cause that defendants were healthcare providers, that the information they were recording was "regarding treatment of these patients' condition," and that "defendants knew that the information that they supplied was misleading or inaccurate." However, the district court did not "find that there's been any evidence to suggest that these location sheets are medical records." In reaching that conclusion, the court considered the definition of medical record found in the MRAA, which provides that a medical record "means information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i). The district

court said it was arguable whether member location sheets "pertain to the member[s'] health care." But the court noted that a medical record must be maintained by a healthcare provider or facility, and the testimony at the preliminary examination was that the member location sheets were not treated as medical records by the GRHV. The district court also indicated that the prosecution failed to show probable cause that defendants intentionally or willfully placed misleading or inaccurate information in a medical record.

The prosecution appealed in the circuit court, which affirmed the district court's decision, agreeing with the district court that the MRAA's definition of medical record was applicable to MCL 750.492a(1). The circuit court concluded that the member location sheets did not meet that definition because they contained the names of multiple members, were stored in a central location and were not maintained for seven years as required by MCL 333.20175(1). The prosecution moved for leave to appeal in this Court in each case. We granted the application for leave to appeal and consolidated the 10 cases.

II

A

The prosecution argues that the lower courts erred by determining that the member location sheets were not medical records for purposes of MCL 750.492a. We agree.[2]

[2] Generally, whether the district court erred when it decided not to bind over a defendant is reviewed for an abuse of discretion. *People v Greene*, 255 Mich App 426, 434; 661 NW2d 616 (2003). However, "[w]hether a defendant's conduct falls within the scope of a penal statute

The goal of statutory interpretation is to discern and give effect to the Legislature's intent. *People v Flick*, 487 Mich 1, 10; 790 NW2d 295 (2010). An initial question we must decide is whether to apply the MRAA's definition of medical record to MCL 750.492a under the doctrine of *in pari materia*. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). This is true even if the statutes do not refer to one another and were enacted on different dates. *In re $55,336.17 Surplus Funds*, 319 Mich App 501, 507; 902 NW2d 422 (2017). "The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject." *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007) (quotation marks and citations omitted).

The MRAA, the PHC, and MCL 750.492a work together to ensure that patients have access to accurate medical records. The MRAA allows patients to examine or obtain copies of medical records held by healthcare facilities, healthcare providers, or medical records companies. See MCL 333.26265. To ensure that those records are preserved, the PHC requires licensed health professionals and health facilities or agencies to "keep and retain each record for a minimum of 7 years from the date of service to which the record pertains." MCL 333.16213(1); MCL 333.20175(1). MCL 750.492a plays an important role in the preservation of medical records by criminalizing the falsification, alteration, and destruction of those records. So MCL 750.492a, the

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is a question of statutory interpretation that is reviewed de novo." *People v Rea*, 500 Mich 422, 427; 902 NW2d 362 (2017).

MRAA, and the record-retention provisions of the PHC are interrelated.[3]

Significantly, the MRAA's definition of medical records is largely the same as that in the PHC.[4] See MCL 333.16213(7)(a); MCL 333.20175a(5)(a); MCL 333.26263(i). By providing the same definition of medical records in both acts, it is clear that the Legislature intended for the healthcare facilities and providers to make uniform and consistent decisions regarding what constitutes a medical record. We see no reason why the Legislature would want a different definition of medical records to govern MCL 750.492a. It would make little sense for a statutory definition to govern the retention of, and access to, medical records, but to have the falsification and destruction of those records be controlled by a different definition.[5] Moreover, MCL 750.492a contains no alternative definition.

For those reasons, we conclude that MCL 750.492a, the MRAA and the pertinent sections of the PHC relate

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[3] Notably, the Attorney General has interpreted MCL 750.492a as being *in pari materia* with the PHC. See OAG, 1993-1994, No. 6,819 (September 28, 1994).

[4] Both acts define the term as meaning information oral or recorded in any form or medium that pertains to a patient's healthcare, medical history, diagnosis, prognosis, or medical condition, but the PHC refers to the records being maintained in the process of providing medical services, while the MRAA refers to the records being maintained in the process of caring for the patient's health. See MCL 333.16213(7)(a); MCL 333.20175a(5)(a); MCL 333.26263(i). We do not find this distinction important here.

[5] If we were to conclude that the statutory definition of medical record does not apply to MCL 750.492a, we question whether that statute would be void for vagueness for not providing "fair notice of the conduct proscribed." *People v Roberts*, 292 Mich App 492, 497; 808 NW2d 290 (2011) (citation omitted). Given that the MRAA and the PHC provide the same definition of medical records, there are legitimate concerns whether a healthcare provider would have fair notice that this definition does not apply to MCL 750.492a. And, if possible, we must interpret

to the same subject matter and share a common purpose. Accordingly, we must read these statutory provisions *in pari materia*, and apply the statutory definition of medical records in interpreting MCL 750.492a.[6]

The question then is whether the member location sheets constitute "information oral or recorded in any form or medium that pertains to a patient's health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient's health." MCL 333.26263(i). The location sheets contain recorded information, so the only issue is whether member location checks pertain to a patient's healthcare and are recorded in the process of caring for the patient's health. The *Merriam-Webster.com* dictionary site defines "health care" as "efforts made to maintain or restore physical, mental,

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statutes to avoid constitutional issues. *Does 11-18 v Dep't of Corrections*, 323 Mich App 479, 505; 917 NW2d 730 (2018) (O'CONNELL, J., concurring).

[6] We note that the MRAA states, "As used in this act" before providing a list of definitions. MCL 333.26263. And the pertinent PHC sections state, "As used in this section" before providing the definition of "medical record." MCL 333.16213(7)(a); MCL 333.20175a(5)(b). However, in *People v Feeley*, 499 Mich 429, 444; 885 NW2d 223 (2016), the Supreme Court declined to hold that such limitations on a statutory definition necessarily preclude application of that definition to other contexts. In that case, the Court determined that the statutes at issue did not share a common purpose. *Id*. at 443. The Court then observed that the relevant statutory definition contained the type of limiting language set forth above. *Id*. at 444. The Court reasoned, "When statutes do not deal with the same subject or share a common purpose *and* the Legislature has chosen to specifically limit the applicability of a statutory definition, the doctrine of *in pari materia* is inapplicable." *Id*. (emphasis added). In this case, however, the relevant statutes do share a common purpose, i.e., the retention of accurate medical records. And for the reasons discussed above, we are convinced that the definition should be read *in pari materia* with MCL 750.492a.

or emotional well-being especially by trained and licensed professionals . . . ." See Merriam-Webster <https://www.merriam-webster.com/dictionary/health%20care> (accessed October 8, 2019) [https://perma.cc/2X59-BBNW].[7]

As noted above, the member location sheets at issue pertained to members requiring skilled nursing. Bixler, the director of nursing at the GRHV, testified that members who require skilled nursing have a "broad range" of cognitive and medical issues that necessitate that type of care. The location sheets at issue in this case pertained to three skilled nursing units: 1 Main, 1 Red, and 3 South. Bixler explained that 1 Main is the GRHV's locked psychiatric unit. The members living there had guardians and were unable to make their own health decisions because of various mental illnesses. These mental illnesses combined with their physical needs necessitated their placement in a secured unit. These members were at risk for eloping from the grounds and "strik[ing] out at each other." 1 Red is a dementia unit for members who are severely cognitively impaired. Bixler said that these members often wander into other members' rooms, which places both them and the other members at risk of injury. She said it was fairly common for these members to be combative or assaultive. 3 South is an "open" unit for members who are less severely impaired. But that unit does have some members who have been diagnosed with dementia. Many of the members in each of these units also suffered from incontinence. At the relevant time, 1 Main and 1 Red required member checks every hour; 3 South required such checks every two hours.

[7] We may consult a dictionary to determine the ordinary meaning of terms not defined by statute. See *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007).

Bixler's testimony establishes that the member location checks are conducted as part of the healthcare provided to the pertinent members. The members in the skilled nursing units have cognitive or psychiatric impairments that require regular observation. Those impairments place them at risk of eloping or hurting themselves or other members. These members also commonly have physical impairments or limitations that present other concerns, such as incontinence or falling. By making regular observations of the members, CNAs ensure that the members are where they are supposed to be and that no health or safety issues requiring intervention have arisen. Bixler explained that the CNAs are the "first line" to detect and report health concerns because they are intimately familiar with the members and know "when something's off . . . ." When caring for a patient's medical condition requires regular observation, performance of that observation relates to the patient's healthcare, i.e., efforts made to maintain the patient's well-being. And because the member location checks pertain to a patient's healthcare, member location sheets are recorded in the process of caring for a patient's health. Consequently, member location sheets satisfy the statutory definition of "medical record."

In concluding otherwise, the lower court focused on the fact that the GRHV did not treat the location sheets as medical records. That is, the GRHV did not retain the records for a period of seven years as required by the PHC. However, the manner in which the GRHV treated the documents is not controlling. To hold otherwise would allow healthcare providers to unilaterally determine what constitutes a medical record under the law by deciding whether or not to maintain them for seven years. For the same reason, we reject the argument that the location sheets are not

medical records because they were not maintained within the members' individual medical charts, but instead contained the names of multiple members and were stored at a central location for each residential unit. Whether or not materials outside a patient's chart constitute medical records turns on their content, not where they are maintained.[8] If the location of a record or its form was dispositive, a healthcare facility or provider, not the law, would control what constitutes a medical record; ultimately, however, it is for the courts to interpret and apply the law. See *Mich Residential Care Ass'n v Dep't of Social Servs*, 207 Mich App 373, 377; 526 NW2d 9 (1994). The fact that the GRHV treated the location sheets as if they were not medical records has little bearing on our resolution of this issue.

Given our conclusion that the member location sheets are medical records, the next question is whether the inaccurate information placed in those records pertained to "the diagnosis, treatment, or cause of a patient's condition." MCL 750.492a(1). We conclude that the district court correctly found that the location sheets pertained to a patient's treatment. Common sense dictates that medical treatment includes managing symptoms and increased risks associated with a patient's illness. Thus, for the same reasons that member location checks relate to a patient's healthcare, misleading or inaccurate information placed in the member location sheets pertained to a patient's treatment. Further, because the scheduled member location checks pertained to a patient's healthcare, recording that the checks were performed

[8] In the event a patient requested a copy of their medical records, the names of the other patients on the member location sheets could readily be redacted in order to preserve their privacy.

if they were not would constitute inaccurate information regarding a patient's condition.

B

For purposes of judicial efficiency, and to avoid a possible second interlocutory appeal, we consider the level of intent required by the statute. The district court first raised this issue in ruling on an objection to the testimony of Sharon Gregory, the GRHV's medical records supervisor:

> [O]ne of the elements that is there, is that the CNA's intentionally or willfully placed or directed someone else to place in a medical record or chart, misleading or inaccurate information, knowing that it was misleading or inaccurate. And, I think that how the Home views medical records does go to whether or not this was an intentional or willful act on the part of the CNA's, if they thought or knew they were putting information in a medical record or not. So, I do think that it's relevant how the Home views these particular documents and whether they're records or not, just given the fact that all of these people were contracted employees at that facility.

While the district court later ruled on the basis of whether the documents were medical records, it was clearly influenced by its concern regarding whether defendants could be convicted under MCL 750.492a if they did not know that the member location sheets were medical records. For the reasons discussed below, we conclude that MCL 750.492a requires the prosecution to prove such knowledge.

Due process requires that the prosecution prove each element of an offense, including intent, beyond a reasonable doubt. See *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992). Crimes generally require either general intent or specific intent. "[T]he

distinction between specific intent and general intent crimes is that the former involve a particular criminal intent beyond the act done, while the latter involve merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Here, defendants are charged with a felony for intentionally or willfully placing misleading or inaccurate information in a patient's medical record. See MCL 750.492a(1)(a). The words "intentionally" and "willfully" indicate a specific-intent crime. *People v Disimone*, 251 Mich App 605, 611; 650 NW2d 436 (2002).

Even when the statute provides a *mens rea* requirement, however, questions may remain as to what the intent level requires and whether it applies to all elements and factual circumstances of a crime. The "presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime." *Rambin v Allstate Ins Co*, 495 Mich 316, 327-328; 852 NW2d 34 (2014). Intent as to each element is required absent language or legislative history that the Legislature intended to omit this requirement. See *id*. at 328-330; *People v Cash*, 419 Mich 230, 240; 351 NW2d 822 (1984). The United States Supreme Court has also concluded "that the presumption in favor of a criminal intent or *mens rea* requirement applies to each element of a statutory crime." *People v Tombs*, 472 Mich 446, 454-455; 697 NW2d 494 (2005) (opinion by KELLY, J.) (discussing *Staples v United States*, 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994), and *United States v X-Citement Video, Inc*, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994)). The Court has explained "that a defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Elonis v United States*, 575 US

723, 735; 135 S Ct 2001; 192 L Ed 2d 1 (2015) (quotation marks and citation omitted). And in a recent case, the Court considered the issue in the context of a statute barring possession of a firearm by certain classes of individuals. In order to "knowingly violate[]" the statute, the Court held that the defendant must not only knowingly possesses a firearm, but also must know that he or she is a member of one of the subject excluded classes. *Rehaif v United States*, 588 US ___, ___; 139 S Ct 2191, 2194; 204 L Ed 2d 594 (2019). The Court stated that "[a]s a matter of ordinary English grammar, we normally read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime." *Id*. at ___; 139 S Ct at 2196 (quotation marks and citation omitted).[9]

Our caselaw is not entirely consistent on what constitutes a "willful" violation of a statute.[10] See *People v Medlyn*, 215 Mich App 338, 344; 544 NW2d 759 (1996) (describing this as an "extremely murky area" of the law). See also *Bryan v United States*, 524 US 184, 191; 118 S Ct 1939; 141 L Ed 2d 197 (1998) ("The word 'willfully' is sometimes said to be 'a word of

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[9] See also *Liparota v United States*, 471 US 419, 433; 105 S Ct 2084; 85 L Ed 2d 434 (1985) (holding that a charge of unlawfully acquiring food stamps requires the prosecution to "prove that the defendant knew that his acquisition or possession of food stamps was in a manner unauthorized by statute or regulations"); *X-Citement Video*, 513 US at 78 (holding that a charge of knowingly transporting child pornography in interstate commerce requires the prosecution to prove that the defendant had knowledge of the "sexually explicit nature of the material and [of] the age of the performers").

[10] Defendants are charged with "intentionally" or "willfully" violating the statute. Michigan courts have interpreted "willful" as being synonymous with intentional. *In re Napieraj*, 304 Mich App 742, 746; 848 NW2d 499 (2014); *Jennings v Southwood*, 446 Mich 125, 139-140; 521 NW2d 230 (1994). Accordingly, we will treat the two terms as requiring the same level of intent.

many meanings' whose construction is often dependent on the context in which it appears.") (citation omitted). However, it is settled that "when a statute prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result the statute seeks to prohibit." *People v Janes*, 302 Mich App 34, 41; 836 NW2d 883 (2013) (quotation marks and citation omitted). And "[t]o commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur . . . ." *People v Whitney*, 228 Mich App 230, 255-256; 578 NW2d 329 (1998) (quotation marks and citations omitted).

Accordingly, we conclude that to prove an intentional or willful violation of MCL 750.492a, the prosecution must establish that the healthcare provider knew that the document being falsified was a patient's medical record. In the absence of such knowledge, a healthcare provider would not be acting with the specific intent to commit the prohibited act, i.e., the placement of inaccurate information in a medical record. This is not to say that a healthcare provider must have knowledge of MCL 750.492a or that his or her conduct violated the law. But to be convicted of intentionally or willfully falsifying medical records, the provider must have knowledge of the facts that make that conduct illegal. See *Elonis*, 575 US at 735.

To be clear, a healthcare provider cannot escape liability under MCL 750.492a(1) simply by claiming that he or she did not know that the document at issue was a medical record. See *United States v Gullett*, 713 F2d 1203, 1212 (CA 6, 1983) (explaining that knowledge can be inferred from "a reckless disregard for the truth or with a conscious purpose to avoid learning the truth . . . .") (quotation marks omitted). But when a

healthcare provider is an employee of a healthcare facility that does not treat the recorded information as medical records, it raises a question of fact whether the provider had sufficient criminal intent to intentionally or willfully violate MCL 750.492a(1). Because we conclude that an intentional or willful violation of the statute cannot occur unless the provider has knowledge that the document being falsified is a medical record, we remand to the district court for it to determine whether there is probable cause that defendants knew that the member location sheets were medical records.

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

BORRELLO, J., concurred with SHAPIRO, J.

SAWYER, P.J. (*dissenting*). I respectfully dissent.

The majority engages in an extensive analysis regarding whether the "member location sheets" constitute a "medical record" under MCL 750.492a(1). While I am not persuaded by the majority's conclusion that the location sheets are medical records, more fundamentally, I do not find it necessary to even answer that question. Rather, I conclude that even if the location sheets are considered medical records, the falsification of those sheets does not fall within the scope of the statute.

MCL 750.492a(1) provides, in pertinent part, as follows:

> Except as otherwise provided in subsection (3), a health care provider or other person, knowing that the information is misleading or inaccurate, shall not intentionally, willfully, or recklessly place or direct another to place in a

> patient's medical record or chart misleading or inaccurate *information regarding the diagnosis, treatment, or cause of a patient's condition.* [Emphasis added.]

I am not persuaded that the false statements placed on the location sheets—indicating that "member location checks" had been completed when they had not been—were statements "regarding the diagnosis, treatment, or cause of a patient's condition" as required by the statute. Indeed, the circuit court, in the first-tier appeal, analyzed whether these were medical records and observed that the information was not so used:

> No information about the patient's condition, location, or incontinence is located on the sheet. Additionally, there is no blank space for this treatment information to be provided.
>
> As stipulated, these sheets are stored in a central location and not in the individual member's file.

Accordingly, the available evidence would not support the conclusion that the information was used by a physician to diagnose a patient's condition, to determine a course of treatment, or to ascertain the cause of a patient's condition. Rather, the evidence would only support a conclusion that the member location checks were conducted as a safety measure. While this is certainly an important aspect of the operation of the facility, it is not included in the scope of MCL 750.492a.

In sum, in the absence of evidence that the data collected was to be used by a medical professional to diagnose or treat a patient's condition, or to ascertain the cause of the condition, I cannot conclude that there is probable cause to believe that defendants violated MCL 750.492a. And, in the absence of evidence supporting a finding of probable cause, I cannot say that the examining magistrate abused her discretion by

refusing to bind defendants over for trial on this charge. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000).

For these reasons, I would affirm the decisions of the lower courts.

ANAYA v BETTEN CHEVROLET, INC

Docket No. 343887. Submitted October 8, 2019, at Grand Rapids. Decided October 15, 2019, at 9:05 a.m. Leave to appeal sought.

Samuel Anaya brought a negligence action in the Muskegon Circuit Court against Betten Chevrolet and its service technician, Matt Root. Anaya and Doris Myricks took Myricks's vehicle to Betten for service and maintenance. Root performed a tire rotation on Myricks's vehicle but failed to properly tighten the lug nuts on its left front wheel. Following the tire rotation, Myricks drove away from Betten with Anaya as her passenger. After Myricks had driven for approximately two blocks, the left front wheel came off the vehicle, causing it to skid and hit a curb. Following the accident, Anaya complained of severe leg and back pain. Anaya filed an action against Betten and Root, alleging that they had breached their duties to properly perform vehicle maintenance, rotate the tires, and secure the tires to the vehicle. Anaya later amended his complaint to assert that Betten and Root had violated the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*. Specifically, Anaya argued that Betten and Root had violated MCL 257.1307a(a) and (e) by charging for a repair that they did not perform and by failing to perform a promised repair within the agreed-upon time frame or within a reasonable time. Betten and Root admitted that Root had failed to properly tighten the lug nuts on Myricks's vehicle, but they contested the causation and damages elements of Anaya's claim, and a jury trial was held on those issues. At the trial, Betten and Root moved for a directed verdict on Anaya's MVSRA claim, arguing that Anaya had failed to support it. Anaya also moved for a directed verdict on his MVSRA claim. Betten and Root argued that Anaya was not entitled to a directed verdict on this claim because Root performed a tire rotation, albeit negligently, and because they were not liable to Anaya under the MVSRA because he was not their customer. The trial court, William C. Marietti, J., denied Betten and Root's motion but granted Anaya's motion, holding that repair facilities are liable to noncustomers as well as to customers under the MVSRA and that Betten and Root had failed to perform the tire rotation because doing so involved the removal and replacement of all the lug nuts. The court instructed the

jury that Betten and Root had violated the MVSRA and admitted negligence, and the jury returned a verdict for Anaya of $40,000. This appeal followed.

The Court of Appeals *held*:

1. The MVSRA does not limit the liability of motor vehicle repair facilities to only their customers. The purposes of the MVSRA include regulating the industry of servicing and repairing motor vehicles and proscribing unfair practices within the industry. Although who may recover for violations of some sections of the act is limited only to customers, MCL 257.1336 creates a cause of action for a "person" who is injured or suffers damages as a result of a violation of the statute by a motor vehicle repair facility. The definition of "person" in the MVSRA, MCL 257.1302a(h), does not refer to customers or vehicle owners.

2. The trial court erroneously granted Anaya's motion for a directed verdict because it incorrectly interpreted MCL 257.1307a. The trial court's interpretation of "perform" led it to conclude that Betten and Root did not perform a tire rotation because Root failed to tighten the lug nuts on one of the wheels of Myricks's vehicle. Although the MVSRA does not define "perform," its common meaning is to carry out an action; it does not imply that an action has been successfully performed or properly completed. Additionally, the statute as a whole does not support the conclusion that a facility violates MCL 257.1307a when it negligently performs a repair. Rather, the Legislature's intention was to regulate the motor vehicle repair industry and repair procedures and to ensure that customers were only charged for necessary repairs that were actually performed. Therefore, Betten and Root were entitled to a directed verdict because there was no factual issue regarding whether they had failed to perform the tire rotation under the MVSRA.

Vacated in part, reversed in part, and case remanded for entry of an amended judgment.

1. STATUTORY INTERPRETATION — MOTOR VEHICLE SERVICE AND REPAIR ACT — MOTOR VEHICLE REPAIR FACILITIES — LIABILITY TO NONCUSTOMERS.

The Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*., does not limit the liability of motor vehicle repair facilities to only customers; although some parts of the statute create causes of action specifically for customers, MCL 257.1336 provides that motor vehicle repair facilities are liable to "persons," which includes noncustomers, for damages or injuries resulting from a violation of the MVSRA.

2. STATUTORY INTERPRETATION — MOTOR VEHICLE SERVICE AND REPAIR ACT — WORDS AND PHRASES — "PERFORMED."

Under MCL 257.1307a(a), a motor vehicle repair facility that is subject to the Motor Vehicle Service and Repair Act, MCL 257.1301 *et seq*., or a person that is an owner or operator of a motor vehicle repair facility that is subject to the act, shall not, directly or through an agent or employee, charge for repairs that are, in fact, not performed; a motor vehicle repair facility has performed a repair under the statute even if the repair was not successful or was performed negligently.

Garan Lucow Miller, PC (by *Caryn A. Ford*) for Samuel Anaya.

Donald M. Fulkerson and *The Thurswell Law Firm, PLLC* (by *Mark E. Boegehold*) for Betten Chevrolet, Inc.

Before: MARKEY, P.J., and BORRELLO and BOONSTRA, JJ.

BOONSTRA, J. Defendants Betten Chevrolet, Inc. (Betten) and Matt Root appeal by right the trial court's final judgment entered after a jury verdict in favor of plaintiff. Defendants challenge the trial court's directed verdict in favor of plaintiff regarding whether defendants violated the Motor Vehicle Service and Repair Act (MVSRA), MCL 257.1301 *et seq*., and its postverdict award of attorney fees and costs based on that violation. We reverse the trial court's grant of a directed verdict in favor of plaintiff, remand for entry of an amended judgment in favor of defendants on plaintiff's MVSRA claim, and vacate the related award of attorney fees and costs.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In October 2013, plaintiff and Doris Myricks took Myricks's automobile to Betten for service and main-

tenance. Service technician Root performed a tire rotation but did not properly tighten the lug nuts on the left front wheel of the vehicle. Myricks drove away from Betten with plaintiff as her passenger. Approximately two blocks from the dealership, the left front wheel came off the vehicle, which caused it to skid and hit a curb. Plaintiff complained of severe low back and leg pain following the single-vehicle accident.

Plaintiff filed a negligence action against defendants in 2017, alleging that they had breached their duties to properly perform vehicle maintenance, rotate the tires, and secure the tires to the vehicle, causing him various injuries and damages. Plaintiff later amended his complaint to additionally allege that defendants had violated the MVSRA. The amended complaint did not identify a specific section of the MVSRA that defendants allegedly had violated; however, plaintiff later argued in his trial brief that defendants had violated MCL 257.1307a by charging for a repair that was not performed and by failing to perform a promised repair within the period of time agreed or a reasonable time. See MCL 257.1307a(a) and (e). Defendants denied plaintiff's negligence and MVSRA allegations and asserted various affirmative defenses.

Before trial, defendants admitted that Root had rotated the tires on Myricks's vehicle and had failed to properly tighten the lug nuts on its left front wheel and that defendants had breached their duty to not perform the tire rotation negligently. But defendants contested the elements of causation and damages, and a jury trial was held on those issues relating to plaintiff's negligence claim. At the close of plaintiff's proofs, defendants moved for a directed verdict. They argued in part that plaintiff had failed to present testimony or evidence to support his MVSRA claim. In

response, plaintiff argued that the evidence presented at trial demonstrated that defendants had misrepresented that the tire rotation had been completed despite defendants' failure to tighten the lug nuts on the wheel.

The trial court denied defendants' motion, concluding that plaintiff had presented sufficient evidence that defendants had violated the MVSRA by charging for a repair that was not performed. Plaintiff then moved for a directed verdict on that issue under MCL 257.1307a(a). Defendants responded that they had performed the repair, albeit incorrectly, and further argued that plaintiff was not able to bring a MVSRA claim because he was not defendants' customer. Defendants again argued that *they* were entitled to a directed verdict that they did *not* violate the MVSRA by failing to perform a tire rotation. The trial court directed a verdict in favor of plaintiff regarding whether defendants had violated the MVSRA.[1] The trial court held that the MVSRA did not limit a facility's liability to only customers, and that defendants had failed to perform the tire rotation because rotating tires involved the removal and replacement of the lug nuts, and defendants had failed to properly replace all the lug nuts.

The jury was instructed that defendants had violated the MVSRA and had admitted negligence. It returned a verdict in favor of plaintiff in the amount of $40,000. The jury's verdict form reflected its conclusion that defendants' negligence and violation of the

[1] The trial court also granted defendants' motion for a directed verdict regarding whether plaintiff was entitled to double damages under MCL 257.1336 based on a willful or flagrant violation of the MVSRA, concluding that there was no evidence that defendants' conduct was either willful or flagrant.

MVSRA were proximate causes of plaintiff's injury. After the verdict, plaintiff moved for entry of a judgment in his favor in the amount of the jury award plus penalty damages, reasonable attorney fees, and costs under MCL 257.1336. The trial court again held that plaintiff was not entitled to penalty damages because defendants had not willfully violated the MVSRA, but it awarded attorney fees and costs in excess of $70,000 based on defendants' violation of the act.

This appeal followed. On appeal, defendants do not challenge the jury verdict or the amount awarded as actual damages, but they challenge the trial court's directed verdict holding that they violated the MVSRA and the court's postjudgment award of attorney fees and costs.

II. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation. *Bush v Shabahang*, 484 Mich 156, 164; 772 NW2d 272 (2009). Additionally, we review de novo a trial court's decision on a motion for directed verdict. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 303 Mich App 441, 446; 844 NW2d 727 (2013); *Heaton v Benton Constr Co*, 286 Mich App 528, 532; 780 NW2d 618 (2009). In reviewing a directed verdict, we review all the evidence presented up to the time of the motion to determine whether a question of fact existed. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). In deciding whether a directed verdict is appropriate, the trial court must view the testimony and all legitimate inferences from

the testimony in the light most favorable to the nonmoving party; we review the evidence in the same manner. *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011); *Krohn*, 490 Mich at 155; *Aroma Wines*, 303 Mich App at 446. The trial court may not substitute its judgment for that of the jury when the evidence could lead reasonable jurors to disagree. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008). Directed verdicts are viewed with disfavor, particularly in negligence cases. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992).

III. THE TRIAL COURT'S GRANT OF DIRECTED VERDICT TO PLAINTIFF

A party may move for a directed verdict at the close of the evidence offered by the opposing party. MCR 2.516; *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 59; 631 NW2d 686 (2001). In doing so, the moving party must state the specific grounds supporting the motion. MCR 2.516.

Defendants argue that the trial court erred by granting plaintiff's motion for a directed verdict regarding defendants' violation of the MVSRA, specifically MCL 257.1307a(a),[2] because plaintiff was not a

[2] Defendants also argue on appeal that the trial court erroneously relied on MCL 257.1307a(a), as added by 2016 PA 430, which was not in effect at the time that defendants completed the tire rotation. Defendants did not present this issue to the trial court and thus failed to preserve it for appellate review. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) (stating that, in general, an issue is preserved for appellate review if the issue is raised, addressed, and decided by the trial court). In any event, the statutory provisions of the MVSRA and the related administrative rules in effect at the time defendants performed the tire rotation and at the time that plaintiff filed his complaint prohibited the same conduct as does the amended

customer of defendants and the language of MCL 257.1307a does not support the trial court's finding that defendants did not perform a tire rotation. We disagree with defendants' argument concerning their liability to plaintiff as a noncustomer, but we agree that the trial court erred by concluding that defendants did not perform a repair in this case.

The purposes of the MVSRA include regulating the practice of servicing and repairing motor vehicles and proscribing unfair and deceptive practices. See *Auto Serv Councils of Mich v Secretary of State*, 82 Mich App 574, 596; 267 NW2d 698 (1978) (stating that the Legislature sought to remedy "gross abuses" by the motor vehicle repair industry by enacting the MVSRA). The MVSRA prohibits a motor vehicle repair facility, or an owner or operator of a motor vehicle repair facility, from engaging or attempting to engage "in a method, act, or practice which is unfair or deceptive." *Id*., quoting former MCL 257.1307.

MCL 257.1307a provides, in relevant part:

> A motor vehicle repair facility that is subject to this act, or a person that is an owner or operator of a motor vehicle repair facility that is subject to this act, shall not, directly or through an agent or employee, do any of the following:
>
> (a) Charge for repairs that are in fact not performed.
>
> * * *
>
> (e) Fail to perform promised repairs within the period of time agreed, or within a reasonable time, unless circum-

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version of the MVSRA. See MCL 257.1307, as enacted by 1974 PA 300, and Mich Admin Code, R 257.132(a) (providing that a motor vehicle repair facility may not "[c]harge for repairs that are in fact not performed"), rescinded by 2016 PA 430. Therefore, our analysis is the same whether the trial court's holding was properly made under the previous or current version of the MVSRA.

> stances beyond the control of the facility prevent the timely performance of the repairs and the facility did not have reason to know of those circumstances at the time the contract was made.

A. DEFENDANTS' LIABILITY TO PLAINTIFF, A NONCUSTOMER

Defendants argue that plaintiff could not properly bring a claim under the MVSRA because he was not defendants' customer or the owner of the vehicle. We disagree.

MCL 257.1336 provides:[3]

> A facility that violates this act is liable as provided in this act, to a person that suffers damage or injury as a result of that violation, in an amount equal to the damages plus reasonable attorney fees and costs. If the damage or injury to the person occurs as the result of a willful and flagrant violation of this act, the person shall recover double the damages plus reasonable attorney fees and costs from the facility.

MCL 257.1336 creates a cause of action for a "person" injured as a result of a motor vehicle repair facility's violation of the MVSRA. See *Campbell v Sullins*, 257 Mich App 179, 186-187; 667 NW2d 887 (2003); *Hengartner v Chet Swanson Sales, Inc*, 132 Mich App 751, 755; 348 NW2d 15 (1984). The plain language of MCL 257.1336 provides that any person who suffers damages or an injury can recover damages and reasonable attorney fees and costs for a repair facility's violation of the MVSRA. It does not require that the injured person be a customer of the motor vehicle repair facility or the owner of the vehicle. Moreover, the statute's definition of "person" makes no

[3] Although MCL 257.1336 was amended effective April 4, 2017, this language does not substantially differ from the preamendment version. See MCL 257.1336, as enacted by 1974 PA 300.

reference to customers or vehicle owners. See MCL 257.1302a(h) (defining "person" as "an individual, corporation, limited liability company, partnership, association, or any other legal entity").

Additionally, another portion of the MVSRA, MCL 257.1331, creates a separate cause of action and limits recovery specifically to customers. In other words, MCL 257.1331 concerns a customer's recovery, whereas MCL 257.1336 more broadly concerns a motor vehicle repair facility's liability to persons for damages or injury resulting from violations of the MVSRA. See *Campbell*, 257 Mich App at 186; *Hengartner*, 132 Mich App at 755. We presume that the Legislature's use of different terms is intentional. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009). MCL 257.1336 does not impose a requirement that a plaintiff be a customer of a motor vehicle repair facility or the owner of the vehicle in order to bring a claim under that section of the MVSRA.

B. INTERPRETATION OF THE WORD "PERFORM"

In interpreting the word "perform" as used in MCL 257.1307a, the trial court determined that defendants did not "perform" a tire rotation because they failed to tighten the lug nuts on at least one of the wheels of Myrick's vehicle. We disagree with that interpretation. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). The Legislature is presumed to have intended the meaning it plainly expressed. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). Clear statutory language must be enforced as written.

Velez v Tuma, 492 Mich 1, 16-17; 821 NW2d 432 (2012). Additionally, a statute must be read as a whole and in the context of the legislative scheme. *Bush*, 484 Mich at 167. When interpreting a specific term, we consider its plain meaning and its placement and purpose in the statutory scheme. *Id*. If a nonlegal term is not defined in a statute, "resort to a layman's dictionary such as *Webster's* is appropriate." See *Horace v Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998).

The MVSRA does not define the term "perform." Therefore, it is appropriate to consult a dictionary to aid our interpretation. *Id*. The term "perform" means "to carry out an action." *Merriam-Webster's Collegiate Dictionary* (11th ed). "PERFORM implies action that follows established patterns or procedures or fulfills agreed-upon requirements and often connotes special skill." *Id*. at 920. Therefore, the term "perform" generally refers to completion of an action according to an established procedure; the term does not imply that the action has been completed properly, successfully, or without mistake.[4]

Moreover, the term "perform" as used in context by the Legislature does not support the conclusion that the repairs must be performed successfully or without error. The conduct prohibited under MCL 257.1307a concerns the performance of vehicle repairs and representations made concerning those repairs, including representations to a customer. MCL 257.1307a(a) prohibits a motor vehicle repair facility from charging for repairs that it did not perform. Other conduct that is prohibited under MCL 257.1307a includes performing unnecessary repairs, performing unauthorized repairs, misrep-

[4] In contrast, the word "ACCOMPLISH stresses the successful completion of a process rather than the means of carrying it out." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 920 (see synonyms for "perform").

resenting the condition of replacement parts, and failing to disclose a diagnosed or suspected vehicle malfunction. MCL 257.1307a(b), (d), (f), and (g). Our review of the statute as a whole supports the conclusion that the Legislature intended to regulate repair procedures and to ensure that customers were only charged for repairs that were necessary and were actually performed, as well as to protect individuals from unknowingly driving vehicles repaired with substandard parts or unrepaired malfunctions. This language does not support the trial court's conclusion that a facility violates MCL 257.1307a by performing a repair negligently; indeed, such a conclusion would transform every negligent repair into a statutory violation.

Evidence presented to the trial court indicated that a tire rotation consists of removing the tires from the vehicle, moving the tires in a specific pattern to a different axle or side of the vehicle, and replacing the tires on the vehicle. The purpose of a tire rotation is to evenly spread the wear on the tires in order to maximize the longevity of the tire tread, to prevent or correct misaligned tires, and to prevent uneven wearing of drive components. There was no evidence presented, nor did plaintiff allege, that Root did not remove the tires and replace them on different axles or sides of the vehicle; rather, plaintiff alleged in his complaint that Root had either failed to replace the lug nuts on one tire or failed to tighten them sufficiently. Defendants admitted the latter; indeed, plaintiff's counsel, in his opening statement, advised the jury that Root "put the lug nuts on but did not use — forgot to use the torque wrench" and noted that the lug nuts were found on the road at the scene of the accident.

We conclude, under the plain language of MCL 257.1307a, that defendants "performed" a tire

rotation, albeit negligently. See *Bush*, 484 Mich at 167. There is no support for the trial court's determination that a tire rotation is not "performed" if a service person fails to sufficiently tighten the lug nuts on one tire. To accept the trial court's interpretation would essentially turn every incorrectly performed repair into a violation of the MVSRA. We do not believe that comports with the Legislature's intent as expressed in the language of the statute. Therefore, we conclude that the trial court erroneously granted plaintiff a directed verdict regarding defendants' alleged violation of this provision of the MVSRA. See *Aroma Wines*, 303 Mich App at 446, 449.[5] In fact, defendants were entitled to a directed verdict on this issue, as no factual issue existed regarding whether defendants had failed to "perform" the tire rotation under the MVSRA. *Heaton*, 286 Mich App at 532. We therefore reverse the trial court's grant of a directed verdict in favor of plaintiff and remand for entry of an amended judgment in favor of defendants on plaintiff's claim for violation of the MVSRA. We further vacate the trial court's related award of attorney fees and costs under MCL 257.1336.

Vacated in part, reversed in part, and case remanded for entry of an amended judgment in accordance with this opinion. Defendants, as the prevailing parties, may tax costs under MCR 7.219. We do not retain jurisdiction.

MARKEY, P.J., and BORRELLO, J., concurred with BOONSTRA, J.

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[5] Although the parties and the trial court did not specifically address defendants' alleged violation of MCL 257.1307a(e), violation of that subsection also requires failure to "perform" a repair.

PEOPLE v BROWN

Docket No. 348079. Submitted October 8, 2019, at Detroit. Decided October 15, 2019, at 9:10 a.m. Leave to appeal denied 507 Mich 895 (2021).

Cleophas A. Brown was charged in the Oakland Circuit Court with carrying a concealed weapon (CCW), MCL 750.227; operating while intoxicated (OWI), second offense, MCL 257.625; and possession of a firearm while under the influence, MCL 750.237(2). On August 6, 2013, the Oakland County Gun Board issued defendant a concealed pistol license (CPL). In September 2013, the board notified defendant in writing that his CPL was suspended as a result of him being arrested and charged with OWI at the end of August 2013; the board upheld the suspension at a November 19, 2013 meeting that defendant did not attend. Defendant was convicted of OWI in May 2015, and the board revoked defendant's CPL on June 6, 2015. In November 2017, defendant had a pistol in his possession when he was involved in a motor vehicle crash; a Law Enforcement Information Network (LEIN) search at the crash site revealed the June 6, 2015 CPL revocation and that defendant had been verbally notified of the revocation by a peace officer; defendant denied receiving verbal or written notification of the revocation. Defendant moved to dismiss the CCW charge, arguing that he was not liable for that offense because he had never received written notice of the revocation as required by the concealed pistol licensing act (CPLA), MCL 28.421 *et seq*.; defendant also asserted that the LEIN entry was insufficient to establish that he had been verbally notified of the revocation before being arrested for the instant offenses. The court, Denise K. Langford Morris, J., granted the motion and dismissed the CCW charge, reasoning that defendant was not liable for the charge because the prosecution had failed to produce evidence conclusively demonstrating that defendant had received notice that his CPL had been suspended or revoked; the court further concluded that verbal notice of the revocation was insufficient under the CPLA and that the LEIN notice was also inadequate under the statute. The prosecution appealed by leave granted.

The Court of Appeals *held*:

1. MCL 750.227(2) provides that a person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling-house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license. To support a charge of CCW, the prosecution must establish that the defendant knowingly carried a pistol in an automobile or on his or her person; the prosecution does not have to prove that the defendant had notice that his or her CPL had been suspended or revoked. Instead, after the prosecution establishes that the defendant knowingly carried a pistol in an automobile or on his or her person, the burden shifts to the defendant to prove that he or she was properly licensed to carry the weapon. In this case, the trial court erred as a matter of law when it effectively held that to establish the charge of CCW, the prosecution had to establish that defendant had received notice of the revocation of his CPL. As a result, the court abused its discretion when it dismissed the CCW charge.

2. Under the doctrine *in pari materia*, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law. But when the Legislature has chosen to specifically limit the applicability of a statutory definition, the doctrine is inapplicable. MCL 28.428(7) and (8), as amended by 2008 PA 406, provided that an individual could not be criminally liable for violating the CPLA if the individual did not receive notice that his or her CPL had been suspended or revoked. And the Penal Code provides that a person is criminally liable of CCW if he or she carries a concealed pistol without a license to carry the pistol as provided by law. While the CPLA and CCW statutes both refer to the same subject matter—that is, carrying concealed weapons—the criminal exemptions in the CPLA that tie liability under that act to the defendant having notice of the suspension or revocation do not apply to a CCW charge. Neither the CPLA nor the CCW statute contains language suggesting that the CPLA exemptions from criminal liability apply to liability under the CCW statute. In addition, while the Michigan Penal Code—which is where the CCW statute is located—provides numerous exemptions to criminal liability for CCW, the exemptions do not refer to MCL 28.428 or otherwise exempt a person from criminal liability for CCW if the individual did not receive notice that their CPL had been suspended or revoked. Because the Legislature clearly limited the applicability of the MCL 28.428

exemptions from criminal liability to criminal activity under the CPLA, the CCW and CPLA statutes are not *in pari materia*, and the CPLA notice requirements are not an element of CCW.

3. Because MCL 28.428 does not state how an individual must be notified that his or her CPL has been revoked, the trial court erred by holding that verbal notice was insufficient under that statute. Even if the CPLA required the prosecution to prove as an element of CCW that defendant received notice of the revocation or suspension, the uncontested evidence established that defendant had, at minimum, received notice of the suspension and the MCL 28.428 exemptions would not have applied anyway.

Reversed and remanded.

CRIMES — CARRYING A CONCEALED WEAPON — ELEMENTS — NOTICE OF SUSPENSION OR REVOCATION OF CONCEALED PISTOL LICENSE NOT AN ELEMENT.

MCL 750.227(2) provides that a person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling-house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license; to support a charge of carrying a concealed weapon, the prosecution must establish that the defendant knowingly carried a pistol in an automobile or on his or her person; if a defendant then wishes to avoid the charge based on a concealed pistol license, the burden is on the defendant to prove that he or she was properly licensed to carry the weapon; the criminal-liability exemptions in MCL 28.428 of the concealed pistol licensing act, MCL 28.421 *et seq*.—which permit a defendant to avoid criminal liability for violations of the act, or certain orders issued under the act, when the defendant did not know that his or her concealed pistol license had been suspended—do not apply to charges of carrying a concealed weapon in violation of MCL 750.227(2), and the prosecution need not prove that the defendant received notice of the suspension or revocation of a concealed pistol license to convict a defendant of violating MCL 750.227(2).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division

Chief, and *Louis F. Meizlish*, Assistant Prosecuting Attorney, for the people.

Grabel & Associates (by *Zachary R. Glaza*, *Timothy A. Doman*, and *Scott A. Grabel*) for defendant.

Before: METER, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] the trial court's opinion and order granting defendant's motion to dismiss his carrying a concealed weapon (CCW) charge, MCL 750.227(2). We reverse.

I. FACTS

The Oakland County Gun Board (the Board) issued defendant a concealed pistol license (CPL) on August 6, 2013. On August 30, 2013, defendant was arrested and charged with operating while intoxicated (OWI). On September 12, 2013, the Board issued a written notice to defendant informing him that his CPL was "SUSPENDED" because of the OWI charge. The letter requested that defendant attend a November 19, 2013 meeting of the Board when they would discuss the suspension. On October 29, 2014, defendant's OWI charge was dismissed without prejudice, but it was later reinstated on November 5, 2014. Defendant chose not to appear at the November 19, 2013 meeting at which the Board unanimously voted to uphold the suspension of defendant's CPL. Defendant was eventually convicted of OWI on May 20, 2015. Because of this conviction, the Board revoked defendant's CPL on June 6, 2015.

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[1] *People v Brown*, unpublished order of the Court of Appeals, entered June 14, 2019 (Docket No. 348079).

On November 24, 2017, at approximately 6:00 p.m., Oakland County Sheriff's Office Deputies Robert Elinski and Eric Rymarz were dispatched to a motor vehicle crash and OWI investigation. After identifying defendant as the individual involved in the crash, Deputies Elinski and Rymarz were informed by other deputies that defendant had a pistol in his possession and that he did not possess a valid CPL. Deputy Elinski also ran a Law Enforcement Information Network (LEIN) search on defendant's CPL status, which confirmed that his CPL had been revoked. Defendant was arrested at the scene. A few days later, Deputy Rymarz contacted the Oakland County Clerk's Office about defendant's CPL; Rymarz received a fax of a LEIN entry dated November 24, 2017, and time-stamped 6:02 p.m., which provided, in relevant part:

> 11/24/17|18:02:37.72|LGWCCW|NOTICE OF REVOKED CPL LICENSE BY PEACE OFFICER.
>
> * * *
>
> REVOKED LICENSE TO CARRY A CONCEALED PISTOL (CPL)
>
> THIS INDIVIDUAL IS NOT ELIGIBLE TO CARRY A CONCEALED PISTOL.
>
> LICENSE REVOCATION DATE: 06/06/2015
>
> ***SERVED VERBAL NOTICE OF REVOKED CPL LICENSE BY PEACE OFFICER.

Defendant was eventually charged with three crimes stemming from the November 24, 2017 arrest: (1) CCW, MCL 750.227; (2) OWI, second offense, MCL 257.625; and (3) possession of a firearm while under the influence, MCL 750.237(2). Defendant moved to dismiss the CCW charge, arguing that he could not be held criminally liable for CCW because he did not

receive written notice that his CPL had been revoked as required by the concealed pistol licensing act (CPLA), MCL 28.421 *et seq*. Defendant also contended that the LEIN entry was inconclusive in establishing whether defendant actually received verbal notice of the revocation of his CPL before November 24, 2017. The prosecution argued in response that the LEIN entry demonstrated that defendant was served with verbal notice of the revocation before his November 24, 2017 arrest and that verbal notice was sufficient under the CPLA. The trial court granted defendant's motion to dismiss the CCW charge, holding that defendant could not be "criminally liable for CCW" because the prosecution "failed to produce evidence that conclusively demonstrates that Defendant received notice . . . that his CPL was suspended or revoked." The trial court explained that verbal notice that defendant's CPL was revoked was insufficient under the CPLA and that the LEIN entry was also inadequate.

II. INTERPLAY BETWEEN THE CCW STATUTE AND THE CPLA

A. PRESERVATION OF THE ISSUE AND STANDARD OF REVIEW

On appeal, the prosecution argues that the trial court erred by dismissing the CCW charge because defendant was not required to have notice that his CPL was revoked in order for the prosecution to prove CCW. The prosecution failed to raise this issue in the trial court but did raise the issue in its application for leave to appeal, and this Court granted leave to address "the issues raised in the application . . . ." *People v Brown*, unpublished order of the Court of Appeals, entered June 14, 2019 (Docket No. 348079). At any rate, "[a]lthough this issue is unpreserved because [the prosecution] failed to raise it below, we may still consider it because it involves a question of law and the facts necessary for its resolution have been presented."

Poch v Anderson, 229 Mich App 40, 52; 580 NW2d 456 (1998). See also *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999).

This Court reviews "a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion." *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). Questions of law, which include questions of statutory interpretation, are reviewed de novo. *People v Pinkney*, 501 Mich 259, 267; 912 NW2d 535 (2018).

B. ANALYSIS

Defendant was charged with CCW under Michigan's CCW statute, MCL 750.227. To rule on the question before us, we must decide whether MCL 750.227 requires the prosecution to prove that the defendant had notice that he was not allowed to carry a concealed pistol. MCL 750.227(2) provides:

> A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

In *People v Combs*, 160 Mich App 666, 673; 408 NW2d 420 (1987), this Court explained the prosecution's burden for proving CCW:

> Carrying a concealed weapon is a general intent crime. The only intent necessary is an intent to do the act prohibited, to knowingly carry the weapon on one's person

> or in an automobile. While a person may be exempted from criminal liability for carrying a concealed weapon if he is licensed to do so, the language in the statute "without a license so to carry said pistol as provided by law" does not add an element to the crime. Here, the evidence established that defendant knowingly carried the revolver in his automobile. Since defendant did not sustain his burden of showing that he was in fact properly licensed to carry the weapon, no further proofs were required of the prosecution to sustain defendant's conviction. [Some quotation marks and citations omitted.]

Combs suggests that the prosecution is not required to prove as an element of CCW that defendant had notice that his CPL had been revoked. To support a charge of CCW, the prosecution need only show that the defendant knowingly carried a pistol in an automobile or on his or her person; if a defendant then wishes to avoid the CCW charge based on a CPL, the burden shifts to the defendant to prove that he or she was "properly licensed to carry the weapon[.]" *Id*. at 673. That the prosecution need not prove as an element of CCW that defendant had notice that his CPL was revoked is buttressed by our Supreme Court's discussion in *People v Quinn*, 440 Mich 178, 189; 487 NW2d 194 (1992), wherein the Court recognized "that the prosecution need not prove as an element of the offense of carrying a concealed weapon that the defendant knew his [CPL] was expired . . . ."[2] (Citation omitted.) Given the foregoing, it is clear that to prove CCW, the

[2] We recognize that this principle of law was "not essential to [the] determination of" *Quinn*, and therefore was likely nonbinding obiter dictum. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597; 374 NW2d 905 (1985). Nonetheless, we find this dictum persuasive, particularly because the *Quinn* Court classified it as a "[f]amiliar contemporary example[]" of when "[t]he Legislature may impose certain penalties regardless . . . of what the actor actually knew or did not know." *Quinn*, 440 Mich at 188.

prosecution was not required to show that defendant had notice that his CPL was revoked. The trial court therefore erred as a matter of law when it held that defendant was "not criminally liable for CCW" because the prosecution "failed to produce evidence that conclusively demonstrates that Defendant received notice . . . that his CPL was suspended or revoked." Because this error of law was the basis for the trial court's dismissal of the CCW charge, the dismissal was necessarily an abuse of discretion. *Waterstone*, 296 Mich App at 132.

Defendant argues that he should not be held criminally liable for the CCW charge because, under the doctrine of *in pari materia*, the notice provisions in the CPLA should be construed together with the CCW statute. We disagree.

Under the doctrine of *in pari materia*, "statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). But when "the Legislature has chosen to specifically limit the applicability of a statutory definition, the doctrine of *in pari materia* is inapplicable." *People v Feeley*, 499 Mich 429, 444; 885 NW2d 223 (2016).

The relevant provisions of the CPLA deal with the rules and procedures governing the issuance, suspension, revocation, and reinstatement of CPLs and the penalty for violating an order that suspends or revokes an individual's CPL. See MCL 28.428(7) and (8).[3] They

[3] At all times relevant to this case, MCL 28.428(7) and (8) provided:

> (7) A suspension or revocation order or amended order issued under this section is immediately effective. However, an individual is not criminally liable for violating the order or amended order unless he or she has received notice of the order or amended order.

provide, in pertinent part, that an individual cannot be criminally liable for violating the CPLA if the individual did not receive notice that his or her CPL had been suspended or revoked. *Id*. The CCW statute, on the other hand, makes a person criminally liable for CCW if he or she carries a concealed pistol "without a license to carry the pistol as provided by law . . . ." MCL 750.227(2).

Defendant argues that the phrase "as provided by law" in MCL 750.227(2) refers to the licensing procedures in MCL 28.428 and that the exemption from criminal liability for lack of notice in MCL 28.428(7) and (8) applies to criminal liability under MCL 750.227(2). While the CPLA and CCW statutes refer to the same subject matter (carrying concealed weapons), it is clear that the Legislature chose to limit the applicability of the CPLA's criminal-liability exemptions. The CPLA and the CCW statutes are in separate chapters of the Michigan Compiled Laws. MCL 28.428(7) states that absent notice, "an individual is not criminally liable *for violating the order or amended order*" that suspended or revoked their CPL, and MCL 28.428(8) states that an individual must be given notice that their CPL was suspended or revoked "before an arrest is made for carrying the pistol *in violation of this act*." (Emphasis

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> (8) If an individual is carrying a pistol in violation of a suspension or revocation order or amended order issued under this section but has not previously received notice of the order or amended order, the individual shall be informed of the order or amended order and be given an opportunity to properly store the pistol or otherwise comply with the order or amended order before an arrest is made for carrying the pistol in violation of this act.

The Legislature has since amended the statutory scheme addressing CPLs. See 2015 PA 3, effective December 1, 2015; 2015 PA 207, effective December 1, 2015; 2017 PA 95, effective October 11, 2017. All references to MCL 28.428 in this opinion are to the version of MCL 28.428 in effect before these amendments. See 2008 PA 406, effective January 6, 2009.

added.)[4] Nothing in the CPLA suggests that the Legislature intended to extend the applicability of these provisions, beyond their stated scope, to other portions of the Michigan Compiled Laws. Likewise, nothing in the CCW statute suggests that the Legislature intended to incorporate the exemptions from criminal liability set forth in MCL 28.428 of the CPLA into the Michigan Penal Code, where the CCW statute is located. The Michigan Penal Code provides numerous exemptions to criminal liability for CCW. See, e.g., MCL 750.231; MCL 750.231a. Nowhere do these exemptions refer to MCL 28.428, nor does the Penal Code otherwise exempt a person from criminal liability for CCW if the individual did not receive notice that their CPL had been suspended or revoked. It is therefore clear that the Legislature chose to limit the applicability of the MCL 28.428 exemptions from criminal liability solely to criminal liability under the CPLA, and, thus, "the doctrine of *in pari materia* is inapplicable." *Feeley*, 499 Mich at 444. Because the doctrine of *in pari materia* is inapplicable, we decline to make the notice requirement in the CPLA an element of CCW. See *People v Kern*, 288 Mich App 513, 522; 794 NW2d 362 (2010) (explaining that a court may not add a provision to a statute that the Legislature saw fit to omit).

III. NOTICE

The prosecution alternatively argues that even if it were required to show that defendant had notice that

[4] See former MCL 28.425b(16), as enacted by 2008 PA 406, which stated that an individual who failed to return a CPL after he or she was notified that his or her license was suspended or revoked was guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both. MCL 28.428(4), as amended by 2017 PA 95, now provides a criminal penalty for failing to surrender a license as required when notified of a CPL suspension or revocation.

his CPL was revoked or suspended in order to prove CCW, the evidence demonstrated that defendant was given adequate notice that he could not legally possess a concealed pistol. We agree.

A. STANDARD OF REVIEW

This Court reviews "a trial court's decision on a motion to dismiss charges against a defendant for an abuse of discretion." *Nicholson*, 297 Mich App at 196. "A trial court may be said to have abused its discretion only when its decision falls outside the range of principled outcomes." *Id*. A trial court's factual findings are reviewed for clear error. *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

Under MCL 28.428(7) and (8), an individual cannot be criminally liable or otherwise arrested for carrying a pistol in violation of an order suspending or revoking the individual's CPL unless the individual received notice of the suspension or revocation. The LEIN entry dated November 24, 2017, stated that defendant's CPL was revoked on June 6, 2015, and that a peace officer served defendant with verbal notice of the revocation. The trial court held that this "verbal notice is insufficient." Yet nothing in MCL 28.428 states *how* an individual must be notified that his or her CPL has been revoked or suspended, only that the individual receive notice. Therefore, the trial court erred by holding that verbal notice was insufficient under MCL 28.428.

But even overlooking this legal error, the prosecution produced evidence establishing that the MCL 28.428 notice requirement was otherwise satisfied. The relevant statutory provisions provide that an individual cannot be criminally liable for carrying a concealed pistol unless the individual received notice that their CPL was revoked or suspended. The uncontested evidence showed that defendant received written notice that his CPL was suspended, and nothing suggests that defendant had reason to believe that this suspension was lifted.

Defendant was sent a letter on September 12, 2013, informing him that his CPL was suspended because of his August 30, 2013 OWI charge. The letter requested that defendant appear before the Board on November 19, 2013. While that OWI charge was dismissed without prejudice on October 29, 2014, the charge was refiled on November 5, 2014. At the November 19, 2013 meeting, which defendant chose not to attend, the Board confirmed that defendant's CPL was suspended because of the August 30, 2013 OWI charge. Thus, the evidence confirms that defendant received notice that his CPL was suspended. No evidence in the record suggests that defendant had reason to believe his CPL was reinstated.[5] Thus, when

[5] In his motion to dismiss, defendant asserted that "upon information and belief," after the first OWI charge was dismissed on October 29, 2014, the county clerk's office informed him "that his CPL would be reinstated." Defendant also asserted that "[u]pon information and belief," the November 24, 2017 incident "was the first time that [defendant] was given any notice that his CPL was revoked," since he did not receive any communication from the Board "despite [defendant]'s multiple requests." However, defendant's assertions in his motion are not based on actual evidence, such as testimony, affidavit, documentation, or otherwise. See *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) (stating that parties' arguments are not evidence).

defendant was arrested on November 24, 2017, he had no reason to believe that he could legally carry a concealed pistol. Accordingly, even if the CPLA required the prosecution to establish as an element of CCW that defendant received notice that his CPL had been revoked or suspended, the uncontested evidence confirms that defendant received notice that his CPL was suspended. Therefore, the exemptions from criminal liability in MCL 28.428 do not apply, and the trial court erred by holding otherwise.

IV. CONCLUSION

Reversed and remanded. We do not retain jurisdiction.

METER, P.J., and O'BRIEN and SWARTZLE, JJ., concurred.

But even accepting as true defendant's assertions in his motion, he does not contend that he believed that his CPL suspension was, in fact, lifted. At best, he was aware that his CPL had been suspended and was unsure whether that suspension had been lifted, prompting him to repeatedly contact the Board for clarification, which he never received. Thus, he had no reason to believe that his CPL was not still, at the very least, suspended at the time of his November 2017 arrest.

DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS/ UNEMPLOYMENT INSURANCE AGENCY v LUCENTE
DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/ UNEMPLOYMENT INSURANCE AGENCY v HERZOG
DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/ UNEMPLOYMENT INSURANCE AGENCY v CARLISLE

Docket Nos. 342080, 345074, and 345943. Submitted July 11, 2019, at Detroit. Decided October 15, 2019, at 9:15 a.m. Docket Nos. 342080 and 345074 reversed 508 Mich ___ (2021).

In each consolidated case, the Unemployment Insurance Agency brought an action in the circuit court, challenging the respective decisions of the Michigan Compensation Appellate Commission (the MCAC) concluding that the individual claimants—all of whom improperly received unemployment benefits after falsely certifying that they were unemployed—were not required to pay restitution and fraud penalties under the Michigan Employment Security Act (the MESA), MCL 421.1 *et seq*. When the agency discovered that the claimants had improperly received unemployment benefits they were not eligible to receive, the agency sent a notice of eligibility redetermination to each claimant, stating that the respective claimant had received benefits when he was not eligible and that the claimant was required to pay restitution under MCL 421.62. The agency then sent each claimant a notice of fraud redetermination, stating that the individual claimant's actions were considered intentional because the individual had intentionally withheld information to obtain benefits. Each redetermination notice explained that the claimant had a right to appeal and that the agency's decision would become final if it was not challenged within 30 days, resulting in the possibility of restitution and fraud penalties becoming due. In Docket No. 342080, the eligibility and fraud redeterminations became final after Frank Lucente failed to timely appeal the notices. Lucente later appealed the 2010 redetermination notices when the agency garnished his wages to recover the restitution and fraud penalties; the agency denied his appeal because Lucente did not file it within the period required by MCL 421.32a(2), and Lucente appealed that decision. The administrative law judge (ALJ) agreed that Lucente had good cause to belatedly appeal the fraud redetermination but that because he

had conceded he was ineligible to receive the specified benefits when he was working full-time, Lucente was required to pay the fraud penalties. The MCAC reversed the ALJ's conclusion that Lucente was subject to fraud penalties, reasoning that the agency's redetermination had not been issued in a timely manner, that the eligibility redetermination did not conform with the MCL 421.32a procedural requirements, and that, as a result, the agency had improperly issued the fraud redetermination without first issuing a determination as required by MCL 421.32. The agency appealed that decision in the Macomb Circuit Court, and the court, Diane M. Druzinski, J., affirmed the MCAC's decision. In Docket No. 345074, Michael Herzog appealed the redeterminations; the ALJ held that the 2017 redetermination notices were void, reasoning that the agency was required to issue a determination before issuing a redetermination under MCL 421.32a. The MCAC affirmed the ALJ's decisions in two orders. Herzog appealed those orders in the Wayne Circuit Court, and the court, John A. Murphy, J., affirmed the MCAC's orders. Similarly, in Docket No. 345943, the ALJ concluded that Wayne Carlisle did not have to pay restitution or fraud penalties, reasoning that the 2017 redetermination notices violated Carlisle's right to due process because the agency had failed to issue determinations before issuing the redeterminations as required by MCL 421.32a. The MCAC affirmed the ALJ's decision, and Wayne Circuit Court Judge Sheila A. Gibson affirmed the MCAC's orders. The agency appealed by leave granted in each case.

The Court of Appeals *held*:

1. A person must be eligible to be entitled to receive unemployment benefits under the MESA. Under MCL 421.27(a)(1), a "determination" is a decision that a claimant is, or is not, entitled to benefits. MCL 421.32 provides that the issuance of a benefit check is considered a determination by the agency that the claimant receiving the check was covered during the compensable period and eligible and qualified for benefits. MCL 321.32a provides that a claimant may request a redetermination of a determination within 30 days of the determination being mailed if he or she disagrees with the determination. MCL 421.32a governs review of a determination of benefits; it is designed to give both claimants and employers a right to a redetermination of the agency's eligibility determination within a certain period. In contrast, MCL 421.62 governs the process under which the agency may seek to recover within a certain period any benefits to which a claimant was not entitled, including those that were improperly paid because of the claimant's false statement, mis-

representation, or concealment of material information. Specifically, MCL 421.62(a) directs the agency to take the action necessary to recover the amount wrongfully obtained or received under the act; in addition, if the improperly received benefits were issued as a result of the individual's fraud or false statements, the agency may impose penalties in accordance with MCL 421.54. The MCL 421.32a procedural and time requirements differ from those applicable to proceedings brought under MCL 421.62 in that the MCL 421.32a limitations period is shorter than that of MCL 421.62; to hold otherwise would render nugatory the time limitations imposed by MCL 421.62 that differ from those in MCL 421.32a. When the agency proceeds under MCL 421.62 to recover improperly paid benefits or fraud penalties or both, the time requirements set forth in MCL 421.62 apply to the proceedings brought under that section; the procedural and time requirements set forth in MCL 421.32a do not apply to proceedings brought under MCL 421.62. When proceeding under MCL 421.62, the agency's incorrect labeling of a notice as a "redetermination" instead of as a "determination" does not negate the agency's ability to recoup fraudulently obtained benefits.

2. In Docket No. 342080, the agency's redetermination letters informed Lucente that the agency's decision was made under MCL 421.62, and each notice adequately informed Lucente of the agency's actions. The agency's decisions under the version of MCL 421.62 in effect when the redeterminations were made were not subject to the MCL 421.32a requirements, and they were not invalid by being labeled "redeterminations." The trial court erred by affirming the MCAC's determination that the agency could not recoup improperly paid benefits and fraud penalties. In Docket Nos. 345704 and 345943, the agency properly proceeded under MCL 421.62 to recoup the benefits improperly paid to Herzog and Carlisle; because the agency was not required to comply with the requirements of MCL 421.32a when proceeding under the version of MCL 421.62 in effect when the redeterminations were made, its failure to do so did not result in either complainant being denied due process. The agency's notices were not rendered invalid because they were labeled "redeterminations" instead of "determinations." Even though it was not required to provide the process due under MCL 421.32a, the agency's notices of redetermination provided Herzog and Carlisle with adequate notice because the notices informed them of what was being decided and they were each given an opportunity to contest those issues. The respective trial courts erred by affirming the MCAC's conclusions that the agency could not recoup improperly paid benefits and fraud penalties because the agency did not comply with the requirements of MCL 421.32a.

Trial court judgments reversed and cases remanded for further proceedings.

ADMINISTRATIVE LAW — UNEMPLOYMENT COMPENSATION — MICHIGAN EMPLOYMENT SECURITY ACT — RECOVERY OF BENEFITS AND FRAUD PENALTIES — PROCEEDINGS BROUGHT UNDER MCL 421.62.

MCL 421.62 governs the process under which the Unemployment Insurance Agency may seek to recover unemployment insurance benefits that a claimant was not entitled to receive, including those that were improperly paid because of the claimant's false statement, misrepresentation, or concealment of material information; when the agency proceeds under MCL 421.62 to recover improperly paid benefits or fraud penalties or both, the time requirements set forth in MCL 421.62 apply to the proceedings brought under that section; the procedural and time requirements set forth in MCL 421.32a do not apply to proceedings brought under MCL 421.62 (MCL 421.1 *et seq*.).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Shannon W. Husband*, *Catherine A. Rudolph*, and *Kimberly K. Pendrick*, Assistant Attorneys General, for the Michigan Unemployment Insurance Agency.

Gwinn Legal PLLC (by *Daniel A. Gwinn* and *Laura Bradshaw-Tucker*) for Frank Lucente.

Marshall C. Disner, PLC (by *Marshall C. Disner*) for Wayne Carlisle.

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

GADOLA, P.J. In each of these consolidated cases, appellant, the Department of Licensing and Regulatory Affairs (now the Department of Talent and Economic Development)/Unemployment Insurance Agency (the Agency), appeals by leave granted[1] the circuit court's

[1] *Mich Unemployment Ins Agency v Lucente*, unpublished order of the Court of Appeals, entered July 9, 2018 (Docket No. 342080); *Dep't of Talent & Economic Dev v Herzog*, unpublished order of the Court of

order affirming the decision of the Michigan Compensation Appellate Commission (MCAC). In each case, the MCAC held that the respective claimant was not required to pay restitution and fraud penalties under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. We reverse and remand.

I. FACTS

A. LUCENTE

In 2008, appellee Frank Lucente lost his employment; he applied for and received unemployment benefits in 2008 and 2009 by certifying his unemployment status with the Agency. Lucente did not have a fixed address from 2008 through 2012, and he received his unemployment checks through his post office box.

On February 2, 2010, Lucente applied for extended unemployment benefits. On February 16, 2010, Lucente was hired as a full-time employee by appellee Dart Properties II LLC (Dart). Lucente did not notify the Agency of his full-time employment with Dart, and instead, from February 20, 2010, through June 19, 2010, Lucente falsely certified that he was unemployed. After June 19, 2010, Lucente stopped informing the Agency of his unemployment status and stopped receiving unemployment benefits. In July 2010, Lucente canceled his post office box and did not notify the Agency of a forwarding address.

Thereafter, the Agency learned that Lucente had been employed with Dart since February 16, 2010. On November 30, 2010, the Agency issued two documents captioned "Notice of Redetermination." The first rede-

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Appeals, entered January 22, 2019 (Docket No. 345074); *Dep't of Talent & Economic Dev v Carlisle*, unpublished order of the Court of Appeals, entered February 21, 2019 (Docket No. 345943).

termination (the eligibility redetermination) involved Lucente's eligibility for unemployment benefits from February 20, 2010, through June 19, 2010, and stated:

> YOU WORKED FULL-TIME FOR DART PROPERTIES II LLC BEGINNING 2/16/10. AS SUCH, YOU ARE INELIGIBLE FOR BENEFITS UNDER SECTION 48 [MCL 421.48] OF THE [MESA]. YOU WERE PAID, SO RESTITUTION IS REQUIRED, AS SHOWN, UNDER SECTION 62 [MCL 421.62] OF THE ACT.

The second redetermination (the fraud redetermination) involved Lucente's use of fraud to improperly obtain unemployment benefits from February 20, 2010, through June 19, 2010, and stated:

> YOUR ACTIONS ARE CONSIDERED TO HAVE BEEN INTENTIONAL BECAUSE YOU FAILED TO NOTIFY THIS AGENCY THAT YOU WERE WORKING FULL-TIME AND CONTINUED TO COLLECT BENEFITS FOR FOUR MORE MONTHS. YOU INTENTIONALLY WITHHELD INFORMATION TO OBTAIN BENEFITS. YOU ARE DISQUALIFIED UNDER SECTIONS 62(B) AND 54(B) [MCL 421.54(b)] OF THE [MESA].

Both redeterminations notified Lucente of his right to appeal the Agency's decisions, stating that "[i]f a protest or appeal is not received within 30 days, a decision will become final and restitution may be due and owing." The documents also stated:

> If it is determined that you intentionally made a false statement, misrepresented the facts or concealed material information to obtain benefits, then the penalty provisions of Sections 54 and 62(b) of [the MESA] will be applied and you will be subject to any or all of the following: You would have to repay money received and pay a penalty of two times (if less than $500 of improper payments) or four times (if $500 or more of improper payments) the amount of benefits fraudulently received.

The Agency mailed the redeterminations to Lucente's post office box on December 1, 2010. The Agency later mailed Lucente a document titled "Non-Protestable Summary of Previously (Re) Determined Restitution," on December 1, 2010, which stated that Lucente owed the Agency $4,794 in restitution and $18,276 in fraud penalties, totaling $23,070, for improperly receiving unemployment benefits from February 20, 2010, through June 19, 2010. The Agency sent additional notices to Lucente on February 24, 2012; March 27, 2012; April 24, 2012; and May 24, 2012. Lucente asserts that he did not receive the notices.

On October 29, 2013, the Agency mailed Lucente a "Notice of Garnishment," indicating that 25% of his wages would be garnished to repay the amount he owed to the Agency. The Agency began garnishing his wages on or about April 3, 2014. Lucente did not object to the garnishment and later asserted that he wanted to "do the right thing" and repay the improperly received unemployment benefits. According to Lucente, however, he was not aware of the fraud penalties also assessed against him.

Eventually, Lucente called the Agency to inquire about the amount he owed in restitution and learned that he had been assessed fraud penalties. On January 11, 2016, Lucente appealed the redeterminations. On January 19, 2016, the Agency denied Lucente's appeal because it had not been filed within the period required by MCL 421.32a(2).

Lucente appealed the Agency's January 19, 2016 orders. He conceded that he had not been eligible for unemployment benefits from February 20, 2010 (the date he began working full-time for Dart), through June 19, 2010, but challenged the Agency's fraud redetermination. The administrative law judge (ALJ)

affirmed the Agency's orders. The ALJ determined that Lucente established good cause under MCL 421.32a(2) to belatedly appeal the Agency's redeterminations; however, given that Lucente had conceded that he was ineligible for unemployment benefits beginning February 16, 2010, the ALJ concluded that Lucente was required to pay fraud penalties because he had obtained the benefits by certifying falsely that he was unemployed.

Lucente appealed the orders of the ALJ to the MCAC, challenging the determination that he was subject to fraud penalties. The MCAC issued two decisions: one affirming the portion of the ALJ's decisions finding that Lucente established good cause for his late appeal under MCL 421.32a(2), and the other reversing the ALJ's conclusion that because Lucente had been ineligible for unemployment benefits under MCL 421.48, he was subject to the fraud provisions of MCL 421.54(b) and MCL 421.62(b). The MCAC held that the Agency's November 30, 2010 eligibility redetermination had not been issued timely, explaining, in relevant part:

> [Under MCL 421.32(f),] a benefit check is considered a determination that the claimant was eligible and qualified during the period covered by the check. Upon a protest by an employer, the Agency may only issue "a redetermination of the claimant's eligibility or qualification **as to that period**." If the Agency wants to issue an adjudication involving later weeks, the Agency may issue a separate **determination** as to those weeks.
>
> The November 30, 2010 redetermination indicates that, starting February 16, 2010[,] the claimant is "ineligible for benefits under Section 48 of the [Act]." The only way that the Agency's November 30, 2010 redetermination is valid under Section 32(f) is if the determination in

> this case is the benefits check covering the period including February 16, 2010. The benefit check covering that period was issued in late March 2010 at the latest.
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> * * *
>
> The Agency's November 30, 2010 redetermination was not issued by the Agency within 30 days of the March 2010 benefit check determination, and the Agency did not present any indication of good cause for the reconsideration. Thus, the March 2010 determination that the claimant was eligible and qualified for those weeks became final. (Second alteration in original.)

The MCAC also cited the "many legal and procedural irregularities" in the case because the Agency's November 30, 2010 eligibility redetermination failed to adhere to the statutory requirements of MCL 421.32a (alternatively referred to as § 32a of the MESA). The MCAC stated, in relevant part:

> The November 30, 2010 redetermination does not "state the reasons for the redetermination" nor is it a document "affirming, modifying, or reversing the prior determination." In fact, the November 30, 2010 redetermination does not include any reference whatsoever to any prior determination. Thus, in addition to not being a timely redetermination under Section 32a(2) of the Act, the November 30, 2010 redetermination failed to include the information required by Section 32a(l) of the Act.
>
> Without an employer protest of the March 2010 benefit check determination, the Agency was without authority to issue a redetermination of the benefit check determination. Even if the Agency followed proper procedure, which it clearly did not, under Section 32(f), the Agency's redetermination of a benefit check determination may only cover the period of time covered by the benefit check determination. Under Section 32(f), if the Agency would like to issue an adjudication as to later weeks, the Agency must issue a determination. In this case, the Agency's

> redetermination covered the time from February 16, 2010 through present despite the fact that the March 2010 benefit check determination only covered two weeks.
>
> The Agency's November 30, 2010 redetermination was issued in violation of numerous provisions of law: (l) it was untimely without good cause shown under Section 32a(2) of the Act; [(2)] it failed in nearly every respect to conform to the requirements of a redetermination under Section 32a(1) of the Act; and (3) as it was a redetermination of a check determination under Section 32(f) of the Act, it impermissibly covered a time period outside the time covered by the determination check.
>
> Thus, we are left with the conclusion that the Agency issued the November 30, 2010 redetermination in violation of Sections 32a(2), 32a(l), and 32(f) of the Act. As the Agency was without authority to issue the untimely November 30, 2010 redetermination, the redetermination is null and void. As a result, there exists no valid Agency adjudication regarding ineligibility under Section 48 of the Act. Because there was no validly issued and appealed adjudication before the ALJ, the ALJ was without jurisdiction to find the claimant ineligible. Therefore, we reverse the ALJ's decision holding the claimant ineligible for benefits under the employed provision of the Act, Section 48.

The MCAC also held that the Agency improperly issued the fraud redetermination without first issuing a determination, stating:

> The November 30, 2010 redetermination indicates that the claimant "intentionally withheld information to obtain benefits." Thus, the November 30, 2010 redetermination deals with intentional misrepresentation and does not relate to whether or not the claimant was eligible or qualified during any period of time. Therefore, as a matter of logic, it cannot be a redetermination of a previous benefit check determination. Thus, in violation of Section

> 32(a) of the Act, the Agency issued a redetermination without previously issuing a determination.
>
> * * *
>
> We are left with the conclusion that the Agency issued the November 30, 2010 redetermination in violation of Sections 32(a) and 32a(l) of the Act. As the Agency was without authority to issue the materially defective and legally insufficient November 30, 2010 redetermination, the redetermination is null and void. As a result, there exists no valid Agency adjudication on the issue of fraud in this case. Because there was no validly issued and appealed adjudication before the ALJ, the ALJ was without jurisdiction to find the claimant subject to the fraud provisions of the Act. Therefore, we reverse the ALJ's decision holding the claimant subject to the fraud provisions of the Act, Sections 54(b) and 62(b).

The Agency appealed the MCAC's decisions in the circuit court, contending that the Agency had timely sought to recover Lucente's fraudulently obtained unemployment benefits under MCL 421.62(a). The circuit court affirmed the MCAC's decisions and adopted the reasoning of the MCAC.

B. HERZOG

In February 2016, appellee Michael Herzog was approved for unemployment benefits, but he did not begin receiving those benefits until June 2016. On October 10, 2016, Herzog began working full-time for appellee Custom Form, Inc. (Custom Form); however, he continued to verify to the Agency that he was unemployed. Herzog received unemployment benefits from October 15, 2016, through November 12, 2016, despite his full-time employment with Custom Form. According to Herzog, he believed that he was entitled

to unemployment benefits for 26 weeks even though he had obtained full-time employment during that time.

On October 11, 2017, the Agency issued and mailed to Herzog two documents captioned "Notice of Redetermination." As in Lucente's case, the first document involved an eligibility redetermination, while the second involved a fraud redetermination. The eligibility redetermination stated that because Herzog had worked full-time for Custom Form from October 10, 2016, through March 3, 2017, he was ineligible to receive unemployment benefits during that time. The Agency sought to recoup the unemployment benefits paid to Herzog from October 15, 2016, through November 12, 2016, and the fraud redetermination stated that he had "intentionally misled and/or concealed information to obtain benefits" that he was not entitled to receive. Herzog was ordered to pay the Agency $1,810 in restitution and $7,240 in fraud penalties.

Herzog appealed the Agency's October 11, 2017 redeterminations. The ALJ issued two orders setting aside the redeterminations as void, holding that the Agency was required to issue a "determination" before issuing a "redetermination" under § 32a. The ALJ relied on an earlier decision of the MCAC that the Agency's failure to first issue a determination violated the claimant's right to due process. The Agency appealed the ALJ's orders in the MCAC, which affirmed the ALJ's orders. The circuit court thereafter affirmed the MCAC's decisions, concluding that the decisions were supported by competent, material, and substantial evidence and that deference was to be given to the MCAC's interpretation of the MESA.

C. CARLISLE

Appellee Wayne Carlisle applied for and received unemployment benefits in 2016; his unemployment "benefit year" began on February 28, 2016. Carlisle received unemployment benefits from August 6, 2016, through October 8, 2016, and from November 26, 2016, through December 31, 2016. However, Carlisle worked as a full-time employee for appellee Rosendin Electric, Inc. (Rosendin) from August 4, 2016, through November 16, 2016. Thereafter, Carlisle worked as a full-time employee for appellee Conti-HTE, LLC (Conti).[2]

On October 4, 2017, the Agency issued and mailed Carlisle three documents captioned "Notice of Redetermination." The first stated that Carlisle was ineligible to receive benefits from July 31, 2016, through November 19, 2016, because of his employment with Rosendin. The second redetermination involved the Agency's finding that Carlisle had improperly obtained benefits through fraud from August 6, 2016, through October 8, 2016, and informed Carlisle that he was required to pay restitution and fraud penalties under MCL 421.62(a). The third redetermination stated that because Carlisle's benefit year was terminated on the basis of fraud, the benefits Carlisle received from November 26, 2016, through December 31, 2016, were overpayments that he was required to repay.

Carlisle appealed the redeterminations to the Agency, arguing that the Agency improperly sought to impose restitution and fraud penalties against him by issuing the October 4, 2017 "redeterminations" without first issuing "determinations." The ALJ reversed

[2] The record is unclear regarding the exact dates Carlisle worked for Conti.

the October 4, 2017 redeterminations, holding that the Agency's failure to issue determinations before issuing the October 4, 2017 redeterminations rendered those redeterminations void under § 32a. Relying on an earlier decision of the MCAC that the Agency's failure to first issue a determination violated the claimant's right to due process, the ALJ concluded that Carlisle was not required to pay restitution or fraud penalties. The MCAC and the circuit court affirmed the ALJ's decisions.

II. DISCUSSION

In each of these consolidated cases, the Agency contends that the circuit court erred by affirming the MCAC decision that the individual appellee was not required to pay restitution and was not subject to fraud penalties because the Agency's actions to recoup the fraudulently obtained benefits did not comply with the procedures articulated by § 32a of the MESA. We agree.

A. REVIEW OF THE AGENCY'S DECISION

These consolidated cases require us to review the decisions of the circuit court, which in turn reviewed the decisions of the MCAC. Michigan's Constitution provides that "[a]ll final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law." Const 1963, art 6, § 28. The MESA expressly provides for judicial review of unemployment benefits claims, *Hodge v US Security Assoc, Inc*, 497 Mich 189, 193; 859 NW2d 683 (2015); the act states, in relevant part:

> The circuit court . . . may review questions of fact and law on the record made before the [ALJ] and the [MCAC] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. [MCL 421.38(1).]

Thus, a circuit court must affirm a decision of the MCAC if it conforms to the law and is supported by competent, material, and substantial evidence on the entire record. *Hodge*, 497 Mich at 193. However, when reviewing a lower court's review of an administrative decision, this Court must determine whether the lower court "applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clear-error standard of review." *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422, 431; 906 NW2d 482 (2017) (quotation marks and citation omitted). Substantial evidence means evidence that "a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Id*. (quotation marks and citation omitted). We review de novo the lower court's legal conclusions. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014). The interpretation of a statute presents an issue of law that we review de novo. *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007). "A decision of the MCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Lawrence*, 320 Mich App at 432 (quotation marks, citation, and brackets omitted).

Also relevant to this Court's review are the principles applicable to statutory construction. The primary goal of statutory construction is to give effect to the intent of the Legislature. *Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017). The best indication of the intent of the Legislature is the plain meaning of the statute's clear and unambiguous language. See *DeRuiter v Byron Twp*, 325 Mich App 275, 283; 926 NW2d 268 (2018). Agencies have authority to interpret the statutes that they administer, *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993), and we respectfully consider an agency's interpretation of the statutes that it administers, *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). But although an agency's construction of a statute that it administers is entitled to "respectful consideration" when it is consistent with the "spirit and purpose" of the statute, the agency's construction is not binding on the courts and cannot conflict with the Legislature's intent. *Id*. at 103, 108. Ultimately, the language of the statute controls. *Id*. at 108.

B. MESA

The MESA establishes both the eligibility of a claimant to receive unemployment compensation and the bases of disqualification for those benefits. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 414; 565 NW2d 844 (1997). The underlying purpose of the MESA is to "lighten the burden of economic insecurity on those who become unemployed through no fault of their own." *Id*. at 417. Because it is a remedial statute, it should be liberally construed to achieve its goal. *Id*. However, a person must be eligible to be entitled to receive unemployment benefits under the MESA.

Shirvell v Dep't of Attorney General, 308 Mich App 702, 755; 866 NW2d 478 (2015).

Under the MESA, a decision that a claimant is, or is not, entitled to benefits is called a determination. See MCL 421.27(a)(1). If the claimant disagrees with a determination, he or she is entitled to request a redetermination. MCL 421.32a(1). A request for a redetermination must be made by the claimant within 30 days of the mailing of the determination. *Id*. The Agency may also seek review of its own decision under that section and is bound by the same time limit. *Id*. The Agency is required to timely review challenges to its determination and must either issue a redetermination or transfer the matter to an ALJ for a hearing. *Id*. After the 30-day period has expired, the Agency may nonetheless reconsider a determination for "good cause," but only if the request for redetermination was filed within one year of the date of the determination. MCL 421.32a(2). If a party is dissatisfied with the redetermination issued by the agency, the party may appeal, first to an ALJ and subsequently to the MCAC and the circuit court. See MCL 421.33; MCL 421.34; MCL 421.38; *Hodge*, 497 Mich at 193.

1. LUCENTE

Section 32 of the MESA, MCL 421.32, provides that the issuance of a benefit check to a claimant is a "determination" by the Agency. Although the MESA has been subject to a number of amendments, at the time Lucente received the disputed benefits, and at the time the Agency issued its November 30, 2010 redeterminations to Lucente, MCL 421.32(d) provided:

> The issuance of each benefit check shall be considered a determination by the unemployment agency that the claimant receiving the check was covered during the

> compensable period, and eligible and qualified for benefits. A chargeable employer, upon receipt of a listing of the check as provided in section 21(a), may protest by requesting a redetermination of the claimant's eligibility or qualification as to that period and a determination as to later weeks and benefits still unpaid that are affected by the protest. Upon receipt of the protest or request, the unemployment agency shall investigate and redetermine whether the claimant is eligible and qualified as to that period. If, upon the redetermination, the claimant is found ineligible or not qualified, the unemployment agency shall investigate and determine whether the claimant obtained benefits, for 1 or more preceding weeks within the series of consecutive weeks that includes the week covered by the redetermination, improperly as the result of administrative error, false statement, misrepresentation, or nondisclosure of a material fact. If the unemployment agency finds that the claimant has obtained benefits through administrative error, false statement, misrepresentation, or nondisclosure of a material fact, the unemployment agency shall proceed under the appropriate provisions of section 62. [MCL 421.32(d), as amended by 2002 PA 192, effective April 26, 2002.][3]

Review of a determination of eligibility to receive benefits is addressed by § 32a of the MESA, which at the time Lucente received the disputed benefits, and at the time the Agency issued the redeterminations to Lucente, provided, in relevant part:

> (1) Upon application by an interested party for review of a determination, upon request for transfer to a referee for a hearing filed with the commission within 30 days after the mailing or personal service of a notice of determination, or upon the commission's own motion within that 30-day period, the commission shall review any determination. After review, the commission shall issue a redetermination affirming, modifying, or reversing the

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[3] MCL 421.32 has since been amended. See 2013 PA 144, effective October 29, 2013; 2016 PA 522, effective April 9, 2017.

> prior determination and stating the reasons for the redetermination, or may in its discretion transfer the matter to a referee for a hearing. If a redetermination is issued, the commission shall promptly notify the interested parties of the redetermination, the redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the commission for a hearing on the redetermination before a referee in accordance with section 33.
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> (2) The commission may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to a referee for a hearing. A reconsideration shall not be made unless the request is filed with the commission, or reconsideration is initiated by the commission with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue. [MCL 421.32a, as amended by 1996 PA 503, effective January 9, 1997.][4]

Although § 32a governs review of a determination of benefits, recovery by the Agency of improperly paid unemployment benefits is governed by § 62 of the MESA, MCL 421.62. Under § 62, if the Agency determines that an individual obtained benefits to which he or she was not entitled, the Agency may recover the amount wrongfully received. MCL 421.62(a). In addition, if the improperly paid benefits were the result of the individual's fraud or false statements, the Agency may impose penalties under MCL 421.54. On November 30, 2010, when the Agency issued its redeterminations to Lucente, § 62 provided, in relevant part:

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[4] MCL 421.32a has since been amended. See 2011 PA 269, effective December 19, 2011; 2017 PA 232, effective July 1, 2018.

> (a) If the commission determines that a person has obtained benefits to which that person is not entitled, the commission may recover a sum equal to the amount received . . . . The commission shall not recover improperly paid benefits from an individual more than 3 years, or more than 6 years in the case of a violation of section 54(a) or (b) or sections 54a to 54c, after the date of receipt of the improperly paid benefits unless: (1) a civil action is filed in a court by the commission within the 3-year or 6-year period, (2) the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits, or (3) the commission issued a determination requiring restitution within the 3-year or 6-year period. Furthermore, except in a case of an intentional false statement, misrepresentation, or concealment of material information, the commission may waive recovery of an improperly paid benefit if the payment was not the fault of the individual and if repayment would be contrary to equity and good conscience.
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> * * *
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> (c) Any determination made by the commission under this section is final unless an application for a redetermination is filed with the commission in accordance with section 32a.
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> (d) The commission shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all penalties under subsection (b). [MCL 421.62, as amended by 1995 PA 125, effective June 30, 1995.][5]

The statutory language of § 62 in effect at the time the Agency determined that Lucente had improperly received benefits clearly provided that if the claimant

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[5] MCL 421.62 has since been amended. See 2011 PA 14, effective March 29, 2011; 2011 PA 269, effective December 19, 2011; 2013 PA 147, effective October 29, 2013; 2016 PA 522, effective April 9, 2017; 2017 PA 231, effective March 21, 2018.

violated MCL 421.54—the statute describing the penalties for a claimant who obtains unemployment benefits through fraud—the Agency could seek restitution within six years of the date that the claimant improperly received the benefits. In fact, under § 62(d), the Agency was compelled to take the action necessary to recoup any benefits improperly obtained, along with any applicable penalties. Section 62(c) suggests that the Agency does so by issuing a determination under § 62, which is final unless a redetermination under § 32a is sought. MCL 421.62.

In this case, it is undisputed that Lucente misrepresented that he was not employed from February 16, 2010, to June 20, 2010, and that he had thereby obtained unemployment benefits he was not eligible to receive. On November 30, 2010, between six and nine months after Lucente wrongfully received those benefits, the Agency issued its decisions to recover the benefits and also fraud penalties, within the six-year limitations period stated in § 62(a). The Agency, however, captioned the decisions "redeterminations" instead of "determinations." The MCAC subsequently determined, and the circuit court affirmed, that the decisions were void because the Agency had failed to seek restitution of the wrongly obtained benefits within the time limits and procedural requirements established by § 32a. The MCAC determined that the Agency's "redeterminations" did not comply with the time limitations imposed by § 32a and "failed in nearly every respect to conform to the requirements of a redetermination" under that section.

The Agency, however, was not proceeding under § 32a; rather, the Agency was acting under § 62 to recoup wrongfully paid benefits. Quite simply, § 32a is designed to give both claimants and employers a right

to a redetermination of the Agency's eligibility determination. Section 62, in contrast, gives *the Agency* the ability to recoup fraudulently obtained benefits. Under § 62, the agency was authorized and, indeed, compelled to take the action necessary to recoup the benefits improperly obtained by Lucente, along with any applicable penalties. See former MCL 421.62(d) (providing that the Agency "*shall* take the action necessary to recover all benefits improperly obtained or paid under this act") (emphasis added). To impose on the Agency, when proceeding under § 62, the additional procedural and time requirements of § 32a would create requirements not imposed by the Legislature. We therefore hold that because the Agency in this case was proceeding under § 62, the Agency did not err when it failed to follow the procedural and time requirements set forth in § 32a.

In so holding, we remain mindful that our primary goal in construing any statute is to give effect to the intent of the Legislature, *Coldwater*, 500 Mich at 167, and that the best indication of the intent of the Legislature is the plain meaning of the statute's clear and unambiguous language, see *DeRuiter*, 325 Mich App at 283. Statutory provisions are not read in isolation, but rather as a whole and in context, *In re Erwin*, 503 Mich 1, 11; 921 NW2d 308 (2018), and statutory sections within an act must be read in the context of the entire act, *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). If the intent of the Legislature is not clear, we interpret a statute in a manner such that every word, phrase, and clause is given effect, and we avoid an interpretation that renders any part of the statute nugatory or surplusage. *In re $55,336.17 Surplus Funds*, 319 Mich App 501, 507; 902 NW2d 422 (2017).

In this case, because the time limitations of § 32a differ from those applicable to proceedings under § 62, applying the § 32a time limitations to actions under § 62 conflicts with and renders nugatory the time limitations imposed by the Legislature in § 62. We will not so read the statute. Rather, we conclude that the Agency was not required to comply with the requirements of § 32a when proceeding under § 62.[6] The Agency in this case took the precise action contemplated by § 62; well within the period for making such determinations under § 62, the Agency determined that Lucente had improperly obtained benefits and made its demands to recoup those benefits and for payment of the statutorily authorized penalties.

We also conclude that the Agency's incorrect captioning of its determination as a "redetermination" was not fatal to its ability to recoup fraudulently obtained benefits under § 62. The Agency's redetermination letters each indicate that it is a decision under § 62, and each decision adequately informed Lucente of the Agency's actions. The "redeterminations" informed Lucente that (1) he improperly received unemployment benefits, (2) he was disqualified from receiving unem-

[6] The MCAC's interpretation of § 32a would make it virtually impossible for the Agency to carry out its statutorily imposed task of recovering fraudulently obtained benefits. Section 32a is strictly designed to give claimants and employers the opportunity to challenge an initial eligibility determination; it has nothing to do with fraud, which explains the exceedingly short period for seeking review of the determination. By contrast, § 62, applicable to fraud determinations, gives the Agency up to three years to seek restitution, a tacit acknowledgment that fraud is unlikely to manifest itself immediately and, instead, often is uncovered only through the course of investigation. It would be nearly impossible for the Agency to detect fraud in the limited period provided by § 32a, and the Legislature chose to provide the Agency a much more realistic time frame in § 62 to make fraud determinations and recover benefits wrongfully received.

ployment benefits, (3) he was subject to fraud penalties under § 54 and § 62 of the MESA, and (4) he had a right to appeal the Agency's "redeterminations." The Agency's decisions under § 62 of the MESA were not subject to the requirements of § 32a, and they were not otherwise rendered invalid by being labeled "redeterminations."

2. HERZOG

The Agency similarly contends that the circuit court erred by affirming the decisions of the ALJ and the MCAC that the Agency's "redeterminations" issued to Herzog were void because they were not preceded by "determinations" as required by § 32a. We agree.

Herzog worked full-time for Custom Form from October 10, 2016, through March 3, 2017. From October 15, 2016, through November 12, 2016, Herzog also collected unemployment benefits from the Agency. On October 11, 2017, the Agency issued two "redeterminations," finding that Herzog was ineligible for unemployment benefits from October 15, 2016, through November 12, 2016, because he had obtained them through fraud by concealing his employment and earnings, and seeking to recover the allegedly fraudulently obtained unemployment benefits under § 62. The ALJ determined that the redeterminations were void because under § 32a, the Agency was required to issue a determination before issuing a "redetermination" and that the MCAC had previously determined that such actions by the Agency violated the claimant's right to due process.

At the time the Agency issued the "redeterminations" to Herzog, § 32(f) provided that the issuance of a benefits check constituted a "determination" of eligibil-

ity for benefits. MCL 421.32(f), as amended by 2013 PA 144, effective October 29, 2013. In addition, § 32a provided, in relevant part:

> (1) Upon application by an interested party for review of a determination, upon request for transfer to an administrative law judge for a hearing filed with the unemployment agency within 30 days after the mailing or personal service of a notice of determination, or upon the unemployment agency's own motion within that 30-day period, the unemployment agency shall review any determination. After review, the unemployment agency shall issue a redetermination affirming, modifying, or reversing the prior determination and stating the reasons for the redetermination, or may in its discretion transfer the matter to an administrative law judge for a hearing. If a redetermination is issued, the unemployment agency shall promptly notify the interested parties of the redetermination, the redetermination is final unless within 30 days after the mailing or personal service of a notice of the redetermination an appeal is filed with the unemployment agency for a hearing on the redetermination before an administrative law judge in accordance with section 33.
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> (2) The unemployment agency may, for good cause, including any administrative clerical error, reconsider a prior determination or redetermination after the 30-day period has expired and after reconsideration issue a redetermination affirming, modifying, or reversing the prior determination or redetermination, or transfer the matter to an administrative law judge for a hearing. A reconsideration shall not be made unless the request is filed with the unemployment agency, or reconsideration is initiated by the unemployment agency with notice to the interested parties, within 1 year from the date of mailing or personal service of the original determination on the disputed issue. [MCL 421.32a, as amended by 2011 PA 269, effective December 19, 2011.][7]

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[7] MCL 421.32a has since been amended. See 2017 PA 232, effective July 1, 2018.

Section 62 provided, in relevant part:

> (a) If the unemployment agency determines that a person has obtained benefits to which that person is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest . . . . The unemployment agency shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing restitution is final. Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall issue a determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information in violation of section 54(a) or (b) or sections 54a to 54c, within 3 years after the receipt of the improperly paid benefits unless the unemployment agency filed a civil action in a court within the 3-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year period. . . .
>
> (b) For benefit years beginning on or after October 1, 2000, if the unemployment agency determines that a person has intentionally made a false statement or misrepresentation or has concealed material information to obtain benefits, whether or not the person obtains benefits by or because of the intentional false statement, misrepresentation, or concealment of material information, the person shall, in addition to any other applicable interest

> and penalties, have his or her rights to benefits for the benefit year in which the act occurred canceled as of the date the claimant made the false statement or misrepresentation or concealed material information . . . .
>
> (c) Any determination made by the unemployment agency under this section is final unless an application for a redetermination is filed in accordance with section 32a.
>
> (d) The unemployment agency shall take the action necessary to recover all benefits improperly obtained or paid under this act, and to enforce all interest and penalties under subsection (b). [MCL 421.62, as amended by 2016 PA 522, effective April 9, 2017.][8]

The statutory language of § 62 clearly permitted the Agency to seek to recoup benefits that had been wrongfully paid within three years of the date that the claimant received the benefits. In this case, the Agency acted in the manner contemplated by § 62, seeking to recoup the wrongfully obtained benefits well within the time for taking that action. In so doing, the Agency, acting under § 62 to recover benefits improperly paid to Herzog, was not required to comply with the requirements of § 32a. Because the Agency was not obligated to follow the procedures articulated in § 32a, its failure to do so did not result in a denial of due process.

We also conclude that although the Agency's October 11, 2017 decisions to Herzog were titled "redeterminations" rather than "determinations," they were not rendered invalid by that label. We note that to some extent, there had been a "determination" made, given that the issuance of a benefits check constitutes a "determination" of eligibility for benefits. See MCL 421.32(f), as amended by 2013 PA 144. But regardless of whether some portions of the Agency's decisions

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[8] MCL 421.62 has since been amended. See 2017 PA 231, effective March 21, 2018.

would have been better labeled as "determinations," the Agency was proceeding under § 62, and it was not required to provide the process due under § 32a.

Moreover, even though it was not required to provide the process due under § 32, the Agency's "redeterminations" did, in fact, provide the process identified in § 32a to protect the claimant from the dangers underlying inadequate notice. The Agency's "redeterminations" adequately informed Herzog of the Agency's actions against him and (1) provided the relevant period in which Herzog was ineligible to receive unemployment benefits, (2) stated that the reason for Herzog's ineligibility was the Agency's finding that Herzog improperly received benefits through fraud, (3) informed Herzog of the amount he owed the Agency in restitution and fraud penalties, and (4) explained Herzog's right to appeal the "redeterminations." The decisions thus apprised Herzog of the Agency's decision regarding his eligibility for benefits, the amount he owed the Agency in restitution and fraud penalties, and his appellate rights, providing Herzog the opportunity to protest the Agency's findings by appealing the "redeterminations" to the ALJ. The process Herzog received was precisely the process contemplated by the statute because he was fully put on notice of what was being decided and was given an opportunity to contest those issues.

3. CARLISLE

The Agency similarly contends that the circuit court erred by affirming the decisions of the MCAC, which affirmed the ALJ's decisions that the Agency's "redeterminations" issued to Carlisle were void because they were not preceded by "determinations" as required by § 32a. We agree.

On October 4, 2017, the Agency issued two "redeterminations" to Carlisle, finding that Carlisle was ineligible for unemployment benefits from July 31, 2016, through November 19, 2016, because at that time, he was employed full-time by Rosendin, and that he "knowingly failed to disclose a material fact to obtain/increase [his] benefits . . . ." The Agency also issued a third "redetermination," indicating that Carlisle was required to pay back benefits he received from November 26, 2016, through December 31, 2016, because his "benefit year was terminated due to fraud, . . . resulting in an overpayment." The ALJ held that the Agency's failure to issue determinations before issuing the redeterminations rendered the redeterminations void, relying on a previous decision of the MCAC that such actions by the Agency violated the claimant's right to due process under § 32a. The MCAC and the circuit court affirmed the ALJ's decision.

At the time Carlisle received the disputed benefits and the Agency issued the "redeterminations," § 62 provided that the Agency could seek to recoup benefits that were obtained by fraud within three years of the date that the claimant improperly received the benefits. MCL 421.62, as amended by 2016 PA 522. The Agency acted in the manner contemplated by § 62, seeking to recoup the wrongfully obtained benefits well within the period for taking that action. In so doing, the Agency, acting under § 62 to recover benefits improperly paid to Carlisle, was not required to comply with the requirements of § 32a. Because the Agency was not obligated to follow the procedures articulated in § 32a, its failure to do so did not result in a denial of due process. Accordingly, the redeterminations were not invalid simply because they were not preceded by earlier "determinations"; in addition, they were not

invalid because they were labeled "redeterminations" rather than "determinations" under § 62(a) of the MESA.

Furthermore, even though the § 32a procedural requirements did not apply to the "redeterminations" brought under § 62, the Agency's decisions adequately informed Carlisle of the Agency's recovery action against him. Specifically, the "redeterminations" (1) provided the relevant time period in which Carlisle was ineligible to receive unemployment benefits, (2) stated the basis for the finding of Carlisle's ineligibility for benefits, (3) informed Carlisle of the amount he owed the Agency in restitution and fraud penalties, and (4) explained Carlisle's right to appeal the "redeterminations." The "redeterminations" thus had all the components identified in § 32a to protect the claimant from the dangers underlying inadequate notice under that statutory section, and the process received by Carlisle was precisely the process contemplated by the statute because he was fully put on notice of what was being decided and was given an opportunity to contest those issues. We therefore detect no denial of due process.

We conclude that in each consolidated case, the circuit court did not apply the correct legal principles when it affirmed the decisions of the MCAC. In Docket No. 342080 (Lucente), we reverse the order of the circuit court and the decision of the MCAC and remand to the MCAC for a determination of the Agency's appeal to that tribunal from the ALJ's July 27, 2016 opinion, consistent with this opinion.

In Docket No. 345074 (Herzog), we reverse the order of the circuit court and the decisions of the MCAC and the ALJ and remand to the ALJ for proceedings consistent with this opinion.

In Docket No. 345943 (Carlisle), we reverse the order of the circuit court and the decisions of the MCAC and the ALJ and remand to the ALJ for proceedings consistent with this opinion.

We do not retain jurisdiction.

SERVITTO and REDFORD, JJ., concurred with GADOLA, P.J.

GRABINSKI v GOVERNOR

Docket No. 339082. Submitted August 14, 2019, at Lansing. Decided October 15, 2019, at 9:20 a.m.

Michael A. Grabinski, a prisoner, brought an action for habeas relief in the Court of Appeals against the Kinross Correctional Facility Warden. In an unpublished order entered on March 2, 2015 (Docket No. 325955), the Court of Appeals, MURRAY, C.J., acting under MCR 7.211(E)(2), advised Grabinski that he was responsible for paying a $375 filing fee and, under MCL 600.2963(8), was not permitted to file another new civil appeal or original action in the Court of Appeals until either the Department of Corrections remitted or Grabinski paid the entire outstanding balance due. Grabinski did not pay the obligation but filed the instant civil action in the Court of Claims against the governor, attorney general, secretary of state, auditor general, director of the corrections department, and the warden of the Richard A. Handlon Correctional Facility, seeking an injunctive order for the recovery of bonds, prevention of a prison transfer, release of withheld mail, and accommodation in a single-occupancy cell. In a separate "common law tort claim suit," Grabinski essentially asserted that he was a "Sovereign American" and therefore the state and federal government had no jurisdiction to hold him prisoner. The Court of Claims summarily dismissed the action for failure to comply with MCL 600.5507(2). Grabinski filed a delayed application for leave to appeal in the Court of Appeals and concurrently filed a motion to waive the filing fee. The Court of Appeals, in an unpublished order entered on August 9, 2017, dismissed his application for leave to appeal and denied his motion to waive fees as moot. Grabinski sought leave to appeal in the Supreme Court and requested that his filing fees be waived. The Supreme Court initially denied Grabinski's motion to waive fees and ordered that he be barred from filing further civil suits until his outstanding balance was paid. However, the Supreme Court subsequently vacated the Court of Appeals order dismissing Grabinski's application and ordered the Court of Appeals to reconsider its dismissal following its resolution of *In re Jackson (On Remand)*, 326 Mich App 629 (2018), which held that MCL 600.2963(8) cannot constitutionally be applied to bar a complaint for superintending control over an under-

lying criminal case if the bar is based on outstanding fees owed by an indigent prisoner-plaintiff from an earlier case and the prisoner-plaintiff lacks funds to pay those outstanding fees.

The Court of Appeals *held*:

Grabinski's application was properly dismissed because this case was distinguishable from *Jackson*. In *Jackson*, the prisoner-plaintiff had filed an original complaint for superintending control in the Court of Appeals because the trial court in his criminal case failed to rule on a motion for reconsideration; therefore, the prisoner-plaintiff was required to file a separate civil action to force the criminal court's action because absent a final order in the criminal matter, the prisoner-plaintiff could not pursue a direct appeal. The *Jackson* Court acknowledged that *Griffin v Illinois*, 351 US 12 (1956), and a series of subsequent cases had deemed unconstitutional legal rules that bar an indigent person from seeking review in a higher court because of an inability to pay filing fees or fees for the preparation of transcripts, particularly in the context of criminal appeals, and therefore found unconstitutional the bar in MCL 600.2963(8) as applied. However, the *Jackson* Court declined to address whether MCL 600.2963(8) could be used to block appellate access to an indigent prisoner in a civil case that does not seek relief related to an underlying criminal case and that is not otherwise provided heightened protection for purposes of access to the courts. In this case, Grabinski's current lawsuit sounded in tort, and he was not seeking mandamus or superintending control to force the circuit court to act in an underlying criminal case. The holding in *Jackson* was based on the heightened protection given to criminal defendants for access to the courts in criminal cases for purposes of securing the federal constitutional right to the appellate process; a civil litigant's status as a prisoner, without more, does not transform a civil action into a criminal matter entitled to heightened protection. Application of MCL 600.2963(8) to a typical civil case brought in the Court of Appeals by a prisoner who owes outstanding fees to the Court for a prior case is not violative of constitutional due-process or equal-protection rights. Accordingly, *Jackson*'s holding did not apply, and the reasoning of *Jackson* could not be extrapolated to this case. Cases might arise in which a prisoner-plaintiff in a civil action could establish entitlement to an exception to MCL 600.2963(8), but under the circumstances of the current matter, MCL 600.2963(8) was not applied unconstitutionally.

Grabinski's delayed application for leave to appeal dismissed.

PRISONS AND PRISONERS — COMMENCEMENT OF A CIVIL ACTION OR FILING AN APPEAL IN A CIVIL ACTION BY A PRISONER — FAILURE TO PAY FILING FEES AND COSTS.

MCL 600.2963(8) provides that a prisoner who has failed to pay outstanding fees and costs as required under MCL 600.2963 may not commence a new civil action or appeal until the outstanding fees and costs from the previous civil action have been paid; application of MCL 600.2963(8) to a typical civil case brought in the Court of Appeals by a prisoner who owes outstanding fees to the Court for a prior case is not violative of constitutional due-process or equal-protection rights.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, for defendants.

Before: GLEICHER, P.J., and GADOLA and CAMERON, JJ.

PER CURIAM. MCL 600.2963(8) precludes prisoners from filing new civil actions or civil appeals when they have outstanding court fees and costs from previous civil actions. The purpose of this provision is to limit serial frivolous lawsuits. This Court recently held, however, that the application of the statute is unconstitutional under certain circumstances. This case does not fall within that ambit. Accordingly, we uphold this Court's previous order and dismiss plaintiff's delayed application for leave to appeal.

I. BACKGROUND

In 2014, Michael Anthony Grabinski, a prisoner, filed an original action for habeas relief in this Court against the Kinross Correctional Facility Warden. This Court advised Grabinski that he was "responsible for paying [a] $375 filing fee and may not file another new civil appeal or original action in this Court until such time that either the Department of Corrections remits or plaintiff pays the entire outstanding balance due."

Grabinski v Kinross Correctional Facility Warden, unpublished order of the Court of Appeals, entered March 2, 2015 (Docket No. 325955). This order was based on MCL 600.2963(8), which provides, "A prisoner who has failed to pay outstanding fees and costs as required under this section shall not commence a new civil action or appeal until the outstanding fees and costs have been paid." Grabinski has yet to pay this obligation.

In 2017, Grabinski filed the current civil action in the Court of Claims against the governor, attorney general, secretary of state, auditor general, director of the corrections department, and the warden of the Richard A. Handlon Correctional Facility. Grabinski sought an injunctive order for the recovery of bonds, prevention of a prison transfer, release of withheld mail, and accommodation in a single-occupancy cell. In a separate "common law tort claim suit," Grabinski essentially asserted that he was a "Sovereign American" and therefore the state and federal government had no jurisdiction to hold him prisoner. The Court of Claims summarily dismissed the action for failure to comply with MCL 600.5507(2), which requires a prisoner litigant to "disclose the number of civil actions and appeals [he or she] has previously initiated."

Grabinski filed a delayed application for leave to appeal in this Court and concurrently filed a motion to waive the filing fee. This Court reminded Grabinski by letter that he was required to pay his outstanding balance of $375 from Docket No. 325955 or his current application would be dismissed pursuant to MCL 600.2963(8). Grabinski did not pay, and this Court dismissed his application for leave to appeal and denied his motion to waive fees as moot. *Grabinski v*

Governor, unpublished order of the Court of Appeals, entered August 9, 2017 (Docket No. 339082).

Grabinski then sought relief in the Supreme Court and requested that his filing fees be waived in that Court as well. The Supreme Court initially denied Grabinski's motion to waive his fees and ordered that Grabinski be barred from filing further civil suits until his outstanding balance was paid. *Grabinski v Governor*, 901 NW2d 405 (2017). The Court subsequently vacated our order dismissing Grabinski's application and ordered this Court to reconsider our dismissal following our resolution of *In re Jackson* (Docket No. 339724). *Grabinski v Governor*, 503 Mich 868 (2018).

This Court has now resolved the appeal in *In re Jackson*. In *In re Jackson (On Remand)*, 326 Mich App 629, 631-632; 929 NW2d 798 (2018), this Court held that "MCL 600.2963(8) cannot constitutionally be applied to bar a complaint for superintending control over an underlying criminal case if the bar is based on outstanding fees owed by an indigent prisoner-plaintiff from an earlier case and the prisoner-plaintiff lacks funds to pay those outstanding fees."

II. ANALYSIS

As directed by the Supreme Court, we now reconsider this Court's dismissal of Grabinski's current application for leave to appeal based on his failure to pay outstanding fees in a prior appeal as directed by MCL 600.2963(8). This case is distinguishable from *Jackson* and the cases upon which *Jackson* relied. Accordingly, this Court properly dismissed Grabinski's application.

Jackson's holding was limited to the situation before it: the unconstitutional prohibition of an appeal in a case that was criminal in nature although designated

as civil. In *Jackson*, 326 Mich App at 632, the prisoner-plaintiff filed an original complaint for superintending control in this Court because the trial court in his criminal case failed to rule on a motion for reconsideration. The prisoner-plaintiff was required to file a separate civil action to force the criminal court's action because absent a final order in the criminal matter, the prisoner-plaintiff could not pursue a direct appeal. *Id*. at 636. The *Jackson* Court acknowledged that *Griffin v Illinois*, 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956), and a series of subsequent cases had deemed unconstitutional "legal rules that bar an indigent person from seeking review in a higher court because of an inability to pay filing fees or fees for the preparation of transcripts, particularly in the context of criminal appeals." *Jackson*, 326 Mich App at 635. This Court declined to be limited by "[f]ormalistic procedural labels," recognized the criminal nature of the superintending control complaint, and found unconstitutional the MCL 600.2963(8) bar as applied. *Id*. at 636-637.

In *Jackson*, 326 Mich App at 638, the American Civil Liberties Union filed an amicus brief arguing "that application of MCL 600.2963(8) would be unconstitutional whenever it would bar an indigent prisoner from proceeding with a civil appeal or original action because of outstanding fees owed for an earlier civil case subject to MCL 600.2963." The *Jackson* panel declined to reach that issue but noted that its opinion was "rooted in the heightened protection given to criminal defendants for access to the courts in criminal cases for purposes of securing the federal constitutional right to the appellate process." *Id*. The panel left "for another day" the issues whether MCL 600.2963(8) could be used to block appellate access to an indigent prisoner "in a civil case that does not seek relief related to an underlying criminal case and that is not otherwise

provided heightened protection for purposes of access to the courts (like termination of parental rights . . .) and whether application of MCL 600.2963(8) only to prisoners and not to indigent nonprisoners raises equal-protection concerns." *Id*.

Grabinski's current lawsuit sounds in tort; his claim is akin to a false-imprisonment action. Grabinski is not seeking mandamus or superintending control to force the circuit court to act in an underlying criminal case. Accordingly, the holding in *Jackson* does not apply. And the reasoning in *Jackson* cannot be extrapolated to this case.

The holding in *Jackson* was based on "the heightened protection given to criminal defendants for access to the courts in criminal cases for purposes of securing the federal constitutional right to the appellate process." *Id*. at 638. Similar heightened protection is afforded to prisoners (and all parents) challenging the termination of their fundamental right to the care, custody, and management of their children. *Id*. at 635-636, citing *MLB v SLJ*, 519 US 102, 114; 117 S Ct 555; 136 L Ed 2d 473 (1996). In criminal and termination of parental rights cases, the indigent party is defending against a state effort to take away a fundamental or liberty interest. But "a constitutional requirement to waive court fees in *civil* cases is the *exception*, not the general rule." *MLB*, 519 US at 114 (emphasis added). In a general civil action, the state is not acting to take away a party's rights. Moreover, a civil litigant's status as a prisoner, without more, does not transform a civil action into a criminal matter entitled to heightened protection.

Ultimately, "fee requirements ordinarily are examined only for rationality," and a state's "need for revenue to offset costs, in the mine run of cases,

satisfies the rationality requirement . . . ." *Id*. at 123. Application of MCL 600.2963(8) to a typical or "mine run" civil case brought to this Court by a prisoner who owes outstanding fees to this Court for a prior case is not violative of constitutional due-process or equal-protection rights. The Legislature could reasonably determine that prisoners are a group particularly likely to bring frivolous litigation. See, e.g., *Bruce v Samuels*, 577 US 82, 85; 136 S Ct 627; 193 L Ed 2d 496 (2016) (discussing Congress having enacted the Prison Litigation Reform Act of 1995 in reaction to a sharp rise in prisoner litigation); *Clifton v Carpenter*, 775 F3d 760, 766 (CA 6, 2014) ("There can be no doubt that reducing frivolous litigation is a legitimate state objective"); *Hughes v Tennessee Bd of Probation & Parole*, 514 SW3d 707, 721 (Tenn, 2017) (finding that a statutory provision similar to MCL 600.2963(8) had a rational basis of reducing frivolous lawsuits by prisoners). Accordingly, MCL 600.2963(8) has a rational basis in deterring frivolous prisoner litigation by requiring a prisoner to complete payment of outstanding fees to this Court for a prior civil case before being allowed to proceed with a new civil case in this Court.[1]

Cases might arise in which a prisoner-plaintiff in a civil action could establish entitlement to an exception to MCL 600.2963(8). We will not speculate in this opinion about hypothetical scenarios in which this

[1] We decline to address defendants' suggestion that we allow plaintiff an opportunity to plead "a prima facie case of either imminent harm or threat of physical injury," which could potentially entitle him to a constitutional exemption from MCL 600.2963(8). See *Mitchell v Fed Bureau of Prisons*, 388 US App DC 346, 351; 587 F3d 415 (2009). We discern nothing in Grabinski's application or the opinion and order appealed from that suggests any basis for concern in this regard. Thus, we leave for another panel to decide if a constitutional exception to the statute exists in such cases.

might occur. Under the circumstances of the current matter, MCL 600.2963(8) was not applied unconstitutionally.

We dismiss Grabinski's delayed application for leave to appeal.

GLEICHER, P.J., and GADOLA and CAMERON, JJ., concurred.

RICKS v STATE OF MICHIGAN

Docket No. 342710. Submitted September 4, 2019, at Detroit. Decided October 29, 2019, at 9:00 a.m. Reversed and remanded 507 Mich 387 (2021).

Desmond Ricks brought an action in the Court of Claims against the state of Michigan, seeking to recover compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., for the period he was wrongfully imprisoned. Plaintiff was sentenced in 1987 to concurrent terms of 4 to 10 years in prison after being convicted of armed robbery and assault with intent to rob while armed; in May 1991, he was paroled. In September 1992, while plaintiff was still on parole, he was convicted by a jury of second-degree murder and possession of a firearm during the commission of a felony (felony-firearm). Plaintiff was sentenced to 30 to 60 years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. On October 13, 1992, plaintiff's parole for the 1987 convictions was revoked; the Michigan Department of Corrections revoked plaintiff's parole status because he was sentenced for the 1992 convictions while he was on parole for the 1987 convictions. As a result of the parole revocation, plaintiff was imprisoned for the 1987 convictions from October 13, 1992 through February 8, 1997; under MCL 768.7a, that sentence was served consecutively with the sentences imposed for the 1992 convictions. On February 9, 1997, plaintiff began serving the sentences imposed for the 1992 convictions. Plaintiff was released from prison on May 26, 2017, after his 1992 convictions were vacated following the discovery of new evidence and the prosecution's determination that there was insufficient evidence to proceed to a new trial on those charges. Plaintiff argued that under WICA, he was entitled to $1,231,918, plus interest, costs, and attorney fees for the entire time he was in prison from October 13, 1992 through his release on May 26, 2017. Defendant disagreed, arguing that plaintiff was only entitled to compensation for the time he served in prison for the 1992 convictions that were subsequently vacated; in other words, defendant argued that plaintiff could only recover compensation for the time he served beginning on February 9, 1997, the day after he finished serving the remainder of his 1987 sentence. The Court of Claims,

MICHAEL J. TALBOT, C.J., entered a stipulated order of judgment, awarding plaintiff $1,014,657.53 in compensation for the time he served in prison for the 1992 convictions that were later vacated; the court did not award plaintiff compensation for the time he spent in prison for the parole violation related to his 1987 convictions. Plaintiff appealed.

The Court of Appeals *held*:

1. The stated purpose of WICA is to provide compensation and other relief for individuals wrongfully imprisoned for crimes. MCL 691.1753 provides that an individual convicted under Michigan's laws and subsequently imprisoned in a state correctional facility for one or more crimes that he or she did not commit may bring an action for compensation against the state as allowed by WICA. In turn, MCL 691.1755(1) provides that a plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves by clear and convincing evidence that (1) the plaintiff was convicted of one or more crimes under Michigan's laws, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence; (2) the plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty; and (3) new evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of the conviction or a gubernatorial pardon, and results in either dismissal of all the charges or a finding of not guilty on all the charges on retrial; the plaintiff is not entitled to compensation under WICA if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial. If a plaintiff meets the MCL 691.1755(1) threshold requirements, and the exceptions in MCL 691.1755(4) or (5) do not apply, MCL 691.1755(2)(a) provides that the plaintiff is entitled to compensation of $50,000 for each year from the date the plaintiff was imprisoned until the date he or she was released from prison. Under one exception, MCL 691.1755(4), compensation may not be awarded under MCL 691.1755(2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction. There are no exceptions to the MCL 691.1755(4) prohibition against awarding compensation for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction, including when a con-

secutive sentence is imposed under MCL 768.7a(2) for a parole violation related to a new felony committed while on parole for another conviction. Although remedial statutes are liberally construed in favor of the persons intended to be benefited—with respect to WICA, the person wrongfully imprisoned—any other interpretation of the statute would conflict with the statute's plain language. In this case, because MCL 691.1755(4) expressly precludes compensation for any concurrent or consecutive time of imprisonment involving another conviction, plaintiff was not entitled to compensation for the consecutive sentence he served from October 13, 1992 through February 8, 1997, for the parole violation. Regardless, plaintiff also did not meet the threshold requirements for recovery under MCL 691.1755(1) for the time he was in prison after his parole was revoked because the 1987 judgment of conviction was never successfully challenged on appeal or in postjudgment proceedings. Accordingly, the Court of Claims did not err when it refused to award plaintiff compensation for the time he served in prison for that period.

Affirmed.

JANSEN, P.J., dissenting, disagreed with the majority's analysis of MCL 691.1755(4). The purpose of WICA is to provide compensation and other relief for individuals wrongfully imprisoned for crimes, to prescribe the powers and duties of certain state and local governmental officers and agencies, and to provide remedies. The MCL 691.1755(4) provision stating that compensation may not be awarded for any time during which a plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction did not apply in this case because plaintiff was imprisoned under a consecutive sentence for a parole violation that was only imposed because of the 1992 wrongful convictions; the majority's interpretation of Subsection (4) ignored that WICA is a remedial statute and that prohibiting plaintiff from recovering compensation under the facts in this case did not conform with the purpose of WICA or the harm it was designed to remedy. Judge JANSEN would have concluded that plaintiff was entitled to additional compensation under WICA for the period he was in prison from October 13, 1992 through February 8, 1998.

STATUTES — WRONGFUL IMPRISONMENT COMPENSATION ACT — COMPENSATION — RECOVERY — IMPRISONMENT UNDER CONCURRENT OR CONSECUTIVE SENTENCES.

MCL 691.1755(4) of the Wrongful Imprisonment Compensation Act provides that compensation may not be awarded under the act for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction; there

> are no exceptions to the MCL 691.1755(4) prohibition against awarding compensation for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction, including when a consecutive sentence is imposed under MCL 768.7a(2) for a parole violation; accordingly, an individual who is imprisoned following a parole violation that stems solely from a wrongful conviction is not entitled to compensation for the time served because of the purported parole violation (MCL 691.1751 *et seq*.).

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *John S. Pallas*, Assistant Attorney General for defendant.

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

CAMERON, J. Plaintiff, Desmond Ricks, filed a lawsuit seeking compensation under the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq.*, after his 1992 convictions for second-degree murder and possession of a firearm during the commission of a felony (felony-firearm) were vacated and the charges were dismissed. Ricks appeals an order of the Court of Claims, which awarded him $1,014,657.53 under WICA but denied him additional compensation of $216,438.36. Finding no error, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Ricks was originally incarcerated on February 19, 1987, following his conviction of armed robbery and assault with intent to rob while armed. Ricks was sentenced to concurrent terms of 4 to 10 years' imprisonment for each conviction. On May 30, 1991, Ricks was paroled. On September 23, 1992, while on parole,

Ricks was convicted by a jury of second-degree murder and felony-firearm. On October 12, 1992, Ricks was sentenced to 30 to 60 years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction.[1] On October 13, 1992, Ricks's parole was revoked for his 1987 convictions of armed robbery and assault with intent to rob. The Michigan Department of Corrections (MDOC) Basic Information Sheet[2] regarding Ricks provided, in relevant part, that the parole order under which Ricks had been released was rescinded because he had incurred another sentence while on parole. The Basic Information Sheet specifically referred to the 1992 second-degree murder and felony-firearm convictions. Ricks was imprisoned as a result of the parole violation concerning the 1987 convictions from October 13, 1992 to February 8, 1997. Ricks began serving the sentences on the second-degree murder and felony-firearm convictions on February 9, 1997.

In early 2017, new evidence came to light that supported a finding that Ricks did not commit the

[1] Ricks was given 219 days of jail credit on the felony-firearm conviction. Although not relevant to the issue on appeal, we note that Ricks was not entitled to jail credit in relation to his 1992 convictions because he was a parolee at all relevant times. See *People v Idziak*, 484 Mich 549, 564-566; 773 NW2d 616 (2009) (holding that the jail-credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because when parolees are arrested for a new offense, they automatically resume serving the balance of their original prison sentences).

[2] A Basic Information Sheet provides a prisoner's personal information, such as race, gender, birthdate, and a physical description. A Basic Information Sheet also lists a prisoner's convictions, sentences, and information concerning the sentencing court. In this case, the Basic Information Sheet also listed the MDOC's rationale for rescinding the parole order under which Ricks was released in relation to the 1987 convictions.

crimes of second-degree murder and felony-firearm. In light of the new evidence, the prosecution agreed that a new trial was necessary. An order of *nolle prosequi* was later entered because the prosecution determined that there was insufficient evidence to proceed to trial. Ricks was released from MDOC custody on May 26, 2017.

On June 6, 2017, Ricks filed a WICA complaint, claiming that he was entitled to $1,231,918, plus interest, costs, and attorney fees for the time he spent in prison from October 13, 1992 through May 26, 2017. The state of Michigan agreed that Ricks was entitled to compensation in the amount of $1,014,657.53 for the period between February 9, 1997 and May 26, 2017. However, the state of Michigan argued that Ricks was not entitled to compensation for the period between October 13, 1992 and February 8, 1997, because he was imprisoned for parole violations during that time, not for the 1992 murder-related convictions.

The Court of Claims held a hearing to determine the correct amount of compensation. Ricks argued that the only reason he was incarcerated between October 13, 1992 and February 8, 1997, was because he was found to have violated a condition of his parole in relation to the 1987 convictions after he was convicted of second-degree murder and felony-firearm in 1992. Ricks argued that but for the 1992 wrongful convictions, the MDOC would not have revoked his parole and he would not have been reincarcerated. In relevant part, the state of Michigan claimed that Ricks was entitled to compensation under WICA "only for the time that he was exclusively serving for the vacated murder conviction," which was the period between February 9, 1997 and May 26, 2017.

The Court of Claims agreed with the state of Michigan, stating:

> I will compensate for the length of time that has been agreed to that the gentleman served on the substantive offense before us[,] and I will not compensate for the amount of time that he served on a violation of parole; that he had to serve first before he began to serve on the case before us nor will I compensate for any time spent in the county jail awaiting trial.

Thereafter, the Court of Claims entered a stipulated order of judgment, awarding Ricks the undisputed amount of compensation, plus costs and attorney fees. The stipulated order of judgment reflected that Ricks was not waiving the right to appeal the denial of the additional $216,438.36 by stipulating to the entry of the order of judgment and accepting payment of the amount ordered by the Court. This appeal followed.

II. ANALYSIS

Ricks argues on appeal that the Court of Claims erred by determining that he was not entitled to compensation for the time he was incarcerated from October 13, 1992 through February 8, 1997, as a result of the MDOC's decision to revoke his parole in relation to the 1987 convictions. We disagree.

This Court reviews de novo issues of statutory interpretation. *In re Mich Cable Telecom Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000). When interpreting a statute, the goal is to "ascertain and give effect to the intent of the Legislature." *Portelli v I R Constr Prod Co, Inc*, 218 Mich App 591, 606; 554 NW2d 591 (1996). Where the language of the statute is unambiguous, the statute must be applied as written. *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). However, appellate courts have no authority to re-

evaluate legislative policy choices or to reconfigure a statute on the basis of a public-policy concern that is not embodied in the text of a statute. *Lash v Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007). "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." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013).

Michigan courts have long recognized that "[t]he State, as sovereign, is immune from suit save as it consents to be sued, and any relinquishment of sovereign immunity must be strictly interpreted." *Manion v State Hwy Comm'r*, 303 Mich 1, 19; 5 NW2d 527 (1942). "[T]he state can only waive its immunity and, consequently, consent to be sued through an act of the Legislature or through the constitution." *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 119; 782 NW2d 784 (2010).

As relevant here, WICA allows "[a]n individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for 1 or more crimes that he or she did not commit" to seek compensation from the state of Michigan. MCL 691.1753. MCL 691.1755 provides, in relevant part, the following:

> (1) In an action under this act, the plaintiff is entitled to judgment in the plaintiff's favor if the plaintiff proves all of the following by clear and convincing evidence:
>
> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. How-

> ever, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence[3] demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.
>
> (2) Subject to subsections (4) and (5), if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:
>
> (a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plaintiff was released from imprisonment on parole or because the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated in prison.

Thus, under MCL 691.1755(1)(a), a plaintiff must first establish that "a term of imprisonment in a state correctional facility" was imposed after the plaintiff's conviction. Although the language of MCL 691.1755(1)(b) and (c) vary slightly, both subsections require the following in order for a plaintiff to obtain compensation under WICA: (1) the charge(s) in the judgment of conviction must be reversed or vacated and (2) the charge(s) must be dismissed or the plaintiff

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[3] WICA defines "new evidence" as "any evidence that was not presented in the proceedings leading to plaintiff's conviction, including new testimony, expert interpretation, the results of DNA testing, or other test results relating to evidence that was presented in the proceedings leading to plaintiff's conviction." MCL 691.1752(b).

must be found not guilty on retrial. See MCL 691.1755(1)(b) and (c). If a plaintiff meets WICA's threshold requirements and neither MCL 691.1755(4) nor (5) apply, the plaintiff is entitled to $50,000 in compensation for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison. See *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 364; 917 NW2d 603 (2018) ("[T]o be 'subject' to something includes, among other things, being 'contingent on or under the influence of some later action . . . .' This signals that when an item or event is subject to another item or event, the former and the latter must be considered together.").

On appeal, the parties disagree whether the Court of Claims properly applied MCL 691.1755(4) when determining that Ricks was not entitled to compensation for the time he was imprisoned for his parole violation. MCL 691.1755(4) provides the following:

> Compensation may not be awarded under [MCL 691.1755(2)] for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction.

Thus, the statutory prohibition is clear: compensation may not be awarded under Subsection (2) for any time the plaintiff was imprisoned under a concurrent or consecutive sentence for "another conviction." The Legislature provided for no exceptions. As relevant here, MCL 768.7a(2) mandates consecutive sentencing for parolees found to have committed new felonies while on parole. See *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991).

Ricks nevertheless argues that he is also entitled to compensation for the time he served in prison for a different conviction (his parole violation) because that

imprisonment was based solely on his 1992 wrongful convictions. Compensation for this imprisonment, Ricks argues, would further the act's purpose, which is "to provide compensation and other relief for individuals wrongfully imprisoned for crimes[.]" 2016 PA 343, title. However, Ricks's construction of the statute is not found in the text of the statute and ignores the plain language of the consecutive-sentence restriction in MCL 691.1755(4), which provides no exceptions for his situation. Rather, MCL 691.1755(4) expressly precludes compensation for any concurrent or consecutive time of imprisonment involving another conviction. In this case, Ricks was imprisoned from October 13, 1992 to February 8, 1997, for a different conviction. Thus, under the plain and unambiguous language of MCL 691.1755—which we must interpret strictly—Ricks was not entitled to compensation for that period of imprisonment. Any conclusion to the contrary would impermissibly render the plain language of MCL 691.1755(4) nugatory. See *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010).

Further, the Legislature's use of the phrase "may not" provides no room for the type of discretion for which Ricks advocates. The statute provides that compensation "may not be awarded . . . *for any time* during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction." MCL 691.1755(4) (emphasis added). The use of the comprehensive word "any" reinforces our conclusion that MCL 691.1755(4) was intended as a complete prohibition against awarding compensation for all time served under a concurrent or consecutive sentence for another conviction. See *People v Hesch*, 278 Mich App 188, 195; 749 NW2d 267 (2008).

In so holding, we acknowledge that remedial statutes are to be liberally construed in favor of the persons intended to be benefited. *Empson-Laviolette v Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008). However, "[t]he fact that a statute has a broad remedial structure does not allow us to interpret its text in a way that conflicts with its plain language." *Mich Flyer LLC v Wayne Co Airport Auth*, 860 F3d 425, 430 (CA 6, 2017). That is exactly what Ricks asks us to do here given that he was serving a sentence "for another conviction," MCL 691.1755(4), when he was imprisoned for the parole violation.

Therefore, because MCL 691.1755(4) bars Ricks from recovering under WICA for the period between October 13, 1992 and February 8, 1997, the Court of Claims did not err when it refused to award compensation for that time. See *In re Mich Cable Telecom Ass'n Complaint*, 239 Mich App at 690.

Additionally, even if the plain language of MCL 691.1755(4) did not bar Ricks from receiving compensation for the period he was imprisoned between October 13, 1992 and February 8, 1997, we would conclude that Ricks does not meet the threshold requirements outlined in MCL 691.1755(1) with respect to the 1987 convictions for armed robbery and assault with intent to rob while armed. As already stated, the plain language of MCL 691.1755(1)(b) and (c) requires that (1) the charge(s) in the judgment of conviction be reversed or vacated and (2) the charge(s) be dismissed or the plaintiff be found not guilty on retrial.

Unlike the 1992 judgment of conviction, the judgment of conviction for Ricks's 1987 convictions was never successfully challenged on appeal or in postjudgment proceedings. Thus, the judgment of conviction in relation to the 1987 convictions was never vacated or

reversed, and Ricks's 1987 convictions remained intact. This is fatal to the portion of Ricks's WICA claim concerning the 1987 convictions because the Legislature's use of the word "the" in front of "charges" and "judgment of conviction" reflects that the Legislature did not intend to provide compensation under WICA unless the charges in a specific judgment of conviction were reversed or vacated and those charges were later dismissed or the plaintiff was found not guilty on retrial. See *Robinson*, 486 Mich at 14 (holding that use of the word "the" designates a definite object). Because Ricks cannot meet the threshold requirements of WICA with respect to the 1987 convictions, he was not entitled to compensation for the time he was incarcerated in relation to those convictions. This includes the period of time between October 13, 1992 and February 8, 1997, when Ricks was imprisoned as a result of the MDOC's decision to revoke his parole following his 1992 convictions for second-degree murder and felony-firearm.

III. CONCLUSION

In sum, Ricks is not entitled to compensation under WICA for his incarceration from October 13, 1992 to February 8, 1997, because MCL 691.1755(4) and the threshold requirements outlined in MCL 691.1755(1) both bar that relief.

Affirmed.

TUKEL, J., concurred with CAMERON, J.

JANSEN, P.J. (*dissenting*). Because I believe the Wrongful Imprisonment Compensation Act (WICA), MCL 691.1751 *et seq*., does not mandate a setoff for the time plaintiff, Desmond Ricks, spent incarcerated be-

tween October 13, 1992, and February 8, 1998, for a parole violation that was a consequence of a wrongful conviction, I respectfully dissent.

Ricks argues on appeal that he is entitled to compensation under WICA for the time he spent incarcerated for parole violations. The Michigan Department of Corrections (MDOC) Basic Information Sheet confirms that if Ricks had not been wrongfully convicted of second-degree murder and felony-firearm, his parole would not have been violated. Indeed, Ricks's parole was rescinded solely because Ricks incurred another sentence while on parole. More specifically, Ricks argues that WICA does not mandate a setoff when another concurrent or consecutive sentence resulted from a wrongful conviction. I agree.

We review issues of statutory interpretation de novo. *Maples v Michigan*, 328 Mich App 209, 218; 936 NW2d 857 (2019).

> When interpreting a statute, our goal "is to ascertain and give effect to the intent of the Legislature." *Portelli v I R Constr Prod Co, Inc*, 218 Mich App 591, 606; 554 NW2d 591 (1996). Unidentified terms in a statute "must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions." *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). This Court must avoid interpreting a statute in a way that would make any part of it meaningless or nugatory. *Sweatt v Dep't of Corrections*, 468 Mich 172, 183; 661 NW2d 201 (2003). [*Maples*, 328 Mich App at 218.]

WICA waives immunity for the state and allows "[a]n individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for 1 or more crimes that he or she did not commit [to] bring an action for compensation" against the state. MCL 691.1753. The purpose of WICA is "to provide compensation and other relief for individuals

wrongfully imprisoned for crimes; to prescribe the powers and duties of certain state and local governmental officers and agencies; and to provide remedies." 2016 PA 343, title.

To bring a successful WICA claim, MCL 691.1755(1) provides that a plaintiff is required to prove by clear and convincing evidence the following:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all the charges or a finding of not guilty on all of the charges on retrial.

In this case, having fulfilled the requirements of MCL 691.1755(1)(a) through (c), Ricks was awarded compensation under MCL 691.1755(2), which states:

> Subject to subsections (4) and (5), if a court finds that a plaintiff was wrongfully convicted and imprisoned, the court shall award compensation as follows:
>
> (a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plaintiff was released from imprisonment on parole or because

> the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated in prison.

MCL 691.1755(4) and (5) place limitations on a plaintiff's compensation. MCL 691.1755(4) is pertinent here and provides:

> Compensation may not be awarded under subsection (2) for any time during which the plaintiff was imprisoned under a concurrent or consecutive sentence for another conviction.

Ricks argues that because he was imprisoned under a consecutive sentence for parole violations resulting from his wrongful conviction, MCL 691.1755(4) does not conform to the purpose of WICA or the harm that it was designed to remedy. I agree.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). The provisions of a statute should be construed reasonably and in context. *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). The Legislature is presumed to have intended the meaning it plainly expressed, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012). When construing a statute, courts "must look to the object of the statute in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 644; 513 NW2d 799 (1994). In doing so, this Court may consider a variety of factors and apply

principles of statutory construction, but it "should not abandon the canons of common sense." *Id*. "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). Remedial statutes are to be liberally construed in favor of the persons intended to be benefited. *Empson-Laviolette v Crago*, 280 Mich App 620, 629; 760 NW2d 793 (2008).

I appreciate the majority's thorough analysis relating to MCL 691.1755(4) and understand their conclusion that a strict interpretation of MCL 691.1755(4) prevents Ricks from receiving compensation for the time he was imprisoned between October 13, 1992 and February 8, 1997. However, I believe the majority overlooks the fact that this statute is remedial in nature and therefore should be liberally construed in favor of the wrongfully convicted, *Empson-Laviolette*, 280 Mich App at 629, and that such a stringent result in this case would not give effect to the Legislature's intent, see *Mich Ed Ass'n*, 489 Mich at 217. Indeed, the purpose of WICA is to "provide compensation and other relief for individuals wrongfully imprisoned for crimes . . . and to provide remedies." 2016 PA 343, title.

The MDOC Basic Information Sheet indicates that Ricks's parole was revoked and his sentences for the armed robbery and assault convictions reinstated solely because he was wrongfully convicted of second-degree murder and felony-firearm while on parole. Put another way, Ricks's parole violation was entirely contingent on the wrongful convictions. In addition to the MDOC Basic Information Sheet, Cynthia Partridge, a time-computation manager for the MDOC, testified via affidavit that Ricks's parole was revoked for incurring the second-degree murder and felony-firearm convictions. Specifically, Partridge averred:

> I conducted a search of MDOC's electronic and paper records to determine the dates Desmond Ricks was housed in a correctional facility maintained and operated by the MDOC and for which offenses he was incarcerated. Mr. Ricks was housed in a MDOC facility beginning on February 19, 1987 after he was convicted of Armed Robbery and Assault with Intent to Rob While Armed ("A" sentences) and sentenced to 4 to 10 years on each sentence, concurrently. Mr. Ricks was paroled on May 30, 1991, after serving a little more than 4 years on his "A" sentences. *Mr. Ricks'[s] parole was violated and he was again incarcerated beginning October 13, 1992, and ending on May 26, 2017, after he was convicted of Felony Firearm and Second-Degree Murder ("B" sentences)*. From October 13, 1992, to February 8, 1997, Mr. Ricks was incarcerated for the 1987 convictions for which he was paroled in 1991 ("A" sentences). Mr. Ricks served his maximum 10-year sentence on his 1987 convictions for Armed Robbery and Assault with Intent to Rob While Armed. Mr. Ricks did not begin serving time exclusively for Felony Firearm and Second-Degree Murder until February 9, 1997. [Emphasis added.]

I would conclude that because the Legislature's clearly articulated intent in enacting MCL 691.1755(4) was to compensate plaintiffs who were incarcerated because of wrongful convictions, Ricks is entitled to additional compensation under WICA in the amount of $216,438.36, because the sole reason he was serving time for a parole violation was his wrongful convictions. I believe any other result is unjust.

TAXPAYERS FOR MICHIGAN CONSTITUTIONAL GOVERNMENT v STATE OF MICHIGAN (ON RECONSIDERATION)

Docket No. 334663. Submitted January 22, 2019, at Lansing. Decided July 30, 2019. Reconsideration granted, opinion vacated, and new opinion issued October 29, 2019, at 9:05 a.m. Affirmed in part, reversed in part, vacated in part, and case remanded 508 Mich ___ (2021).

Taxpayers for Michigan Constitutional Government (TMCG), Steve Duchane, Randall Blum, and Sara Kandel brought an original action in the Court of Appeals against the state of Michigan; the Department of Technology, Management, and Budget; and the Office of the Auditor General to enforce § 30 of the Headlee Amendment, Const 1963, art 9, § 30, which prohibits the state from reducing the total of state spending paid to all units of local government, taken as a whole, below that proportion in effect in fiscal year 1978–1979. Plaintiffs alleged in a four-count complaint that the state's accounting practices have resulted in the underfunding of its § 30 revenue-sharing obligation: Count I asserted that the state violated § 30 by classifying as state spending paid to local government monies paid to school districts pursuant to Proposal A, Const 1963, art 9, § 11; Count II made the same assertion as to monies paid to public school academies (PSAs) pursuant to Proposal A and MCL 380.501(1); Count III alleged that the state improperly classified as § 30 state spending those funds paid to maintain trunk-line roads; and Count IV sought a determination that state funds directed to local governments for new state mandates may not be counted toward the proportion of state funds required by § 30. The Court of Appeals, BORRELLO, P.J., and FORT HOOD and SHAPIRO, JJ., dismissed Count III without prejudice upon stipulation of the parties in an unpublished order entered on December 4, 2017.

The Court of Appeals *held*:

1. An organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest. In this case, each of TMCG's 20 individual members was a Michigan resident and taxpayer, and TMCG's 20 municipal members were cities, villages, and townships. Because the individual

members, as taxpayers, had standing under Const 1963, art 9, § 32 to bring this Headlee enforcement action, TMCG had standing to bring suit in its representative capacity as to its individual members, and because units of local government, including cities, villages, and townships, are considered taxpayers under § 32 for purposes of vindicating the rights of their respective constituents, TMCG had standing to bring suit in its representative capacity as to its municipal members. Defendants' assertion to the contrary failed for lack of factual and legal support.

2. The goal of the judiciary when construing Michigan's Constitution is to identify the original meaning that its ratifiers attributed to the words used in a constitutional provision. Const 1963, art 9, § 30 provides that the proportion of total state spending paid to all units of local government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978–1979. Const 1963, art 9, § 33 defines "local government" as any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government.

3. State funding disbursed to local school districts through Proposal A and the State School Aid Act, MCL 388.1601 *et seq*., constituted voter-sanctioned payments of state funding to a specific unit of local government, i.e., public-school districts. Although § 30 embodies and effectuates the antishifting purpose referred to in § 25 of the Headlee Amendment, the state's inclusion of Proposal A funds paid to school districts did not trigger a forbidden tax shift. Section 30 only requires that state funding of all units of local government, taken as a group, be maintained at 1978–1979 levels; it does not require that each individual unit of government receive in perpetuity the same proportion of the allotment for local government as it received in 1978. Accordingly, plaintiff's argument that classifying Proposal A funding as § 30 revenue sharing shifted the state's tax burden to units of local government failed. Defendants were entitled to summary disposition on Count I.

4. School districts constitute units of local government as defined in Const 1963, art 9, § 33. Under MCL 380.501(1), a PSA is a school district for purposes of Const 1963, art 9, § 11. Const 1963, art 9, § 11 provides, in relevant part, that a state school aid fund shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems. MCL 388.1603(7) of the School Aid Act, MCL 388.1601 *et seq*., includes PSAs in the definition of "district." Under MCL 388.1608b(1), to receive state funding, PSAs must receive a district code from the Department of Education. Pursuant to

those provisions, PSAs receive state funding earmarked for school districts. State funding of PSAs thus constitutes funding of a unit of local government for the purpose of calculating state aid under the Headlee Amendment. There was no evidence that would demonstrate the Legislature's intent either to limit the state's authority to define and fund school districts or to specifically bar the state from later defining the term "school district" to include PSAs.

5. When Const 1963, art 9, § 29 and Const 1963, art 9, § 30 are read together, they require the state to fully fund the necessary implementation costs of any new mandate imposed on a unit of local government and to provide this funding in addition to the funding paid in satisfaction of the state's § 30 revenue-sharing obligation. The first sentence of § 29 speaks only to "existing" activities and therefore was aimed at existing services or activities already required of or otherwise performed by the local government at the time the Headlee Amendment became effective. The second sentence of § 29 refers only to future services or activities. In sum, § 29 prohibits the state from reducing its proportion of the necessary costs of existing activities while it requires the state to pay the increased necessary costs in full when it mandates new activities or mandates activities at an increased level. If state spending to fund new state mandates under § 29 may be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30, then § 29 state funding for new mandates would supplant state spending intended for local use and thereby allow funding for new mandates to serve two conflicting purposes, i.e., to fund new state mandates as well as to preserve the 1978–1979 level of state funding to local governments. Accordingly, state spending to fund state-mandated local services and activities as required by § 29 of the Headlee Amendment may not be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30. Plaintiffs were entitled to summary disposition on Count IV of their complaint.

6. MCL 21.235(3) requires the Governor to include in a report accompanying the annual budget recommendation of the Legislature those amounts that the Governor determines are required to make disbursements to each local unit of government for the necessary cost of each state requirement for that fiscal year and the total amount of state disbursements required for all local units of government. MCL 21.241 establishes a legislatively mandated duty that the state, through its officers and departments, collect, report, and place on the public record certain

information regarding the state's compliance with the Headlee Amendment. In this case, the state breached that duty. The state's failure to comply with the dictates of MCL 21.235(3) and MCL 21.241 prevents taxpayers from knowing what mandated activity is funded and what is unfunded and prevents taxpayers from specifically identifying mandated activity that is included within Const 1963, art 9, § 30 calculations as well as what, if any, mandated activity is not included. Accordingly, mandamus was an appropriate remedy. Mandamus relief was prospective only given that plaintiffs waived their claim to compensation for the state's past practice of counting funding for new or increased mandates for purposes of § 30.

Summary disposition and a declaratory judgment granted, in part, to defendants on Counts I and II of plaintiffs' complaint and to plaintiffs on Count IV of plaintiff's complaint. Plaintiffs may recover costs and a reasonable attorney fee limited to the costs and fees incurred during the litigation related to Count IV of their complaint.

METER, J., concurring in part and dissenting in part, agreed with most of the lead opinion's analysis but dissented from the lead opinion's analysis of Count II of plaintiffs' complaint. Judge METER would have held that a PSA is neither a political subdivision of the state nor a school district within the meaning of Const 1963, art 9, § 33 and, therefore, not a unit of local government for purposes of Const 1963, art 9, § 30. PSAs lack the distinctive marks of political subdivisions of the state for purposes of § 33. A PSA has no direct electorate and possesses a lesser capacity for self-governance than other bodies corporate that are traditionally recognized as political subdivisions. The absence of these two crucial and distinctive marks of a political subdivision supported plaintiffs' position that a PSA is not a local government for purposes of § 30. The Legislature gave PSAs the designation of limited-purpose school districts in MCL 380.501(1) for a single constitutional purpose—the receipt of state school aid funding. The fact that the Legislature did not expressly confer upon PSAs the status of school districts for purposes of the Headlee Amendment or for purposes of § 30 was compelling evidence of the Legislature's intent not to confer that status. Accordingly, Judge METER would have held that plaintiffs were entitled to summary disposition on Count II of their complaint.

BORRELLO, P.J., concurring in part and dissenting in part, agreed with most of the lead opinion's analysis but dissented from the lead opinion's analysis of Count IV of plaintiffs' complaint. Judge BORRELLO would have held that state funding provided to

units of local government for new or increased state mandates under Const 1963, art 9, § 29 may be counted for purposes of Const 1963, art 9, § 30 and thus that defendants were entitled to summary disposition on Count IV. Nothing in the language of either § 29 or § 30 prohibits the state from eliminating a state mandate and then shifting funds formerly allocated to the eliminated mandate to satisfy the state's obligation under the Headlee Amendment to fund a new mandate or an increase in the level of a mandated activity or service from the 1978 base year so long as the total proportion of state spending paid under § 30 is not reduced by the shifting of funds. Furthermore, the provisions of the Headlee Amendment do not prohibit the state's reduction of its financed portion of any existing activity or service provided by a unit of local government not required by state law. Accordingly, the state is free to shift or reallocate that general and unrestricted revenue sharing paid under § 30 to fund the necessary costs incurred by units of local government in providing a newly enacted state-mandated activity or service or an increase in an existing mandated activity or service without violating the scheme of the Headlee Amendment.

1. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — STATE SPENDING PAID TO UNITS OF LOCAL GOVERNMENT — STATE FUNDING OF PUBLIC SCHOOL ACADEMIES.

Const 1963, art 9, § 30 provides that the proportion of total state spending paid to all units of local government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978–1979; Const 1963, art 9, § 33 defines "local government" as any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government; state funding of public school academies constitutes funding of a unit of local government for the purpose of calculating state aid under the Headlee Amendment.

2. CONSTITUTIONAL LAW — HEADLEE AMENDMENT — STATE SPENDING TO FUND STATE-MANDATED LOCAL SERVICES AND ACTIVITIES.

Const 1963, art 9, § 29 provides, in pertinent part, that the state is prohibited from reducing the state-financed proportion of the necessary costs of any existing activity or service required of units of local government by state law and that a new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the Legislature or any state agency of units of local government, unless a state

appropriation is made and disbursed to pay the unit of local government for any necessary increased costs; Const 1963, art 9, § 30 provides that the proportion of total state spending paid to all units of local government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978–1979; state spending to fund state-mandated local services and activities as required by § 29 of the Headlee Amendment may not be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30.

Sugar Law Center for Economic & Social Justice (by *John C. Philo*), *Tracy A Peters PLLC* (by *Tracy A. Peters*), *Law Offices of Nickolas M. Guttman* (by *Nickolas M. Guttman*), *John E. Mogk*, and *Robert A. Sedler* for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Matthew B. Hodges*, *Adam P. Sadowski*, *David W. Thompson*, and *Michael S. Hill*, Assistant Attorneys General, for defendants.

Amici Curiae:

Dennis R. Pollard and *Jennifer Hill* for the Michigan Municipal League, the Government Law Section of the State Bar of Michigan, the Michigan Association of Counties, and the Michigan Township Association.

ON RECONSIDERATION

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

SHAPIRO, J. Taxpayer-plaintiffs bring this original action against the state of Michigan; the Department of Technology, Management and Budget; and the Office of Auditor General to enforce § 30 of the Headlee Amendment,[1] which prohibits the state from reducing

[1] Plaintiffs also seek to enforce § 25 of the Headlee Amendment, Const 1963, art 9, § 25. However, § 25 of the Headlee Amendment is an

the total of state spending paid to all units of local government, taken as a whole, below that proportion in effect in fiscal year 1978–1979. Const 1963, art 9, § 30. The parties agree that the proportion of state spending to be paid to all units of local government taken collectively under § 30 is 48.97%. They disagree, however, with regard to what categories of state spending may be classified as "state spending paid to all units of Local Government" for purposes of § 30. Plaintiffs allege that accounting practices employed by the state have resulted in a persistent and growing underfunding of its § 30 revenue-sharing obligation. Count I of their complaint asserts that the state has violated § 30 by its practice of classifying as state spending paid to local government those monies paid to school districts pursuant to Proposal A, Const 1963, art 9, § 11. Count II makes the same assertion as to monies paid to public school academies (PSAs), colloquially known as charter schools, pursuant to Proposal A and MCL 380.501(1). Count IV seeks a determination that state funds directed to local governments for new state mandates may not be counted toward the proportion of state funds required by § 30. According to plaintiffs, the improper inclusion of these expenditures in its calculations has enabled the state to displace state payments to local governments previously made for existing programs and services and, as a consequence, to force local governments to choose between increasing taxes and fees to fund programs and services previously funded by

introductory paragraph to the amendment that summarizes the revenue and tax limits imposed on the state and local governments by the other provisions of the amendment. *Durant v Michigan*, 456 Mich 175, 182-183; 566 NW2d 272 (1997); *Waterford Sch Dist v State Bd of Ed (After Remand)*, 130 Mich App 614, 620; 344 NW2d 19 (1983), aff'd 424 Mich 364 (1985). The introductory sentences found in § 25 are not intended "to be given the substantive effect of creating specific rights and duties." *Waterford Sch Dist*, 130 Mich App at 620.

revenue-sharing payments from the state and reducing the scope of or eliminating altogether those programs and services.[2]

For the reasons set forth in this opinion, we grant summary disposition in favor of defendants on Counts I and II and declare that the state did not violate § 30 by classifying Proposal A funding paid to school districts and PSA funding as state funds paid to local government. However, we grant summary disposition to plaintiffs on Count IV and declare that pursuant to § 29, funding for new or increased state mandates may not be counted for purposes of § 30. Finally, we grant mandamus relief and direct the state, and its officers and departments, to comply with the reporting and disclosure requirements of MCL 21.235(3) and MCL 21.241.

I. BURDENS OF PROOF

A. CAUSES OF ACTION

Plaintiffs seek declaratory, injunctive, and mandamus relief.[3]

It is a well-recognized proposition that the remedy required in an action to enforce a provision of the Headlee Amendment "comprises a resolution of the parties' prospective rights and obligations by declara-

[2] Plaintiffs also alleged that the state improperly classified as § 30 state spending those funds paid to maintain trunk-line roads. This allegation constituted the gravamen of Count III of plaintiffs' complaint. We dismissed Count III without prejudice upon stipulation of the parties. *Taxpayers for Mich Constitutional Gov't v Michigan*, unpublished order of the Court of Appeals, entered December 4, 2017 (Docket No. 334663).

[3] At oral argument, plaintiffs withdrew their request for monetary relief for past shortfalls in the state's payments to local government in satisfaction of its § 30 revenue-sharing obligation.

tory judgment." *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 266; 583 NW2d 512 (1998). See also *Adair v Michigan*, 470 Mich 105, 112; 680 NW2d 386 (2004); *Durant v Michigan*, 456 Mich 175, 204-206; 566 NW2d 272 (1997); *Oakland Co v Michigan*, 456 Mich 144, 166; 566 NW2d 616 (1997). "[T]he plaintiff in a declaratory-judgment action bears 'the burden of establishing the existence of an actual controversy, as well as the burden of showing that . . . it has actually been injured or that the threat of imminent injury exists.' " *Adair v Michigan (On Second Remand)*, 279 Mich App 507, 514; 760 NW2d 544 (2008), aff'd in part and rev'd in part on other grounds 486 Mich 468 (2010), quoting 22A Am Jur 2d, Declaratory Judgments, § 239, p 788. See also *Adair v Michigan*, 486 Mich 468, 482-483; 785 NW2d 119 (2010) (stating that because the plaintiffs met their initial burden of demonstrating a violation of the "prohibition of unfunded mandates" clause of § 29 of the Headlee Amendment, they were entitled to a declaratory judgment unless the state demonstrated that the plaintiff school districts' costs were not increased as a result of the requirements or that the costs incurred were not necessary).

Mandamus is an extraordinary remedy. *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 142; 369 NW2d 277 (1985). Thus, the issuance of a writ of mandamus is only proper when (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has a 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. *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518; 866 NW2d 817 (2014). "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.' " *Univ Med Affiliates*, 142 Mich App at 143 (citation omitted); see also *Rental Props Owners Ass'n of Kent Co*, 308 Mich App at 518-519. "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." *Hillsdale Co Senior Servs, Inc v Hillsdale Co*, 494 Mich 46, 58 n 11; 832 NW2d 728 (2013) (quotation marks and citation omitted); see also *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016). "The burden of showing entitlement to the extraordinary remedy of a writ of mandamus is on the plaintiff." *White-Bey v Dep't of Corrections*, 239 Mich App 221, 223; 608 NW2d 883 (1999).

The moving party bears the burden of proving an entitlement to injunctive relief. *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34; 753 NW2d 579 (2008). The moving party carries this burden by proving that the four traditional elements favor the issuance of a preliminary injunction by a preponderance of the evidence. *Id.*; *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939). In determining whether to issue a preliminary injunction, a trial judge must consider those four elements, which are:

> (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. [*Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998); see also *Detroit Fire Fighters Ass'n*, 482 Mich at 34.]

B. SUMMARY DISPOSITION

At the direction of the Court, the parties have filed cross-motions for summary disposition.[4] Both plaintiffs and defendants seek summary disposition pursuant to MCR 2.116(C)(10). Summary disposition is appropriate under MCR 2.116(C)(10)

> when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. The court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. The moving party must specifically identify the undisputed factual issues and has the initial burden of supporting its position with documentary evidence. The responding party must then present legally admissible evidence to demonstrate that a genuine issue of material fact remains for trial. [*E R Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 644; 717 NW2d 370 (2006) (citations omitted).]

Plaintiffs also seek summary disposition pursuant to MCR 2.116(C)(9). Summary disposition may be granted under MCR 2.116(C)(9) when "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." A motion under this subrule tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Lepp v Cheboygan Area Sch*, 190 Mich App 726, 730; 476 NW2d 506 (1991). If the "defenses are 'so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery,' " then summary disposition under this subrule is proper. *Id*. (citation omitted).

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[4] *Taxpayers for Mich Constitutional Gov't v Michigan*, unpublished order of the Court of Appeals, entered May 9, 2017 (Docket No. 334663).

II. STANDING

Before we can reach the merits of the substantive questions in this case, we must revisit the issue of standing. Defendants challenged plaintiffs' standing to commence this Headlee enforcement action in their answer to plaintiffs' original complaint. We summarily dismissed the standing challenge as it pertained to individual plaintiffs Steve Duchane, Randall Blum, and Sara Kandel, but we reserved our ruling as it pertained to lead plaintiff Taxpayers for Michigan Constitutional Government (TMCG). We explained:

> [T]he Court dismisses defendants' standing challenge, but only as to the individual taxpayer plaintiffs, i.e., Duchane, Blum, and Kandel. Under § 32, "[a]ny taxpayer of the state has standing to bring suit to enforce the provisions of the Headlee Amendment." *Mahaffey v Attorney General*, 222 Mich App 325, 340[; 564 NW2d 104] (1997). Because all of plaintiffs' claims and requested forms of relief are part of an action seeking to enforce Headlee, the individual taxpayer plaintiffs have § 32 standing.
>
> However, vis-à-vis the lead plaintiff, Taxpayers for Michigan Constitutional Government (TMCG), the Court reserves its standing determination. "[A]n organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest." *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 373 n 21[; 792 NW2d 686] (2010) (*LSEA*). However, TMCG bears the burden of demonstrating that it has standing, see, e.g., *Moses Inc v Southeast Mich Council of Gov'ts*, 270 Mich App 401, 414[; 716 NW2d 278] (2006), and TMCG is, with regard to plaintiffs' request for a declaratory judgment, required to "plead *and* prove facts which indicate an adverse interest," *LSEA*, 487 Mich at 372 n 20 (quotation marks and citation omitted; emphasis added). See also MCR 2.605(A)(l) (stating the "actual controversy" requirement for declaratory judgments). Because TMCG has failed to plead or prove the facts necessary to carry its burden of demonstrating that it has standing—specifically, to demon-

> strate whether its membership has a sufficient interest in this matter to afford organizational standing—the Court holds in abeyance its decision on this issue. The parties may further address the question of TMCG's standing in their respective motions for summary disposition and in any related filings. [*Taxpayers for Mich Constitutional Gov't v Michigan*, unpublished order of the Court of Appeals, entered May 9, 2017 (Docket No. 334663).]

After reviewing plaintiffs' documentation, we dismiss the remainder of defendants' standing challenge as without merit.

Lead plaintiff TMCG represents that it is "a nonpartisan, non-profit, tax exempt organization founded by taxpayers, municipal leaders, educators and lawyers dedicated to ensuring the State of Michigan follows the word of law as written in the state Constitution and fulfills the revenue sharing requirements guaranteed by the Headlee Amendment."[5] As we observed in our May 9, 2017 order, "an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest." *LSEA*, 487 Mich at 373 n 21. Plaintiffs append to their motion for summary disposition the affidavit of individual plaintiff Steve Duchane, who attests to being one of the founding members and the treasurer of TMCG. Duchane also attests that each of TMCG's 20 individual members is a Michigan resident and taxpayer. He further attests that TMCG has 20 "municipal members," including cities, villages, and townships. Because the individual members, as taxpayers, have standing under Const 1963, art 9, § 32 to bring this Headlee enforcement action, TMCG has standing to bring suit in its representative capacity as to these

[5] Taxpayers for Michigan Constitutional Government, *Home Page* <http://www.michcongov.org> (accessed May 26, 2020) [https://perma.cc/A2RE-ZVQ2].

members. *LSEA*, 487 Mich at 373 n 21. Likewise, because units of local government, including cities, villages, and townships, are considered "taxpayers" under § 32 for purposes of vindicating the rights of their respective constituents, see *Oakland Co v Michigan*, 456 Mich 144, 167; 566 NW2d 616 (1997); *Riverview v Michigan*, 292 Mich App 516, 520 n 1; 808 NW2d 532 (2011),[6] TMCG has standing to bring suit in its representative capacity as to its municipal members, *LSEA*, 487 Mich at 373 n 21. Defendants' assertion to the contrary fails for lack of factual and legal support.

III. STATE SPENDING AND § 30

A. CONST 1963, ART 9, § 30

At its core, plaintiffs' suit seeks to answer a single legal question, which is whether certain categories of state spending, i.e., payments to school districts guaranteed by Const 1963, art 9, § 11; payments to PSAs guaranteed by Const 1963, art 9, § 11 and MCL 380.501; and payments for state-mandated activities and services under Const 1963, art 9, § 29, constitute state spending to local governments under § 30 of the Headlee Amendment. The question posed by this suit is a novel one. In seeking its answer, we are guided in our application of § 30 by the principles governing the construction of constitutional provisions.

"The goal of the judiciary when construing Michigan's Constitution is to identify the original meaning that its ratifiers attributed to the words used in a constitutional provision." *CVS Caremark v State Tax Comm*, 306 Mich App 58, 61; 856 NW2d 79 (2014). "In

[6] Superseded by statute on other grounds as stated in *Telford v Michigan*, 327 Mich App 195 (2019).

performing this task, we employ the rule of common understanding." *Id*. "Under the rule of common understanding, we must apply the meaning that, at the time of ratification, was the most obvious common understanding of the provision, the one that reasonable minds and the great mass of the people themselves would give it." *Id*. "Words should be given their common and most obvious meaning . . . ." *In re Burnett Estate*, 300 Mich App 489, 497-498; 834 NW2d 93 (2013). "Further, every provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another." *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003). The interpretation of a constitutional provision takes account of the purpose sought to be accomplished by the provision. *Adair v Michigan*, 497 Mich 89, 102; 860 NW2d 93 (2014).

Section 30 provides:

> The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79. [Const 1963, art 9, § 30.]

For purposes of the Headlee Amendment, the term "Local Government" is defined in § 33 of that amendment as "any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government." Const 1963, art 9, § 33.

B. PROPOSAL A PAYMENTS TO SCHOOL DISTRICTS

State funding disbursed to local school districts through Proposal A and the State School Aid Act,

MCL 388.1601 *et seq*., constitutes voter-sanctioned payments of state funding to a specific unit of local government, i.e., public-school districts. Nevertheless, plaintiffs argue that Proposal A spending is a category of state funding that may not be classified as § 30 revenue sharing. They argue that classifying Proposal A funding as § 30 revenue sharing effectively shifts the state's tax burden to local government units. A shifting of the tax burden occurs, according to plaintiffs, because the Proposal A payments "supplant[] other state spending previously paid to local governments, placing a tax burden on local governments to further raise local taxes to offset lost state revenue." We find no support in the plain language of § 30 to sustain such a claim.

Although § 30 embodies and effectuates the antishifting purpose referred to in § 25 of the Headlee Amendment, *Schmidt v Dep't of Ed*, 441 Mich 236, 254; 490 NW2d 584 (1992), the state's inclusion of Proposal A funds paid to school districts does not trigger a forbidden tax shift. Section 30 plainly provides that "[t]he proportion of total state spending paid to all units of Local Government, *taken as a group*, shall not be reduced below that proportion in effect in fiscal year 1978-79." (Emphasis added.) The inclusion of the phrase "taken as a group" in § 30 "clearly requires that the overall percentage allotment of the state budget for local units of government must remain at 1978 levels." *Durant v State Bd of Ed*, 424 Mich 364, 393; 381 NW2d 662 (1985). In other words, "§ 30 only requires that state funding of all units of local governments, taken as a group, be maintained at 1978-79 levels." *Id*. The Supreme Court expressly rejected, as a "strained interpretation of an unambiguous statement of intent by the voters," the proposition that § 30 mandated that each individual unit of government receive in perpetuity the same proportion of the allotment for local government

as it received in 1978. *Id*. Thus, § 30 "does not guarantee any individual local unit of government, or indeed any type of local unit (all cities, for example), that it will always either get the same dollars as the year before or even the same share of state dollars." Fino, *A Cure Worse Than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 Rutgers L J 959, 1003 (2003). Rather, the voters intended, as revealed in the language of § 30, that the state be free from time to time to rebalance how § 30 revenue sharing is distributed among "all units of Local Government, taken as a group," so long as the overall proportion of funding remains at the constitutionally mandated level. The inclusion of Proposal A funding in § 30 spending reflects a constitutionally sanctioned rebalancing of the distribution of that revenue sharing. Plaintiffs' argument to the contrary is an argument without foundation in the language of § 30. Absent that constitutional foundation, their challenge fails. Defendants are entitled to summary disposition on Count I of plaintiffs' complaint.

C. PSA FUNDING

Plaintiffs argue that state aid to PSAs does not fall within the scope of § 30 funding because it is not a unit of local government. We conclude, however, that state funding of PSAs constitutes funding of a unit of local government for the purpose of calculating state aid under the Headlee Amendment.

It is undisputed that "school districts" constitute a "unit of local government" as defined in § 33 of the amendment. Const 1963, art 9, § 33. The question then is whether PSAs are "school districts" for purposes of calculating state funding of education. We answer that question affirmatively in light of the Revised School Code, MCL 380.1 *et seq*., which provides that "[a]

public school academy . . . is a school district for purposes of section 11 of article IX of the state constitution of 1963 . . . ." MCL 380.501(1). The constitutional provision referred to mandates that "[t]here shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law." Const 1963, art 9, § 11. In addition, the School Aid Act, MCL 388.1601 *et seq*., includes PSAs in the definition of "district." MCL 388.1603(7). To receive state funding, PSAs must receive a "district code" from the Department of Education. MCL 388.1608b(1). Pursuant to these provisions, PSAs receive state funding earmarked for school districts.

Plaintiffs argue that state funds directed to PSAs should not be counted as state funds directed to school districts for purposes of the Headlee Amendment because PSAs do not resemble school districts in many other ways. Indeed, PSAs are school districts for a "limited purpose." OAG, 1995-1996, No. 6,915, p 204 (September 4, 1996). See also OAG, 2003-2004, No. 7,154, pp 121-122 (March 31, 2004).[7] Nevertheless, PSAs are school districts for the purpose at issue in this case, i.e., the receipt of state school aid. Because state funding for PSAs is considered aid to a school district by law, we see no basis to not count those monies when calculating state spending paid to local government.

Plaintiffs' other argument is that PSAs could not have been understood as "school districts" when the Headlee Amendment was ratified. It is unlikely that the Headlee voters specifically intended that aid to PSAs would count as state aid to local governments

[7] For example, PSAs are not geographically limited, are not governed by an elected board, and cannot levy taxes.

considering that PSAs did not yet exist.[8] For the same reason, however, there is no reason to conclude that the voters specifically intended to exclude PSA funding from that calculation. What is clear is that the voters almost certainly understood that the state has discretion in how it chooses to "maintain and support a system of free public elementary and secondary schools . . . ." Const 1963, art 8, § 2. As the Supreme Court stated in *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557; 566 NW2d 208 (1997), "[t]he Legislature has had the task of defining the form and the institutional structure through which public education is delivered in Michigan since the time Michigan became a state." *Id*. at 571, citing Const 1835, art 10, § 3.[9]

There is no language in the Headlee Amendment showing an intent to limit this ongoing authority of the state to define and fund school districts. Thus, the text does not compel the conclusion sought by plaintiffs. We have also reviewed the record presented by the parties and find no evidence that would demonstrate an intent either to limit the state's authority to define and fund school districts or to specifically bar the state from later defining the term "school district" to include PSAs.

The Legislature lawfully defined PSAs as school districts for the purpose of receiving state aid. Accord-

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[8] The Headlee Amendment was ratified in 1978. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 103 n 189; 921 NW2d 247 (2018). The Legislature authorized the creation of PSAs in 1993. 1993 PA 362.

[9] *Council of Organizations* dealt with a parallel question also arising under MCL 380.501(1), i.e., a challenge to the constitutionality of the provision deeming PSAs to be "public schools" for purposes of Article 8, § 2 of the state Constitution. The Supreme Court upheld the Legislature's classification of PSAs as public schools. See *Council of Organizations*, 455 Mich at 571-584.

ingly, we see no reason to overrule the state's decision to count those funds as payments to local government under the Headlee Amendment. Put simply, we decline to hold that PSAs are school districts for purposes of receiving state aid but not school districts for purposes of determining how much state aid the school districts received.[10]

D. SECTION 29 MANDATES

In Count IV of their complaint, plaintiffs seek, in part, a judgment from this Court declaring that state spending to fund state-mandated local services and activities as required by § 29 of the Headlee Amendment may not be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30. According to plaintiffs, when §§ 29 and 30 are read together, they require the state to fully fund the necessary implementation costs of any new mandate imposed on a unit of local government and to provide this funding in addition to the funding paid in satisfaction of the state's § 30 revenue-sharing obligation. We agree.

Const 1963, art 9, § 29 provides, in pertinent part:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

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[10] Because we conclude that PSAs are school districts for purposes of calculating state aid under the Headlee Amendment, we need not address the question whether a PSA constitutes some other "unit of local government."

The first sentence of § 29 speaks only to "existing" activities and so "aimed at existing services or activities already required of[, or otherwise performed by,] local government" at the time the Headlee Amendment became effective. *Durant*, 424 Mich at 379. This sentence " 'prohibits reduction of the state proportion of necessary costs with respect to the *continuation* of state-mandated activities or services.' " *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999) (emphasis added), quoting *Mayor of Detroit v Michigan*, 228 Mich App 386, 396; 579 NW2d 378 (1998).

The second sentence of § 29 refers only to "[a] new activity or service . . . beyond that required by existing law . . . ." Unlike the first sentence, it does not refer to mandates that were in existence prior to the Headlee Amendment, i.e., it "addresses future services or activities." *Durant*, 424 Mich at 379.

In sum, § 29 "prohibits the state from reducing its proportion of the necessary costs of *existing activities* while it requires the state to pay the increased necessary costs in full when it mandates *new activities* or mandates activities at an *increased level*." *Judicial Attorneys Ass'n*, 460 Mich at 597-598. In *Schmidt*, 441 Mich at 257 n 24, our Supreme Court observed:

> A short time after the Headlee Amendment was ratified by the voters, its drafters prepared notes reflecting their view of the amendment's intent. Although the drafters' notes are not authoritative, *Durant*, [424 Mich at 382 n 12], they are one piece of evidence concerning the common understanding of the voters' intent. [See also *Durant*, 456 Mich at 196; *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 8-9; 564 NW2d 457 (1997).]

The drafters' notes with regard to § 30 provide:

> The primary intent of this section was to prevent a shift in tax burden, either directly or indirectly from state to

> local responsibility. The phrase "taken as a group" permits the legislature to reallocate funds to local units of government, i.e., geographically or from one unit to another. It was the drafters' intent to rely on the political process to effect such allocations and not to limit the legislature's ability to create more effective and efficient governmental entities or to eliminate those local units which no longer serve any utilitarian purpose.
>
> Additional or expanded activities mandated by the state, as described in Section 29 would tend to increase the proportion of total state spending paid to local government above that level in effect when this section becomes effective. [Plaintiffs' Brief in Support of Motion for Summary Disposition (December 6, 2017) at Exhibit 1, Taxpayers United Research Institute, *Drafters' Notes — Tax Limitation Amendment* (Proposal E, approved by the electors on November 7, 1978, as an Amendment to the Michigan Constitution of 1963), § 30, pp 10-11.]

This note weighs in favor of plaintiffs' position because it evinces an intent that state-funding obligations arising from new § 29 obligations are to be paid in addition to § 30 revenue sharing. Likewise, the differing purposes of these sections support plaintiffs' position. State funding under the second sentence of § 29 is intended to offset the necessary costs of new burdens placed on units of local government, whereas § 30 state funding is intended to preserve the 1978 level of state funding to units of local government to be used for then-extant services or activities. If state spending to fund new state mandates under § 29 may be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30, then § 29 state funding for new mandates would supplant state spending intended for local use and, thereby, allow funding for new mandates to serve two conflicting purposes, i.e., to fund new state mandates as well as to preserve the 1978–1979 level of

state funding to local governments. This double duty would force units of local government to choose between cutting services or raising taxes to make up for the funds lost to pay for the necessary costs of new mandates.[11] Such a result is at odds with the proper balancing of the "dual goals of a) preserving the Legislature's ability to enact necessary and desirable legislation in response to changing times and conditions and b) guaranteeing a predictable level of minimum funding" because this result accords more discretion to the Legislature than envisioned by the Headlee Amendment. *Judicial Attorneys Ass'n*, 460 Mich at 605. That result is also at odds with the principles of constitutional construction, which provide that each provision is of equal dignity and none may be construed so as to nullify or substantially impair another. *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 115; 463 NW2d 461 (1990), remanded on other grounds 441 Mich 930 (1993). Accordingly, plaintiffs are entitled to summary disposition on Count IV of their complaint.

E. MANDAMUS RELIEF

Shortly after the Headlee Amendment was enacted, our Legislature passed 1979 PA 101, codified at MCL 21.231 *et seq*., to implement the provisions of the Headlee Amendment. Const 1963, art 9, § 34;

[11] Judge BORRELLO points out that not counting the costs of new services or activities toward the state's funding obligation could result in the state's having to provide funds to local governments in excess of 48.97% of total spending. However, § 30 sets 48.97% as the floor, not the ceiling, of total state spending to be provided to local governments. Moreover, the Headlee Amendment does not define any mechanism by which a reduction of required local services or activities could be offset against the cost of new mandates. And there is no evidence in the record that the state has ever defined or employed such a mechanism.

Adair, 497 Mich at 103 n 31. Section 5 of the act contains the following pertinent provision:

> The governor shall include in a report which is to accompany the annual budget recommendation to the legislature, those amounts which the governor determines are required to make disbursements to each local unit of government for the necessary cost of each state requirement for that fiscal year and the total amount of state disbursements required for all local units of government. [MCL 21.235(3).]

Section 11 of the act provides:

> (1) Within 6 months after the effective date of this act the department shall collect and tabulate relative information as to the following:
>
> (a) The state financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law.
>
> (b) The nature and scope of each state requirement which shall require a disbursement under section 5.
>
> (c) The nature and scope of each action imposing a potential cost on a local unit of government which is not a state requirement and does not require a disbursement under this act.
>
> (2) The information shall include:
>
> (a) The identity or type of local unit and local unit agency or official to whom the state requirement or required existing activity or service is directed.
>
> (b) The determination of whether or not an identifiable local direct cost is necessitated by state requirement or the required existing activity or service.
>
> (c) The amount of state financial participation, meeting the identifiable local direct cost.
>
> (d) The state agency charged with supervising the state requirement or the required existing activity or service.

> (e) A brief description of the purpose of the state requirement or the required existing activity or service, and a citation of its origin in statute, rule, or court order.
>
> (3) The resulting information shall be published in a report submitted to the legislature not later than January 31, 1980. A concurrent resolution shall be adopted by both houses of the legislature certifying the state financed proportion of the necessary cost of an existing activity or service required of local units of government by existing law. This report shall be annually updated by adding new state requirements which require disbursements under section 5 and each action imposing a cost on a local unit of government which does not require a disbursement under this act. [MCL 21.241.]

Plaintiffs seek a writ of mandamus to force the state and its officers and departments to honor the annual disclosure and reporting duties set forth in both MCL 21.235(3) and MCL 21.241. We grant mandamus as requested.

It is clear that MCL 21.241 establishes a legislatively mandated duty that the state, through its officers and departments, collect, report, and place on the public record certain information regarding the state's compliance with the Headlee Amendment. The state has breached this duty. It is equally clear that the acts required by these statutory provisions are ministerial and that the failure of the state to undertake such acts undermines the right and role of taxpayer oversight and enforcement conferred by Const 1963, art 9, § 32. As noted by plaintiffs, the failure of the state to comply with the dictates of MCL 21.235(3) and MCL 21.241 "prevents taxpayers from knowing what mandated activity is funded and what is unfunded" and "prevents taxpayers from specifically identifying mandated activity that is included within art. 9, § 30 calculations and what, if any, mandated activity is not included."

For these reasons, we deem mandamus to be an appropriate remedy and hereby direct the state through its officers and departments to hereafter comply with the annual reporting requirements of MCL 21.235(3) and MCL 21.241.

IV. COSTS AND ATTORNEY FEES

Summary disposition and a declaratory judgment are granted, in part, to defendants on Counts I and II of plaintiffs' complaint and to plaintiffs on Count IV of plaintiffs' complaint consistent with this opinion. Mandamus relief pursuant to Count IV is prospective only because plaintiffs have waived their claim to compensation for the state's past practice of counting funding for new or increased mandates for purposes of § 30. Plaintiffs may recover costs and a reasonable attorney fee as allowed by Const 1963, art 9, § 32 and *Adair*, 486 Mich at 494, limited to the costs and fees incurred during the litigation related to Count IV of their complaint.

METER, J. (*concurring in part and dissenting in part*). I concur with most of the lead opinion's well-reasoned analysis. I dissent, however, from the lead opinion's analysis of Count II of plaintiffs' complaint. As noted in the lead opinion, Const 1963, art 9, § 30 provides that the "proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79." The term "Local Government" is defined by Const 1963, art 9, § 33 as "any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities cre-

ated by other units of local government." I would hold that a Public School Academy (PSA) is neither a "political subdivision of the state," generally, nor a "school district," specifically, within the meaning of § 33 and, thus, is not a unit of local government for purposes of § 30. Because a PSA is not a unit of local government, state spending paid to a PSA is not state spending paid to a unit of local government and § 33 bars the state from classifying it as such.

I. POLITICAL SUBDIVISION OF THE STATE

Plaintiffs argue that state funds disbursed to PSAs may not be included in the state's calculation of the proportion of total state spending paid to units of local government, taken as a group, under § 30. According to plaintiffs, funds disbursed to PSAs may not be classified as spending paid to local government because a PSA is not a political subdivision of the state as that term was commonly understood by the ratifiers of the Headlee Amendment in 1978. I agree.

A. PREVIOUS INTERPRETATIONS

Preceding the adoption of the Headlee Amendment, in OAG, 1963-1964, No. 4,037, p 1 (January 2, 1963), our attorney general analyzed whether a county drainage district constituted a political subdivision of the state for purposes of determining whether the state was obligated to provide social security coverage for employees of such a district. The attorney general described the "distinctive marks" of a political subdivision of the state as follows:

> The political divisions of the state are those which are formed for the more effectual or convenient exercise of political power within the particular localities. Originally, counties and townships, in which a uniform state policy is

> observable, composed this class almost or quite exclusively. Then, as population became denser in certain places, and there was added to this common design a special necessity for local government different from that proper to more rural districts, villages, towns and cities were constituted, and, as these were separated by their charters of incorporation from the townships of which they had before been part, and absorbed their functions, they also became political divisions. In these institutions, therefore, must be discovered the essential characteristics of their class, and they will be such common and prominent features as have co-existed with these organizations throughout their history, and are not possessed by other bodies of legislative creation which stand outside of the same category. These distinctive marks are, I think, that they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions, and that to the electors residing within each is, to some extent, committed the power of local government, to be wielded either mediately or immediately, within their territory, for the peculiar benefit of the people there residing. Bodies so constituted are not merely creatures of the state, but parts of it, exerting the powers with which it is vested for the promotion of those leading purposes which it was intended to accomplish, and according to the spirit which actuates our republican system. They are themselves commonwealths and therefore are properly entrusted with the sovereign power of taxation to meet their own necessities. [*Id*. at 3 (quotation marks and citation omitted).]

The attorney general then opined that a county drainage district was not a political subdivision of the state because the drainage district could not operate as a body corporate when it had no independent officers or its own drainage board; because its chief end was not the government of persons and things within its territory but mere land improvement at the expense of the land, either through general taxation or special assess-

ment; and because the electors of the district had no voice in the corporate affairs of the district. *Id*. at 6-8.

Shortly after the adoption of the Headlee Amendment, this Court analyzed whether Delta College, a community-college district organized under state law, was a political subdivision of the state. *People v Egleston*, 114 Mich App 436; 319 NW2d 563 (1982). This Court began its analysis by summarizing the defining attributes of a political subdivision of the state as follows:

> The attributes which are generally regarded as distinguishing a political subdivision are its existence for the purpose of discharging some function of local government, its prescribed area and its authority for self-government through officers selected by it. The term "political subdivision" is both broad and comprehensive and denotes any division of a state made by the proper authorities for the purpose of carrying out a portion of those functions of the state which by long usage and the inherent necessities of government have always been regarded as public. It is not necessary that a political subdivision exercise all the functions of the state, but is sufficient if it is authorized to exercise a portion of them. [*Id*. at 440 (citation omitted).]

With regard to the nature, structure, and authority of a community-college district, this Court observed:

> Const 1963, art 8, § 7 requires the Legislature to provide by law for the establishment and financial support of public community colleges to be supervised and controlled by locally elected boards. The governing body of the district is elected at large by the voters of the district. The district is a body corporate which may sue and be sued and may take, condemn, use, hold, sell, lease and convey real property without restriction as to location. MCL 389.103; MSA 15.615(1103). The governing board has the power to make plans for, promote, acquire, construct, own, develop, maintain and operate a community college and a vocational-technical education program. The board may

> borrow, subject to the provisions of 1943 PA 202, as amended, such sums of money on such terms as it deems desirable. It is authorized to borrow money and issue bonds for the obligation incurred, pursuant to MCL 389.122; MSA 15.615(1122) and MCL 389.126; MSA 15.615(1126). The district is specifically granted authority to adopt "bylaws, rules and regulations for its own government and for the control and government of the community college district." MCL 389.125; MSA 15.615(1125). The district is also empowered to do all other things in its judgment necessary for the proper establishment, maintenance, management and carrying on of the community college. MCL 389.125(f); MSA 15.615(1125)(f). [*Egleston*, 114 Mich App at 440-441.]

This Court then concluded that a community-college district constituted a political subdivision within the plain meaning of the term. The Court elaborated:

> We view three factors as most important in leading to the conclusion that a community college district is a "political subdivision" of the state for purposes of MCL 750.255; MSA 28.452. First, the governing body of the district is responsible only to its own electorate for its management of the district. No other political subdivision of the state exercises authority over the community college board. Second, the Legislature explicitly granted the board authority to adopt rules and regulations for its own government and for the control and government of the district. Third, the district's borrowing power is broad and similar to that of other political subdivisions of the state. We think that a community college district comes clearly within the plain meaning of the term "political subdivision." [*Egleston*, 114 Mich App at 441.]

B. CHARACTERISTICS OF A PSA

The Legislature authorized the creation of PSAs in 1993 PA 362 (Act 362), which is commonly referred to as the charter schools act. *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*,

455 Mich 557, 560-561; 566 NW2d 208 (1997); MCL 380.501 *et seq*. In keeping with our precedent, this Court must analyze Act 362 to ascertain whether the Legislature imprinted PSAs with the "distinctive marks" of a political subdivision of the state as identified in OAG, 1963-1964, No. 4,037, at 3 and *Egleston*.

Act 362 conferred on PSAs the status of "limited purpose" school districts. OAG, 1995-1996, No. 6,915, p 204 (September 4, 1996); see also OAG, 2003-2004, No. 7,154, pp 121-122 (March 31, 2004). Our Legislature considers PSAs to be school districts for the limited purpose of receiving state aid to schools from the State School Aid Fund. MCL 380.501(1). Our Legislature also conferred on PSAs the designations of "public school," "body corporate," and "governmental agency." MCL 380.501(1). "The powers granted to a public school academy . . . constitute the performance of essential public purposes and governmental functions of this state." MCL 380.501(1). These powers serve a local-government purpose, which is to implement "the actual intricacies of the delivery of specific educational services" to the students served by each respective PSA. *LM v Michigan*, 307 Mich App 685, 697; 862 NW2d 246 (2014). The students served by each authorized PSA are primarily those students who reside within the geographical boundaries of the body authorizing the PSA. MCL 380.504(3). PSAs may be authorized only by the board of a school district, the board of an intermediate school district, the board of a community college, or the governing board of a state public university. MCL 380.501(2)(a)(*i*) through (*iv*).

A PSA is organized as a nonprofit corporation under the Nonprofit Corporation Act, MCL 450.2101 *et seq*. MCL 380.501(1); *Council of Organizations*, 455 Mich at 565. The governing body of a PSA is not elected at large

by the voters of the geographic district of the authorizing body; rather, the governing body of a PSA is a board of directors composed of privately selected members, upon whom the Legislature has conferred the status of public officers who must "take the constitutional oath of office for public officers under section 1 of article XI of the state constitution of 1963." MCL 380.503(11). The authorizing body establishes by resolution "the method of selection, length of term, and number of [board] members . . . of each public school academy subject to its jurisdiction." MCL 380.503(5). Additionally, a PSA may employ an education-management corporation, with the approval of the PSA's authorizing body, to manage or operate the PSA or provide administrative, managerial, or instructive staff to the PSA. MCL 380.503c; MCL 380.503(6)(k) and (n). A PSA, its incorporators, board members, officers, employees, and volunteers are covered by governmental immunity. MCL 380.503(8).

A PSA may not levy ad valorem property taxes or another tax for any purpose, MCL 380.503(9), or charge tuition, MCL 380.504(2). However, a PSA may enter into an "agreement, mortgage, loan, or other instrument of indebtedness" with a third party. MCL 380.503b(1). It may borrow money and issue bonds. MCL 380.504a(g). It may also "solicit and accept any grants or gifts for educational purposes and to establish or permit to be established on its behalf 1 or more nonprofit corporations the purpose of which is to assist the public school academy in the furtherance of its public purposes." MCL 380.504a(f). A PSA may enter into binding legal agreements with persons or entities as necessary for the operation, management, financing, and maintenance of the PSA and sue and be sued in its name. MCL 380.504a(a) and (d). Additionally, a PSA may "acquire, hold, and

own in its own name real and personal property, or interests in real or personal property, for educational purposes by purchase, gift, grant, devise, bequest, lease, sublease, installment purchase agreement, land contract, option, or condemnation, and subject to mortgages, security interests, or other liens; and to sell or convey the property as the interests of the public school academy require." MCL 380.504a(b). A PSA, "with the approval of the authorizing body, may employ or contract with personnel as necessary for the operation of the public school academy, prescribe their duties, and fix their compensation." MCL 380.506.

Despite the powers and authority conferred by the Legislature on PSAs, PSAs are under the ultimate and immediate control of the authorizing bodies. *Council of Organizations*, 455 Mich at 573. The authorizing bodies serve as the fiscal agent for each PSA and are invested with the power of oversight and the ability to revoke a charter any time an authorizing body has a reasonable belief that grounds for revocation exist. MCL 380.502(2)(a); MCL 380.507(1)(d) through (h); MCL 380.507(3); *Council of Organizations*, 455 Mich at 573.

Finally, the board of each of the authorizing bodies is either publically elected or appointed by public bodies. The public maintains control of the PSAs through the authorizing bodies. *Council of Organizations*, 455 Mich at 575-576.

C. A PSA IS NOT A POLITICAL SUBDIVISION OF THE STATE

Given the foregoing review of the structure, operations, and powers of a PSA as set forth in Act 362, I would hold that a PSA lacks the distinctive "marks" of a "political subdivision of the state" for purposes of § 33 and is therefore not a "local government" for purposes of § 30.

First, a PSA has no direct electorate. A PSA is responsible to its authorizing body for its management and the provision of educational services. In turn, the authorizing body is responsible to its electorate for the degree of oversight the body exercises or fails to exercise over the PSA to ensure that the PSA operates within the terms of its charter and under the law. Thus, the electorate within the authorizing body's geographical boundaries plays a less direct role in the management of the body corporate of a PSA than does the electorate in the management of the body corporate of a political subdivision of the state.

Second, a PSA possesses a lesser capacity for self-governance than other bodies corporate that are traditionally recognized as political subdivisions. Each PSA is under the ultimate and immediate control of its authorizing body, which our Legislature invested with the powers to charter, to exercise oversight over PSA operations, to revoke a charter when reasonable grounds for revocation exist, and to serve as the fiscal agent for each PSA for purposes of the receipt of school aid funds from the state.

The absence of these two crucial and distinctive "marks" of a political subdivision supports plaintiffs' position that a PSA is not a local government for purposes of § 30. Given the common characteristics of a political subdivision of the state, as understood and recognized both before and after the ratification of the Headlee Amendment and as reflected by OAG, 1963-1964, No. 4,037 and *Egleston*, I can only conclude that the great mass of the people who ratified the Headlee Amendment would not have understood a PSA to be a political subdivision of the state for purposes of § 33 and, therefore, a local government for purposes of § 30. *Adair v Michigan*, 497 Mich 89, 101; 860 NW2d 93

(2014); *CVS Caremark v State Tax Comm*, 306 Mich App 58, 61; 856 NW2d 79 (2014). A PSA may be a component of a local government, but it is not itself a local government.[1]

II. SCHOOL DISTRICT

Plaintiffs also argue that state funds disbursed to PSAs may not be included in the state's calculation of the proportion of total state spending paid to units of local government under § 30 because a PSA is not a "school district" as the term was commonly understood by the ratifiers of the Headlee Amendment in 1978. Again, I agree.

This Court has long recognized that a school district is a political subdivision of the state. *Nalepa v Plymouth-Canton Community Sch Dist*, 207 Mich App 580, 586-587; 525 NW2d 897 (1994). This was the common understanding at the time the Headlee Amendment was ratified. As I have already noted, however, a PSA lacks several crucial and distinctive "marks" of a political subdivision and, therefore, is not a political subdivision of the state. If a PSA is not a political subdivision of the state, then it cannot be a school district for purposes of § 33 or a local government for purposes of § 30. Thus, the question becomes whether, by designating PSAs as "limited purpose" school districts in MCL 380.501(1), the Legislature intended to create a new species of school district for the purpose of subjecting PSAs to an application of the Headlee Amendment.

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[1] See also *Paquin v St. Ignace*, 504 Mich 124, 135-136; 934 NW2d 650 (2019) (noting, albeit in a decision involving Const 1963, art 11, § 8, that it is irrelevant whether an entity performs similar functions to those of a local government; to pass constitutional scrutiny, the relevant question is whether the entity *is itself* a local government).

As previously noted, our Legislature conferred upon PSAs the designation of limited-purpose school districts in MCL 380.501(1), which provides, in part, that "[a] public school academy is a public school under section 2 of article VIII of the state constitution of 1963, [and] is a school district for the purposes of section 11 of article IX of the state constitution of 1963 . . . ." Article 8, § 2 obligates our Legislature to maintain and support a system of free public elementary and secondary schools by providing for and financing a system of free public schools. *LM*, 307 Mich App at 697. Article 9, § 11 mandates that "[t]here shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law." Const 1963, art 9, § 11. Article 9, § 11 also embodies the Proposal A amendment and thereby guarantees local schools districts funding at the minimum level it provided in fiscal year 1994–1995, or approximately $5,000 per pupil. Const 1963, art 9, § 11; *Durant v Michigan*, 251 Mich App 297, 308; 650 NW2d 380 (2002). The limited-purpose designation is also conferred in § 3 of the School Aid Act, MCL 388.1601 *et seq*. MCL 388.1603(7).

In MCL 380.501(1), the Legislature designated a PSA as a "school district" for a single specific constitutional purpose—the receipt of state school aid funding. The Legislature made no reference to the Headlee Amendment in MCL 388.1603(7). The Legislature did make clear, however, that a PSA is a "public school," a "body corporate," and "a governmental agency." MCL 380.501(1). The Legislature also indicated that "[t]he powers granted to a public school academy . . . constitute the performance of essential public purposes and governmental functions of this state." MCL 380.501(1). The language employed in

MCL 380.501(1) clearly evinces that the Legislature knew how to make PSAs school districts for limited constitutional purposes. The fact that our Legislature did not expressly confer upon PSAs the status of school districts for purposes of the Headlee Amendment, generally, or for purposes of § 30, specifically, is compelling evidence of the legislators' intent not to confer such status. See *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012). Rather, the language used in MCL 380.501(1) indicates that the Legislature intended to confer school-district status on PSAs for the *sole* purpose of receiving state aid from the State School Aid Fund. OAG, 1995-1996, No. 6,915, p 204 (September 4, 1996). The Legislature did not intend to equate PSAs with school districts as a general proposition.

This conclusion is further supported by language within Act 362 that distinguishes PSAs from school districts. For example, MCL 380.503(9) provides, in pertinent part:

> A public school academy may not levy ad valorem property taxes or another tax for any purpose. However, operation of 1 or more public school academies by a school district or intermediate school district does not affect the ability of the school district or intermediate school district to levy ad valorem property taxes or another tax.

In a similar vein, MCL 380.503a provides:

> If a school district or intermediate school district applies for and obtains a contract to operate 1 or more public school academies under this part, the power of the school district or intermediate school district to levy taxes for any purpose under this act is not affected by the operation of a public school academy by the school district or intermediate school district. Revenue from taxes levied by a school district or intermediate school district under this act or bonds issued by a school district or intermediate school

> district under this act may be used to support the operation or facilities of a public school academy operated by the school district or intermediate school district in the same manner as that revenue may be used under this act by the school district or intermediate school district to support school district or intermediate school district operations and facilities. This section does not authorize a school district or intermediate school district to levy taxes or to issue bonds for any purpose that is not otherwise authorized under this act.

Additionally, a school district may authorize the organizing of a PSA, must serve as the fiscal agent for each PSA authorized by the school district, and is invested with the power of oversight and the ability to revoke a charter any time the authorizing school district has a reasonable belief that grounds for revocation exist. MCL 380.502(2)(a); MCL 380.507(1)(d) through (h); MCL 380.507(3); *Council of Organizations*, 455 Mich at 573. These statutory provisions reflect the Legislature's clear intent to subordinate a PSA to the PSA's authorizing school district, not to create a new species of school district or a body corporate that is coequal in the hierarchy of local government with school districts.

For these reasons, I would conclude that a PSA is neither a "political subdivision of the state," generally, nor a "school district," specifically, within the meaning of § 33 of the Headlee Amendment and, therefore, is not a unit of local government for purposes of § 30. Accordingly, I would hold that plaintiffs were entitled to summary disposition on Count II of their complaint. In all other respects, I concur with the lead opinion.

BORRELLO, P.J. (*concurring in part and dissenting in part*). I respectfully disagree with my colleagues' analysis of Count IV of plaintiffs' complaint. In my opinion, my colleagues' conclusions regarding the operation of Const 1963, art 9, § 29 vis-à-vis

Const 1963, art 9, § 30 are predicated on faulty logic regarding the interplay between these two provisions. I would hold that state funding provided to units of local government for new or increased state mandates under § 29 may be counted for purposes of § 30 and, thus, that defendants, and not plaintiffs, are entitled to summary disposition on Count IV of the complaint. In all other regards, I concur with the lead opinion.

Section 30 provides that the "proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year 1978-79." As the lead opinion recognized, § 30 "only requires that state funding of all units of local governments, taken as a group, be maintained at 1978-79 levels." *Durant v State Bd of Ed*, 424 Mich 364, 393; 381 NW2d 662 (1985). Moreover, the drafters' notes explaining the Headlee Amendment indicated that the primary intent of § 30

> was to prevent a shift in tax burden, either directly or indirectly from state to local responsibility. The phrase "taken as a group" permits the legislature to reallocate funds to local units of government, i.e., geographically or from one unit to another. It was the drafter[s'] intent to rely on the political process to effect such allocations and not to limit the legislature's ability to create more effective and efficient governmental entities or to eliminate those local units which no longer serve any utilitarian purpose. [Plaintiffs' Brief in Support of Motion for Summary Disposition (December 6, 2017) at Exhibit 17, Taxpayers United Research Institute, *Drafters' Notes — Tax Limitation Amendment* (Proposal E, approved by the electors on November 7, 1978, as an Amendment to the Michigan Constitution of 1963), § 30, p 10.]

Section 29 provides, in relevant part:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing

> activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

Each sentence in § 29 serves a separate but related function. The first sentence is "aimed at existing services or activities already required of local government," *Durant*, 424 Mich at 379, and " 'prohibits reduction of the state proportion of necessary costs with respect to the *continuation* of state-mandated activities of services,' " *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 595; 597 NW2d 113 (1999) (emphasis added), quoting *Mayor of Detroit v Michigan*, 228 Mich App 386, 396; 579 NW2d 378 (1998). The second sentence "addresses future services or activities," *Durant*, 424 Mich at 379, and "requires the state to pay the increased necessary costs in full when it mandates *new activities* or mandates activities at an *increased level*," *Judicial Attorneys Ass'n*, 460 Mich at 598.

When analyzing the interplay between constitutional provisions, such as these two provisions of the Headlee Amendment, this Court must remain mindful of two basic principles of constitutional construction.

> First, every statement contained within a state constitution must be interpreted in light of the whole document. Second, no fundamental constitutional principle shall be construed so as to nullify or substantially impair another, all fundamental constitutional principles being of equal dignity. [*Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 115; 463 NW2d 461 (1990), remanded on other grounds 441 Mich 930 (1993).]

As my colleagues properly pointed out, the parties have agreed that the proportion of total state spending that is required to be paid under § 30 to units of local government, as a whole, is 48.97%. Defendants indicate that this 1978–1979 baseline percentage included the state's provision of both discretionary funding paid to units of local government and funding specifically allocated to reimburse the units of local government for the costs of pre-Headlee state mandates.

As previously noted, § 30 guarantees that the percentage of the total state budget earmarked for local government spending will not decline from the fiscal year 1978–1979 level. Thus, § 30 guarantees nothing more than the provision by the state of a certain base level of funding, i.e., an amount equivalent to the proportion of total state spending paid to all units of local government, taken as a group, in effect in fiscal year 1978–1979. I would conclude that the first sentence of § 29, when read in conjunction with § 30, operates to protect that portion of the overall 48.97% composed of funding to reimburse units of local government for the necessary costs of implementing state mandates that existed in 1978 and that predate the ratification of the Headlee Amendment. The first sentence of § 29 accomplishes this purpose by prohibiting the reduction of state spending with respect to state-mandated activities and services in effect at the time the Headlee Amendment was ratified. *Judicial Attorneys Ass'n*, 460 Mich at 595, 603; *Livingston Co v Dep't of Mgt & Budget*, 430 Mich 635, 644; 425 NW2d 65 (1988).

The second sentence of § 29 " 'requires the state to fund any additional necessary costs of newly mandated activities or services and increases in the level of such activities or services from the 1978 base year.' "

Judicial Attorneys Ass'n, 460 Mich at 595, quoting *Mayor of Detroit*, 228 Mich App at 396. Section 30 contains no language guaranteeing the exact composition of the funding, i.e., that the base level of funding guaranteed by § 30 must contain the same ratio of discretionary funding to restricted funding as existed in the 1978–1979 fiscal year. Simply stated, there is nothing in the language of either § 29 or § 30 that prohibits the state from eliminating a state mandate and then shifting funds formerly allocated to the eliminated mandate to satisfy the state's obligation under the Headlee Amendment to fund a new mandate or an increase in the level of a mandated activity or service from the 1978 base year so long as the total proportion of state spending paid under § 30 is not reduced by the shifting of funds. Furthermore, as acknowledged by our Supreme Court, the provisions of the Headlee Amendment do not prohibit the state's reduction of its financed portion of any existing activity or service provided by a unit of local government not required by state law, i.e., a service or activity provided at the discretion or option of the unit of local government. *Livingston Co*, 430 Mich at 644, 648. In the absence of such a prohibition, and to the extent that general and unrestricted revenue sharing composed a portion of the total state spending in fiscal year 1978–1979, the state is free to shift or reallocate that general and unrestricted revenue sharing paid under § 30 to fund the necessary costs incurred by units of local government in providing newly enacted state-mandated activity or service or an increase in an existing mandated activity or service without violating the scheme of the Headlee Amendment.

I believe that such a view of the interplay between §§ 29 and 30, as detailed in this opinion, best honors the voters' intent neither to freeze legislative discre-

tion to enact necessary and desirable legislation in response to changing times and conditions nor to permit state government unrestricted discretion in its allocation of support for mandated activities and services. *Judicial Attorneys Ass'n*, 460 Mich at 601, 605.

For these reasons I would conclude that state funding provided to units of local government for new or increased state mandates under § 29 may be counted for purposes of § 30. Accordingly, I would grant summary disposition on Count IV of plaintiffs' complaint in favor of defendants in addition to granting defendants summary disposition on Counts I and II.

BRONSON HEALTH CARE GROUP, INC v STATE AUTO PROPERTY AND CASUALTY INSURANCE COMPANY

Docket No. 345332. Submitted October 8, 2019, at Grand Rapids. Decided November 7, 2019, at 9:00 a.m.

Bronson Health Care Group, Inc., brought an action in the Kalamazoo Circuit Court against State Auto Property and Casualty Insurance Company and State Automobile Mutual Insurance Company (collectively, State Auto) to recover personal protection insurance (PIP) benefits for services provided to Victor Caballero (Victor). Victor was injured in an automobile accident while driving a vehicle insured under a policy issued by State Auto to his wife, Maria Caballero (Maria). When Maria purchased the policy, she signed four Named Driver Exclusion Endorsements, one for each of four persons, including Victor, who were each identified on the endorsements as a "Person Excluded." Bronson treated Victor for his injuries, and Victor assigned to Bronson his right to seek PIP benefits under the no-fault act, MCL 500.3101 *et seq*. Bronson sought to recover PIP benefits from State Auto for the services it provided to Victor, but State Auto denied coverage because Victor was an excluded operator under Maria's policy. State Auto moved for summary disposition under MCR 2.116(C)(10), arguing that because Victor was an excluded operator under the policy he was not entitled to PIP benefits from State Auto. Bronson responded that because the Named Driver Exclusion Endorsement Maria had signed naming Victor as an excluded operator did not specify that PIP benefits would not be paid if Victor operated a covered vehicle, it was entitled to recover PIP benefits from State Auto. The trial court, Alexander C. Lipsey, J., granted summary disposition for State Auto, concluding that the language of the policy as a whole reflected an intent to exclude PIP benefits when Victor was driving a covered vehicle. Bronson appealed.

The Court of Appeals *held*:

The trial court properly granted State Auto's motion for summary disposition because Victor, and by assignment, Bronson, was not entitled to PIP benefits under the no-fault act. Bronson contended that State Auto was liable for payment of PIP benefits because the endorsement did not specifically state that excluded

operators would not be entitled to payment of PIP benefits when driving a covered vehicle. However, because PIP benefits are mandated by statute, this issue is a matter of statutory interpretation and is not controlled by the language of the policy. The no-fault act mandates certain minimal coverage, but an insurance policy may provide broader coverage than what is required by the act. For coverage that is not mandated by the no-fault act, the insurance policy governs the coverage as a contractual agreement. However, for mandated coverage, the no-fault act governs. PIP benefits are mandated by the no-fault act, so whether a claimant is entitled to them is based in statute, not contract. Under MCL 500.3114(1), an insurer is required to provide PIP benefits to a named insured and members of the insured's household. However, a person named as an excluded operator under MCL 500.3113(d) is not entitled to PIP benefits for injuries sustained in an accident while driving a covered vehicle. Bronson's claim that Victor was entitled to PIP benefits because the endorsement did not specifically list PIP benefits among the benefits that would not apply when an excluded person operated a covered vehicle does not account for the fact that PIP benefits are not subject to contractual exclusion because they are statutorily mandated. Therefore, an exclusion of PIP benefits by the endorsement would have been unenforceable. Because the endorsement properly identified Victor as an excluded operator, he was statutorily barred from receiving PIP benefits.

Affirmed.

INSURANCE — NO-FAULT ACT — PERSONAL PROTECTION INSURANCE BENEFITS — EXCLUDED OPERATORS.

Insurers are required to provide personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*.; however, persons who are named as excluded operators in a personal automobile policy are not entitled to PIP benefits under the act, MCL 500.3113(d), even if the policy does not specifically state that excluded operators are not entitled to payment of PIP benefits.

Miller Johnson (by *Thomas S. Baker*, *Christopher Schneider*, and *Patrick M. Jaicomo*) for Bronson Health Care Group, Inc.

Garan Lucow Miller, PC (by *Daniel S. Saylor*) for State Auto Property and Casualty Insurance Company and State Automobile Mutual Insurance Company.

Before: MARKEY, P.J., and BORRELLO and BOONSTRA, JJ.

BOONSTRA, J. Plaintiff appeals by right the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Victor Caballero (Victor) was involved in an automobile accident while driving a motor vehicle insured under a Personal Auto Policy (the Policy) issued by State Auto[1] to Maria Caballero (Maria), Victor's wife. Victor sustained injuries and was treated by plaintiff, Bronson Health Care Group, Inc. He assigned to plaintiff his right to seek payment of personal protection insurance (PIP) benefits under the Michigan no-fault insurance act (the no-fault act),[2] and plaintiff in turn sought to recover them from State Auto. State Auto denied coverage on the ground that Victor was an excluded operator under the Policy. Plaintiff brought suit, asserting that Victor had a statutory right to receive PIP benefits and that plaintiff, by assignment, had a right to recover those benefits for the services it provided to Victor. State Auto moved for summary disposition under MCR 2.116(C)(10), contending that, as an excluded operator, Victor (and therefore plaintiff

[1] The Policy bears the caption "**STATE AUTO®** Insurance Companies," and it identifies the State Auto Insurance Companies as including, among others, State Auto Property & Casualty Insurance Company and State Automobile Mutual Insurance Company. The Policy's declarations page identifies the company providing coverage under the Policy as "State Automobile Mutual." For simplicity, and consistently with the parties' treatment of the issue, we will refer to the insurer under the Policy, and collectively to the named defendants, as "State Auto."

[2] The no-fault act was enacted by 1972 PA 294, which added a chapter to the Insurance Code of 1956, MCL 500.100 *et seq*. The no-fault act is found in chapter 31 of the Insurance Code, MCL 500.3101 *et seq*.

by assignment) was not entitled to recover PIP benefits from State Auto. Plaintiff argued that it was entitled to recover PIP benefits from State Auto because the Policy's applicable Named Driver Exclusion Endorsement (the Endorsement) did not specify that PIP benefits would not apply if Victor operated a covered motor vehicle; instead, it only stated that certain other types of benefits would not apply. The trial court concluded that the language of the Policy as a whole reflected an intent to exclude PIP benefits when Victor, an excluded driver, was driving a covered vehicle. It therefore granted State Auto's motion. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *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. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. [*Id*. at 139-140 (quotation marks and citations omitted).]

We review de novo as a question of law the interpretation of statutes. *McCormick v Carrier*, 487 Mich 180, 188; 795 NW2d 517 (2010). We also review de novo the construction and interpretation of an insurance contract. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 209; 888 NW2d 916 (2016).

III. ANALYSIS

Plaintiff argues that the trial court erred by granting summary disposition in favor of State Auto because, based on the plain and unambiguous language of the Endorsement, it did not apply to PIP benefits. However, we disagree with plaintiff's framing of the issue. Moreover, we conclude, after appropriately framing the issue, that the trial court properly granted summary disposition in favor of State Auto, although our reasoning differs somewhat from that of the trial court.[3]

Although plaintiff argues that the issue before us is purely one of *contractual* interpretation, we conclude that when, as in this case, the benefits in question are mandated by statute, the issue is actually one of *statutory* interpretation. "[T]he no-fault act mandates certain minimal coverage," although "a policy of insurance may provide broader coverage than that mandated under the statute or may provide supplemental coverage for benefits not required by the no-fault act." *Rednour v Hastings Mut Ins Co*, 245 Mich App 419, 422; 628 NW2d 116 (2001), rev'd on other grounds 468 Mich 241 (2003). For nonmandated coverage, "it is the insurance policy as a contractual agreement between the parties that governs the coverage, rather than the statutory provisions of the no-fault act . . . ." *Id*. However, for mandated coverage, it is the no-fault act itself that governs the coverage. *Id*.; see also *Cruz v State Farm Mut Auto Ins Co*, 241 Mich App 159, 164-167; 614 NW2d 689 (2000).

PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract. See, e.g., MCL 500.3105(2)

[3] We may affirm the trial court when it reached the right result, even if we differ on the reasoning underlying that result. See *Burise v Pontiac*, 282 Mich App 646, 652 n 3; 766 NW2d 311 (2009).

("Personal protection insurance benefits are due under this chapter without regard to fault."); MCL 500.3105(1) ("Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ."); *Cruz*, 241 Mich App at 164 ("The no-fault act mandates that insurers 'pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.' "), quoting MCL 500.3105(1). "Because [PIP] benefits are mandated by the no-fault statute, the statute is the 'rule-book' for deciding the issues involved in questions regarding awarding those benefits." *Id*. (citation omitted). Therefore, "our task is to interpret the statute and not the policy. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act,[4] the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies." *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 530; 502 NW2d 310 (1993).

Because of the statutorily mandated nature of PIP benefits, the no-fault act requires an insurer, in order to issue a policy consistent with the act, to provide PIP benefits to a "named insured" and to his or her spouse and household relatives. See MCL 500.3114(1); see also *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 532; 740 NW2d 503 (2007). But MCL 500.3113(d) provides in relevant part that a person is not entitled to PIP benefits for accidental bodily injury if at the

[4] As noted, it is permissible for an insurance policy to provide for *broader* coverage than is required by statute, in which case the policy may be enforced as written. See *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 530-531 n 10; 502 NW2d 310 (1993) (citing 12A Couch, Insurance, 2d (rev ed), § 45:699, p 336).

time of the accident "the person was operating a motor vehicle or motorcycle as to which he or she was named as an excluded operator as allowed under section 3009(2)." MCL 500.3009(2)[5] provides:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. An exclusion under this subsection is not valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance:
>
> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

The no-fault act thus provides a mechanism by which a person may be statutorily excluded from entitlement to PIP benefits notwithstanding that he or she may otherwise have been entitled to them. Therefore, the issue before us is whether Victor was properly named as an excluded operator under MCL 500.3009(2)—if so, he was statutorily barred from receiving PIP benefits by MCL 500.3113(d).

When Maria purchased the policy from State Auto, she signed four endorsements, each entitled Named Driver Exclusion Endorsement, one for each of four persons who were identified by those endorsements as a "Person Excluded."[6] One of those persons was Victor.

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[5] MCL 500.3009(2) is part of the Insurance Code, but it predates and is not part of the no-fault act.

[6] Named driver exclusion endorsements "are intended to reduce premiums, and the excluded drivers are generally the highest risk drivers." *Detroit Auto Inter-Ins Exch v Comm'r of Ins*, 86 Mich App 473, 479; 272 NW2d 689 (1978). Presumably, Maria received a reduced policy premium as a result of listing Victor and the other three excluded drivers in the endorsements.

The endorsements became part of the Policy. The Endorsement applicable to Victor reads as follows:

Attn: Cynthia Odens

Policy Number: AMI 0047990

NAMED DRIVER EXCLUSION ENDORSEMENT

4 Pages

THIS ENDORSEMENT CHANGES THE TERMS OF YOUR POLICY.
PLEASE READ IT CAREFULLY, AND KEEP IT WITH YOUR POLICY.

This endorsement changes certain terms of the above-referenced policy issued to the Named Insured(s) listed below. This endorsement becomes effective at the same time and date of that policy unless a different time and date are listed below.

In consideration of the premium charged for the motor vehicle liability insurance policy listed above, it is agreed that the following coverages--Liability, Uninsured Motorists, and Physical Damage--under this policy shall not apply whenever the motor vehicle described in the policy, or any other auto to which the terms of the policy are extended, is driven operated, with or without the permission of the Named Insured, by the Named Person excluded below.

Victor Caballero

Type or Print Name of Person Excluded

In accepting this Named Driver Exclusion Endorsement, you acknowledge that:

a) There would be no residual liability insurance in effect, and the owner and the operator of the vehicle could be held personally liable for any damages in the event of an accident.
b) The vehicle would be considered uninsured under the no-fault law, and the owner and operator of the vehicle could be guilty of a misdemeanor and subject to the penalties of the no-fault law.
c) If the owner or registrant of the vehicle is injured in an accident while the vehicle is driven by a named excluded driver, the owner or registrant would not be eligible for any no-fault benefits if injured while the vehicle is being operated by the named excluded driver.

I/We assent to the terms of this endorsement:

Maria Caballero

Print Name of Named Insured

X Maria S Caballero

Signature of Named Insured

Date Signed: 9/14/12

Print Name of Named Insured

Signature of Named Insured

Date Signed:

(Signatures are required from all named insureds listed on the policy.)

This endorsement forms a part of the policy to which it is attached. The space below does not need to be completed unless this endorsement is issued subsequent to the current policy period. This endorsement will remain in effect for the term of the policy and for each renewal, reinstatement, substitute, modified, replacement, or amended policy unless discontinued by us.

9-17-'12

Effective Date

The Endorsement thus clearly identifies "Victor Caballero" as a "Person Excluded." In addition, the declarations page of the Policy[7] contains the full language of the warning required by MCL 500.3009(2), and further states that "A NAMED EXCLUDED DRIVER IS NOT ENTITLED TO BE PAID PERSONAL PROTECTION BENEFITS FOR ACCIDENTAL BODILY

[7] The declarations page is part of the Policy. See, e.g., *Dancey v Travelers Prop Cas Co of America*, 288 Mich App 1, 8; 792 NW2d 372 (2010) ("The policy application, declarations page of [the] policy, and the policy itself construed together constitute the contract. An insurance contract should be read as a whole, with meaning given to all terms.") (citation omitted).

INJURY" if the named excluded driver was driving the car covered by the Policy at the time of the accident. The Certificate of No-Fault Insurance issued to Maria reiterates that Victor is an excluded driver who would not be entitled to PIP benefits if he was driving the vehicle at the time of an accident, and it also contains the warning language of MCL 500.3009(2).[8] In sum, the Policy, read as a whole, and related documents clearly and unambiguously name Victor as an excluded operator and comply with MCL 500.3009(2).[9]

Plaintiff nonetheless contends that Victor was entitled to PIP benefits. Plaintiff's argument is premised on the fact that the Endorsement did not specifically list PIP benefits among the benefits that would not apply when an otherwise covered motor vehicle was operated by an excluded operator; rather, it only identified "Liability, Uninsured Motorists, and Physical Damage" as coverages that would not apply when the vehicle was operated by an excluded operator. In other words, plaintiff's position at bottom is that State Auto is liable for PIP benefits because it failed to exclude

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[8] As noted, and like the statutes in question, the documents use various terminology seemingly interchangeably. The Endorsement is entitled Named Driver Exclusion Endorsement, refers to a "named excluded driver," and identifies Victor as the "Person Excluded" and "Named Person." The declarations page and certificate of no-fault insurance alternatively refer to a "named excluded person [who] operates a vehicle" and to a "named excluded driver," and they identify Victor as "excluded" under the "driver exclusion endorsement" if driving the insured vehicle. Plaintiff appears to concede that the various language is designed to name Victor as an "excluded operator" under MCL 500.3113(d) and MCL 500.3009(2), but argues that, by its terms, the Endorsement did not apply to PIP benefits.

[9] Consistent with MCL 500.3009(2), the declarations page of the Policy and the Certificate of No-Fault Insurance clearly state that "[o]wners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable." As those recitations reflect, plaintiff is therefore not without recourse.

them in the Endorsement. But this position runs afoul of the fact that PIP benefits are not contract-based, but are instead statutorily mandated.

Because PIP benefits are not a creature of contract but instead are statutorily mandated, *Rednour*, 245 Mich App at 422, they are not subject to contractual exclusion. See, e.g., *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 229-231, 238; 531 NW2d 138 (1995). Therefore, a contractual exclusion of PIP benefits would have been unenforceable, as it would have resulted in a policy that provided more restrictive coverage than is mandated by the no-fault act and thus would have been contrary to the mandates of the act. *Id*. at 238 (holding that "the policy [excluding mandated benefits] is invalid as violative of the no-fault act"). See also *Rohlman*, 442 Mich at 530 n 10, quoting 12A Couch, Insurance, 2d (rev ed), § 45:697, p 334 n 3 ("A compulsory insurance statute in effect declares a minimum standard which must be observed, and *a policy cannot be written with a more restrictive coverage*. *The statute is manifestly superior to and controls the policy, and its provisions supersede any conflicting provisions of the policy*.) (emphasis added; quotation marks and citation omitted); see also *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003) (noting that "[a]n insurer is free to define or limit the scope of coverage as long as the policy language . . . is not in contravention of public policy" and that the exclusion of benefits mandated by the no-fault act renders such an exclusion void) (quotation marks and citation omitted).

Indeed, and directly contrary to plaintiff's position that a contractual exclusion of PIP benefits was *required* in order for State Auto to avoid liability for PIP benefits, a contractual exclusion of PIP benefits would

instead have been *improper*, as it would have been in derogation of the mandates of the no-fault act. Simply put, PIP benefits are statutory and thus not subject to a contractual exclusion. As relates to PIP benefits, therefore, the import of the Endorsement was not in the listing of inapplicable coverages (relating to the operation of a vehicle by an excluded operator), but rather in the identification of Victor as an excluded operator. Accordingly, the exclusionary effect of MCL 500.3009(2) was not dependent on the inclusion within the Endorsement of language specifically excluding PIP benefits. Further, the fact that the Endorsement did not include language specifically excluding PIP benefits is immaterial, because as a matter of *statutory* law, see MCL 500.3113(d) and MCL 500.3009(2), Victor was not entitled to PIP benefits.[10]

As we have previously observed, a validly excluded driver's "act of driving the insured vehicle at the time of the accident render[s] the vehicle uninsured"; no further reference to the Policy is required because at the time of the accident "there was no personal liability or property damage 'security' required by MCL 500.3101 in effect." *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 198; 826 NW2d 197 (2012); see also *Frankenmuth Ins Co v Poll*, 311 Mich App 442, 447; 875 NW2d 250 (2015) (noting that when a validly excluded driver drove the vehicle in question, "the insurance policy was void, and therefore the security required by MCL 500.3101 was not in effect at the time of the accident (i.e., no one was insured)," and the defendant insurer "was not the insurer of the vehicle

[10] In part because the Endorsement could not properly have excluded PIP benefits, we also reject plaintiff's contention that the Policy was ambiguous as between the declarations page (which clearly stated that Victor was not entitled to PIP benefits) and the Endorsement (which, as noted, did not specifically refer to PIP benefits).

involved in the accident" at the time the accident occurred) (quotation marks and citations omitted).

For all of these reasons, we conclude that Victor was properly named as an excluded operator and that he was therefore statutorily barred from receiving PIP benefits. Accordingly, the trial court properly granted State Auto's motion for summary disposition because, when viewed in the light most favorable to plaintiff, no genuine issue of material fact existed regarding Victor's entitlement to PIP benefits. See *Miotke*, 300 Mich App at 139-140; MCR 2.116(C)(10).

Affirmed.

MARKEY, P.J., and BORRELLO, J., concurred with BOONSTRA, J.

In re LD RIPPY, MINOR

Docket No. 347809. Submitted September 10, 2019, at Detroit. Decided November 14, 2019, at 9:00 a.m.

The Department of Health and Human Services filed a petition in the Wayne Circuit Court, Juvenile Division, seeking to terminate at the initial dispositional hearing respondent's parental rights to LR under MCL 722.638, asserting that LR had suffered severe physical abuse by respondent because she consumed alcohol every day while pregnant with LR. The department alleged that when respondent gave birth prematurely to LR, he was in critical condition and manifested symptoms and characteristics of fetal alcohol syndrome (FAS) that would require long-term medical treatment. Relying on MCL 712A.19a(2) and MCL 722.638, the department requested termination of respondent's parental rights at the initial dispositional hearing without first making reasonable efforts to reunify respondent with LR. At that hearing, the court, Christopher D. Dingell, J., assumed jurisdiction of LR, finding that respondent had issues with alcohol that continued while she was pregnant, that respondent suffered from multiple mental health issues that she had stopped treating when she was pregnant, and that LR was medically fragile and would require lifelong medical care. For those same reasons, the trial court concluded that statutory grounds for termination existed under MCL 712A.19b(3)(b)(*i*), (g), and (j) and that termination of respondent's parental rights was in LR's best interests because of respondent's extensive alcohol-abuse history, respondent's mental health issues, and LR's long-term medical issues that respondent was not in a position to meet given her untreated alcoholism and mental health issues; in addition, respondent had another child under a legal guardianship because of her alcoholism and the same conditions existed at the time of trial in this case that existed when respondent placed her first child in the guardianship. Respondent appealed.

The Court of Appeals *held*:

1. In child protective proceedings, reasonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2). In

that regard, MCL 712A.19a(2)(a) provides that reasonable efforts to reunify the child and family are not required if there is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in MCL 722.638. In turn, MCL 722.638(1) provides that the department shall submit a petition for authorization by the court if the department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included (1) abandonment of a young child; (2) criminal sexual conduct, involving penetration, attempted penetration, or assault with intent to penetrate; (3) battering, torture, or other severe physical abuse; (4) loss or serious impairment of an organ or limb; (5) life-threatening injury; or (6) murder or attempted murder. MCL 722.638(2) further provides that in a petition submitted under MCL 722.638(1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing. Relatedly, MCR 3.977(E) requires that a court terminate the respondent's parental rights at the initial dispositional hearing and order that additional efforts for reunification of the child with the respondent must 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 dispositional hearing, the court finds by clear and convincing evidence that one or more facts alleged in the petition are true and establish grounds for termination of parental rights under certain MCL 712A.19b(3) subsections; and (4) termination of parental rights is in the child's best interests.

2. Given its stated findings at the initial dispositional hearing, the court clearly determined that respondent subjected LR to aggravated circumstances under MCL 722.638(1)(a)(*iii*) (severe physical abuse) and (*iv*) (loss or serious impairment of an organ or limb). Specifically, the court's findings established that LR had suffered severe physical abuse—i.e., from respondent's excessive consumption of alcohol when she was pregnant with LR—that resulted in a life-threatening injury to LR. Because aggravated circumstances were established under MCL 722.638(1), MCL 712a.19a(2)(a) did not require the department to make reasonable efforts to reunite respondent with LR before terminating her parental rights. Accordingly, the trial court satisfied

the MCR 3.977(E) requirements necessary to terminate respondent's parental rights at the initial dispositional hearing. Respondent's additional argument that a guardianship should have been established failed because a guardianship petition was not filed in the trial court and there was no record evidence that the grandmother with whom LR was initially placed would have agreed to that arrangement.

3. Respondent did not challenge the trial court's determination that statutory grounds existed under MCL 712A.19b(3)(b)(*i*), (g), and (j) to terminate her parental rights. Once a statutory ground for termination has been proved, the trial court must find that termination is in the child's best interests before it can terminate parental rights. A trial court may consider numerous factors when making a best-interest determination, including the child's bond to the parent; the parent's parenting ability; the child's need for permanency, stability, and finality; the advantages of a foster home over the parent's home; and the parent's substance-abuse history. In this case, even though respondent shared a bond with LR and visited him often, termination was in LR's best interests because (1) LR was born with symptoms and characteristics of FAS that would require lifelong medical care, (2) respondent admitted that she drank six beers a day while pregnant and had suffered from alcoholism for the previous six years, (3) respondent had not addressed her untreated alcoholism and mental health issues, and (4) respondent had another child not in her care because of her alcoholism and mental health issues and those same conditions existed at the time of trial here that existed when she placed her first child in a guardianship.

4. The Court declined to address whether the MCL 722.638(1) definition of the word "child" encompasses an embryo or fetus for purposes of parental termination or child protective statutes because neither the department nor respondent raised the issue in the trial court or on appeal and the issue was, accordingly, waived.

Affirmed.

BECKERING, J., dissenting, disagreed with the majority's conclusion that the trial court correctly terminated respondent's parental rights without first requiring petitioner to make reasonable efforts for reunification as required by MCL 712A.19a(2). That provision requires the department to make reasonable efforts to reunify the child and family in all cases except in four specific circumstances: (1) there is a judicial determination that the parent subjected the child to aggravated circumstances as set forth in MCL 722.638(1) and (2); (2) the parent has been convicted of certain crimes; (3) the parent has had rights to the child's

sibling involuntarily terminated and the parent has failed to rectify the conditions that led to the termination of parental rights; or (4) the parent is required by court order to register under the sex offender registration act. Specific to this case, MCL 722.638(1) requires a petitioner to submit a petition for the court's authorization when a child has suffered from, or is at risk of, certain types of aggravated abuse, including severe physical abuse, loss or serious impairment of an organ or limb, or a life-threatening injury. If a parent is suspected of any of that abuse or is suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk, MCL 722.638(2) requires the petitioner to request termination at the initial dispositional hearing. Michigan Supreme Court precedent required the department to make reasonable efforts to reunify respondent with LR unless one of the aggravated circumstances expressly listed in MCL 712A.19a(2)(a) through (d) existed, none of which was present in this case. The grounds on which the department sought to terminate respondent's parental rights suggested that respondent's prenatal conduct constituted severe physical abuse resulting in the conditions associated with FAS and that the conduct fell under the aggravated circumstances set forth MCL 712A.19a(2)(a), which required a judicial determination that respondent subjected LR to aggravated circumstances as set forth in MCL 722.638(1) and (2). However, MCL 722.638 expressly applies to a "child." The term "child" is not defined in the statute or in other child protection and parental termination statutes, and even though the Legislature has amended those statutes multiple times, it has not defined the word to include an embryo or fetus; accordingly, MCL 722.638(1) did not apply to respondent's prenatal conduct and could not be the basis for a finding of aggravating circumstances. For that reason, MCL 722.638(2) neither required the department to seek termination in its original petition nor allowed it to omit making reasonable efforts at reunification. Judge BECKERING would have reversed the trial court order terminating respondent's parental rights and remanded for further proceedings.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Lesley C. Fairrow*, Assistant Attorney General for the Department of Health and Human Services.

Jeffrey M. Young for respondent.

Michigan Children's Law Center (by *Alexandra Ghent*) for the minor child.

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

O'BRIEN, P.J. Respondent appeals as of right the order terminating her parental rights to the minor child, LR, under MCL 712A.19b(3)(b)(*i*) (the parent's act caused physical injury and there is a reasonable likelihood that the child will suffer from injury or abuse in the future in the parent's home), MCL 712A.19b(3)(g) (the parent failed to provide proper care or custody for the child), and MCL 712A.19b(3)(j) (there is a reasonable likelihood that the child will be harmed if returned to the parent's home). We affirm.

I. FACTS

On September 19, 2018, petitioner, the Department of Health and Human Services (DHHS), filed a petition for permanent custody of LR. The DHHS alleged in the petition that on July 25, 2018, Children's Protective Services (CPS) received a complaint that on July 24, 2018, respondent gave birth to LR, who was in critical condition and had symptoms of fetal alcohol syndrome (FAS). The petition stated that LR was born prematurely at 32 weeks and that he would require long-term medical treatment because of suspected FAS. LR had the "physical characteristics of FAS, including: microcephaly, a thin upper lip, clenched jaw, lower set ears, webbed feet, and no testes." He also had an "intraventricular hemorrhage, hydrocephalus (buildup of fluid in the cavities deep within the brain), cystic encephalomalacia, and a small heart murmur." There was an additional concern that LR had a brain bleed that would require ongoing medical treatment. It was re-

ported that LR had "very minimal brain activity," and that he was "brain dead and neurologically devastated." The DHHS alleged that respondent admitted to consuming alcohol throughout her pregnancy, and the DHHS requested termination of respondent's parental rights at the initial dispositional hearing.

At that hearing, CPS Specialist Kiana Anderson testified that respondent "didn't have any intention of planning for this baby" and that "she wanted to give her baby to her mom." Following the initial dispositional hearing, the trial court entered an order stating its findings of fact and conclusions of law and ultimately terminated respondent's parental rights.

II. REUNIFICATION EFFORTS

Respondent does not challenge the trial court's determination that statutory grounds existed for terminating her parental rights. Rather, she argues that the trial court erred by terminating her parental rights because the DHHS failed to make reasonable efforts to reunite her with LR and should have established a guardianship for LR with respondent's mother. We disagree.

Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances under MCL 712A.19a(2). *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted). MCL 712A.19a(2)(a) states that reasonable efforts to reunify the child and family are not required if "[t]here is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638." In turn, § 18 of the Child Protection Law, MCL 722.638, provides:

(1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(*iii*) Battering, torture, or other severe physical abuse.

* * *

(*v*) Life threatening injury.

* * *

(2) In a petition submitted as required by subsection (1), if a parent is a suspected perpetrator or is suspected of placing the child at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk, the department shall include a request for termination of parental rights at the initial dispositional hearing as authorized under section 19b of chapter XIIA of 1939 PA 288, MCL 712A.19b.

Under MCR 3.977(E):

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 of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m);

(4) termination of parental rights is in the child's best interests.

In its petition, the DHHS sought termination at the initial dispositional hearing under MCL 722.638 because it believed that LR had suffered severe physical abuse at the hands of respondent. The DHHS alleged that respondent excessively consumed alcohol while pregnant with LR, causing LR to be born prematurely with extreme and ongoing medical complications.

Following the initial dispositional hearing, the trial court found that respondent had a severe problem with alcohol that persisted while she was pregnant with LR and that she suffered from multiple mental health issues "that she stopped treating upon finding out she was pregnant." The trial court also found that LR was born with many medical issues characteristic of FAS, including "a thin upper lip, a clenched jaw, lower set ears, webbed feet, no testes, an interventricular hemorrhage, a build up of fluid in his brain cavities and a small heart murmur." On the basis of these medical issues, the trial court concluded that LR was a medically fragile child who would require special and lifelong medical care. It was for these reasons that the trial court found grounds to assume jurisdiction over LR.

And it was for similar reasons that the trial court held that the DHHS had established statutory grounds for termination by clear and convincing evidence. The trial court considered respondent's admission that she drank alcohol throughout her pregnancy; LR's resulting medical symptoms of FAS and need for ongoing, lifelong medical treatment; and respondent's failure to seek treatment for her alcoholism or mental health issues. On these facts, the trial court concluded that statutory grounds for termination were established under MCL 712A.19b(3)(b)(*i*), (g), and (j). As will be discussed in more detail, the trial court also concluded that termination was in LR's best interests.

In light of its stated findings, the trial court satisfied the MCR 3.977(E) requirements necessary to terminate respondent's rights at the initial dispositional hearing. Also, it is clear from its stated findings that the trial court determined that LR had suffered severe physical abuse (respondent's excessive consumption of alcohol while pregnant) that resulted in a life-threatening injury (LR's FAS symptoms and the accompanying medical issues) and that respondent was the perpetrator of this abuse. These findings amount to a judicial determination that respondent subjected LR to aggravated circumstances as provided in MCL 722.638(1)[1] and (2).

[1] Specifically, MCL 722.638(1)(a)(*iii*) and (*v*). We also note that the trial court arguably could have concluded that respondent's abuse of LR included serious impairment of an organ under MCL 722.638(1)(a)(*iv*). The trial court explicitly found that LR suffered injuries to his brain—"an interventricular hemorrhage [and] a build up of fluid in his brain cavities"—because of respondent's excessive consumption of alcohol while pregnant. The brain is an organ, and the court found that the injuries to LR's brain would require extensive medical treatment.

The dissent addresses whether reasonable efforts are required when the DHHS proceeds to request termination at the initial dispositional hearing under MCL 722.638(3). Whether the DHHS is required to

Therefore, under MCL 712A.19a(2)(a), the DHHS was not required to make reasonable efforts to reunite respondent with LR, and respondent's argument that the DHHS failed to make reasonable efforts has no merit.[2]

As for respondent's argument that a guardianship should have been established, no one petitioned the trial court for a guardianship and there is no suggestion in the record that the grandmother with whom LR was placed would have agreed to that arrangement. In its initial petition, the DHHS requested termination of respondent's parental rights. Typically, "the appointment of a guardian is done in an effort to avoid termination of parental rights." *In re TK*, 306 Mich App 698, 705; 859 NW2d 208 (2014). And for a court to consider a guardianship before termination, one of two conditions must be met: either the DHHS must demonstrate "under [MCL 712A.19a(8)] that initiating the termination of parental rights to the child is clearly not in the child's best interests" or the court must "not order the agency to initiate termination" proceedings under MCL 712A.19a(8). MCL 712A.19a(9). See also *In re COH*, 495 Mich 184, 197; 848 NW2d 107 (2014).

provide reasonable efforts in that situation is not before this Court and has no implications for this case, so it should be left as an issue for another day.

[2] Our dissenting colleague delves into whether the definition of "child" in MCL 722.638(1) includes "an embryo or fetus for purposes of the statutes governing the termination of parental rights or child protection." This issue is waived because it was never raised by the parties either in the trial court or on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (explaining that Michigan generally follows the "raise or waive" rule). Though we could nevertheless exercise our discretion and review the issue—because it is a question of law for which the necessary facts have been presented—"this Court should decline to do so when it would require us to construct and evaluate our own arguments." *Aguirre v Dep't of Corrections*, 307 Mich App 315, 326; 859 NW2d 267 (2014).

Even then, a court can order a guardianship only if it "determines that [doing so] is in the child's best interests[.]" MCL 712A.19a(9)(c). In this case, neither of the conditions precedent under MCL 712A.19a(9) were met, nor did the court determine that establishing a guardianship was in LR's best interests. In fact, the court concluded that *termination* was in LR's best interests, as will be discussed in the next section. Accordingly, respondent's argument that the trial court should have established a guardianship for LR is without merit.

III. BEST INTERESTS

Respondent argues that the trial court erred by finding that termination of her parental rights was in LR's best interests. We disagree.

"Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts Minors*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "We review for clear error the trial court's determination regarding the children's best interests." *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014).

The trial court may consider a number of factors when determining whether termination of a respondent's parental rights is in the child's best interests, including

> "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's wellbeing while in

> care, and the possibility of adoption. [*Id*. at 713-714, quoting *In re Olive/Metts*, 297 Mich App at 41-42.]

A parent's substance-abuse history is also relevant to whether termination is in the child's best interests. *In re AH*, 245 Mich App 77, 89; 627 NW2d 33 (2001).

In determining whether the termination of respondent's parental rights was in the best interests of LR, the trial court stated:

> The court finds that it is in the best interest of [LR] to terminate the parents' parental rights because of mother's extensive alcohol abuse history and father's desire to only plan with the support of the mother.[3] [LR] has extensive medical issues and the parents' [sic] are not in the position to meet [LR]'s regular needs or medical needs due to mother's unresolved mental health and alcoholism issues. Further, the parents' [sic] indicated to the CPS worker that [they] did not wish to plan for [LR] and wanted the maternal grandmother to adopt him. [LR] is placed with his maternal grandmother and has been placed with her since his release from the hospital. [LR] is bonded to his grandmother, she is able to meet his special needs and ensure that he receives the special medical care that he requires and she wants to adopt him.

CPS Specialist Anderson testified that respondent and LR shared a bond and that respondent visited him often. Despite this bond, the trial court found that termination was in LR's best interests. LR came into care because he displayed symptoms and characteristics of FAS at birth. Respondent admitted to drinking six beers a day during her pregnancy. Respondent reported to CPS Specialist Anderson that she has suffered from alcoholism "for the last six years." Also, LR is medically fragile and has extensive medical

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[3] Father's rights were also terminated, but he is not a party to this appeal.

issues that require lifelong care, and it is unclear whether respondent would be able to care for him in light of her failure to address her own issues: her untreated alcoholism and mental health issues.

Moreover, respondent reported that she has another child that is not in her care because of her alcoholism.[4] The guardian ad litem noted that the same conditions existed at the time of trial that existed when respondent placed her first child in a guardianship; respondent was still suffering from alcoholism and mental health issues. Because of LR's need for permanency, stability, and finality, LR cannot wait for respondent to seek treatment. In addition, respondent stated to CPS Specialist Anderson, on multiple occasions, that she wanted to voluntarily terminate her parental rights, which is further evidence that respondent was not ready to provide LR with a permanent and stable home. Therefore, the trial court did not clearly err when it determined that there was sufficient evidence to support termination of respondent's parental rights in order to serve LR's best interests, despite any remaining bond between respondent and LR.[5]

Affirmed.

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

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[4] Respondent's seven-year-old daughter was placed in a guardianship with the child's paternal grandmother.

[5] In her best-interest argument, respondent notes, in a single sentence, that the parties were not afforded an opportunity for closing arguments. The transcript reflects that the trial court went off the record during the termination hearing and never went back on the record. Thus, the available transcript indicates that the proceedings ended before the attorneys were given the opportunity for closing arguments. Yet respondent does not explain how this affected the trial court's best-interest analysis, nor does she raise her lack of closing argument as a separate issue in her statement of questions presented. Given these failures, we deem the issue abandoned. See *Etefia v Credit*

BECKERING, J. (*dissenting*). In this child protective proceeding, respondent-mother appeals as of right the trial court's order terminating her parental rights to the minor child, LR, under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury), MCL 712A.19b(3)(g) (failure to provide proper care or custody), and MCL 712A.19b(3)(j) (reasonable likelihood that child will be harmed if returned to parent). On appeal, respondent argues that the trial court erred by terminating her parental rights because petitioner, the Department of Health and Human Services, failed to make reasonable efforts to reunite her with her newborn child, LR, and that termination of her parental rights was not in LR's best interests. In light of my interpretation of the applicable statutes and existing Supreme Court precedent, I agree with respondent that the trial court erred by terminating respondent's parental rights without first requiring petitioner to make reasonable efforts for reunification in accordance with MCL 712A.19a(2). I would reverse and remand for further proceedings.

Technologies, Inc, 245 Mich App 466, 471; 628 NW2d 577 (2001) ("Insufficiently briefed issues are deemed abandoned on appeal."); *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008) ("This issue is not contained in the statement of questions presented; it is therefore deemed abandoned.").

Respondent follows this single sentence by asserting, "Therefore, the trial court clearly erred in its failure to explicitly address the various needs of the child." It is unclear how this relates to the inability of the parties to present closing argument. It is also unclear how the trial court failed to "explicitly address the various needs of the child." The trial court acknowledged LR's medical needs and concluded that respondent would not be able to adequately address them, while LR's current placement could. The trial court also noted that because of respondent's ongoing issues, she would be unable to meet LR's "regular needs," whereas LR's current placement wishes to adopt him, providing him an opportunity for permanency. We therefore conclude that respondent's argument does not warrant appellate relief.

I. FACTS

On September 19, 2018, petitioner filed an original permanent-custody petition, seeking to terminate respondent's parental rights to two-month-old LR. The petition alleged that it was contrary to LR's welfare to remain in respondent's care because of the risk of harm related to physical abuse, and it cited respondent's history of alcoholism, her disclosure of using alcohol throughout her pregnancy, and her acknowledgment that alcohol affects her ability to parent. The petition also indicated that respondent has another child, AF, who was not the subject of the petition because she was in a legal guardianship with her paternal grandmother. As evidence of physical abuse, the petition noted LR's physical characteristics consistent with fetal alcohol syndrome (FAS), including microcephaly, a thin upper lip, a clenched jaw, lower-set ears, webbed feet, no testes, an intraventricular hemorrhage, hydrocephalus, cystic encephalomalacia, and a small heart murmur.[1] The petition sought termination of respondent's parental rights under MCL 712A.19b(3)(a), (b)(*i*) and (*ii*), (g), (j), (k)(*i*), (*iii*), (*iv*), and (*v*).[2]

Following the preliminary hearing[3] and a pretrial hearing, the case proceeded to a bench trial on

[1] At the preliminary hearing, CPS Specialist Kiana Anderson testified that medical staff told her that FAS cannot be diagnosed until later in life; hence, they indicated that LR had characteristics consistent with FAS. Anderson agreed that the medical staff had speculated that LR's conditions were perhaps the result of FAS. Anderson also testified that respondent had no prior CPS history.

[2] MCL 712A.19b(3)(a) (abandonment) and (3)(b)(*ii*) (parent who had the opportunity to prevent the physical injury to the child failed to do so) did not apply to respondent, but to father, whom petitioner believed at the time to be the putative father.

[3] The preliminary hearing was continued over the course of three dates because of respondent's indication of having Indian heritage,

November 7, 2019. At the hearing, CPS Specialist Kiana Anderson, acting on behalf of petitioner, and LR's father testified. LR's medical records were also admitted into evidence. Anderson testified that LR had been released from the hospital and that his medical records indicated he had physical characteristics consistent with FAS. LR did not test positive for substances at the time of his birth. Anderson recounted that respondent admitted drinking alcohol throughout her pregnancy, that she drinks six beers daily, a problem she's had for three or four years, and that she wants to get treatment. She also said that respondent was visiting LR "very often" at the hospital. On one occasion, respondent needed to sign a surgical consent form, but she showed up intoxicated, and the hospital was unable to accept her consent; she returned later and signed the form. According to Anderson, this was the only report of respondent showing up at the hospital intoxicated.

Anderson testified that LR's medical records indicate he may need lifelong medical care associated with his multiple conditions, although at the time of the hearing he was doing well under the circumstances. She said that the parents told her they wished to give LR to respondent's mother because they both knew respondent had an alcohol problem. Anderson clarified, however, that respondent and father were not actually voluntarily giving up their parental rights. Anderson also testified that respondent had an older child, AF, for whom respondent had not provided care in more than three years. AF had been in a guardianship with her paternal grandmother since 2016, because of respon-

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requiring compliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and because of the filing of an amended petition to add LR's father as a respondent in the proceedings. Father's parental rights, though also terminated, are not at issue in this appeal.

dent's alcoholism as well as domestic violence with AF's father at the time the guardianship was formed.

Regarding respondent's mental health, Anderson testified that respondent said she has severe depression and anxiety and had been diagnosed with post-traumatic stress disorder but that she had stopped taking her required medication because she was pregnant. Anderson admitted that petitioner had not provided respondent any reunification services but stated that was because petitioner was seeking termination of respondent's parental rights.

Father testified that he knew respondent was drinking during the pregnancy but that she drank less while pregnant; he approximated that she drank five beers a day. As father was testifying that he wanted respondent's mother to adopt LR, the court went off the record and the proceedings abruptly ended.

In a November 21, 2018 opinion and order, the trial court concluded that it had jurisdiction under MCL 712A.2(b). Summarizing the evidence presented at trial, the trial court found statutory grounds to terminate under MCL 712A.19b(3)(b)(*i*), (g), and (j), and it concluded that termination of respondent's parental rights was in LR's best interests.

II. ANALYSIS

Respondent argues that the trial court erred by terminating her parental rights because petitioner failed to make reasonable efforts to reunite her with LR in violation of MCL 712A.19. Petitioner agrees that, in general, reasonable efforts must be made to reunite the parent and the child, as required by MCL 712A.19a(2), and that the sufficiency of the petitioner's efforts toward reunification is relevant to the sufficiency of the evidence needed to establish one

of the statutory bases for termination of parental rights. Petitioner contends, however, that "such efforts are not required where the case proceeds under an original petition for termination." A key question in this case is when is it okay to proceed under an original petition for termination and not make reasonable efforts at reunification? Having reviewed the applicable statutes and Supreme Court precedent, I conclude that it is only in the presence of one of the aggravated circumstances expressly delineated in MCL 712A.19a(2)(a) through (d) that such efforts toward reunification need not be made.

A. WHEN REASONABLE EFFORTS ARE REQUIRED

According to MCL 712A.19a(2),

> [r]easonable efforts to reunify the child and family must be made in all cases except if any of the following apply:
>
> (a) There is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in section 18(1) and (2) of the child protection law, 1975 PA 238, MCL 722.638.
>
> (b) The parent has been convicted of 1 or more of the following:
>
> (*i*) Murder of another child of the parent.
>
> (*ii*) Voluntary manslaughter of another child of the parent.
>
> (*iii*) Aiding or abetting in the murder of another child of the parent or voluntary manslaughter of another child of the parent, the attempted murder of the child or another child of the parent, or the conspiracy or solicitation to commit the murder of the child or another child of the parent.
>
> (*iv*) A felony assault that results in serious bodily injury to the child or another child of the parent.

(c) The parent has had rights to the child's siblings involuntarily terminated and the parent has failed to rectify the conditions that led to the termination of parental rights.

(d) The parent is required by court order to register under the sex offenders registration act.

MCL 722.638(1) states, in relevant part:

The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:

(a) The department determines that a parent, guardian, or custodian, or a person who is 18 years of age or older and who resides for any length of time in the child's home, has abused the child or a sibling of the child and the abuse included 1 or more of the following:

* * *

(*iii*) Battering, torture, or other severe physical abuse.

(*iv*) Loss or serious impairment of an organ or limb.

(*v*) Life threatening injury.

MCL 722.638(1) requires petitioner to submit a petition for the court's authorization when a child has suffered from or is at risk of certain types of aggravated abuse. If a parent is a suspected perpetrator of any aggravated abuse described in Subsection (1) or is suspected of placing the child at an unreasonable risk of harm because of the parent's failure to take reasonable steps to intervene to eliminate that risk, then Subsection (2) requires petitioner to include in this mandated petition a request for termination at the initial dispositional hearing. MCL 722.638(2).

Quoting MCL 712A.19a(2), our Supreme Court has explicitly stated that "[r]easonable efforts to reunify the child and family must be made in *all* cases except

those involving aggravated circumstances" not present in that case. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010) (quotation marks and citation omitted). See also *In re Rood*, 483 Mich 73, 99-100; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.) ("Under MCL 712A.19a(2), [r]easonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances not present here.") (quotation marks omitted; brackets in original). In *In re Hicks*, 500 Mich 79, 85; 893 NW2d 637 (2017), our Supreme Court again noted that "[u]nder Michigan's Probate Code, the Department has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." In support, it cited MCL 712A.18f(3)(b) and (c)[4] and MCL 712A.19a(2) and noted in a footnote that "[t]here are certain enumerated exceptions to this rule, see MCL 712A.19a(2), none of which applies to this case." *Id*. at 85 & n 4. See also MCR 3.965(C)(4); MCR 3.976(B)(1). In other words, the portal to proceeding "past go" and seeking termination of parental rights at the outset without bothering to make reunification efforts is framed by the parameters of MCL 712A.19a(2).[5] I

[4] MCL 712A.18f(2) provides that "[b]efore the court enters an order of disposition in a proceeding under [MCL 712A.2(b)] of this chapter, the agency shall prepare a case service plan that shall be available to the court and all the parties to the proceeding." MCL 712A.18f(3) dictates the requirements of a case service plan and what it must include, such as efforts to be made by the child's parent to enable the child to return to his or her home and efforts to be made by the agency to return the child to his or her home.

[5] In support of its contention that reasonable efforts to reunify a child with his or her parent are not required in cases in which termination is the department's goal at the initial disposition, petitioner cites MCL 712A.19b(4), MCR 3.977(E), and *In re HRC*, 286 Mich App 444, 463; 781 NW2d 105 (2009). The cited authorities confirm the accuracy of petitioner's statement, but they do not address petitioner's *authorization* for

would conclude that petitioner was required to provide respondent with reasonable efforts at reunification

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seeking termination in an original petition and for its entitlement to relief from its duty to provide reunification services. MCL 712A.19b(4) provides, in part, that if petitioner files a petition to terminate the parental rights to a child, the court may enter a termination order at the initial dispositional hearing, and MCR 3.977(E) sets forth the circumstances under which the court must order termination of the respondent's parental rights at the initial disposition. Neither the statute nor the court rule, however, provides authority for petitioner to file an original petition seeking termination in the first place. In *In re HRC*, 286 Mich App at 446-448, the trial court terminated the respondent's parental rights at the initial disposition hearing, in part, because he had sexually abused two of his children. This Court addressed, among other issues, whether petitioner should have provided reunification services for the respondent. Petitioner sought termination in its original petition based on the allegations of two of the victims, changed its request to temporary custody when the accusers recanted their allegations, and then refiled the termination petition when new evidence of the respondent's sexual abuse of the children emerged. This Court followed its assertion that "[p]etitioner . . . is not required to provide reunification services when termination of parental rights is the agency's goal," with the observation that, under the circumstances, MCL 722.638(1)(a)(*ii*) required petitioner to file an original petition seeking termination. *Id*. at 463. Thus, *In re HRC* is consistent with the principle that petitioner must provide reunification services in all cases except those involving certain exceptional circumstances.

I acknowledge that in *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013), this Court quoted *In re HRC* for the apparent proposition that a petitioner is not required to provide reunification services when termination of parental rights is the agency's goal, but the *In re Moss* Court neglected to explain that *In re HRC* explicitly entailed aggravated circumstances under MCL 722.638(1)(a)(*ii*). *In re Moss* cites as corroborative authority MCL 712A.19b(4), MCR 3.961(B), and MCR 3.977(E); but *In re Moss* itself entailed an aggravated circumstance because the respondent-mother had attempted to suffocate her youngest daughter. *In re Moss*, 301 Mich App at 82. To the extent *In re Moss* stands for the proposition that reasonable efforts at reunification are not required in cases *other than* those with aggravated circumstances set forth in MCL 712A.19a(2), it runs afoul of our Supreme Court's explicit statements to the contrary in *In re Mason*, 486 Mich at 152, *In re Rood*, 483 Mich at 99-100, and *In re Hicks*, 500 Mich at 85 & n 4. We are bound by Supreme Court precedent. *In re Nestorovski Estate*, 283 Mich App 177, 206; 769 NW2d 720 (2009) (SAAD, C.J., dissenting) ("Michigan Supreme

unless aggravated circumstances under MCL 712A.19a(2) existed.[6]

B. AGGRAVATED CIRCUMSTANCE UNDER MCL 712A.19a(2)

Because reasonable efforts at reunification must be made in "*all* cases" except in the presence of one of the aggravated circumstances set forth in MCL 712A.19a(2), this Court must next determine whether any of the facts alleged in the petition qualify as an aggravated circumstance. *Mason*, 486 Mich at 152. Although the petition did not expressly state that it sought termination at the initial disposition under MCL 722.638(1) and (2), obviating the need for reasonable efforts under MCL 712A.19a(2)(a), the petition no doubt lends itself to that interpretation. Petitioner sought termination of respondent's parental rights under MCL 712A.19b(3)(b)(*i*), a subparagraph that refers to a physical injury caused by a parent's act. Petitioner referred throughout this proceeding to respondent's alcoholism, her heavy drinking during pregnancy, and the fact that LR was born in critical

Court precedent that is binding on this Court does not permit an inferior court, appellate or trial, to overrule Supreme Court precedent[.]").

[6] I recognize that in a couple of unpublished opinions of this Court, MCL 722.638(3) has been cited as justification for a petitioner seeking termination at the initial disposition without having to provide reasonable efforts in cases that do not involve aggravated circumstances as described in MCL 722.638(1). But MCL 712A.19a(2)(a) only cites MCL 722.638(1) and (2), not MCL 722.638(3), as the exceptions under which the petitioner is not required to make reasonable efforts to reunify the child and family. This renders MCL 722.638(3) seemingly at odds with the limiting parameters of MCL 712A.19a(2). But in light of our Supreme Court's pronouncements in *In re Mason*, 486 Mich at 152, *In re Rood*, 483 Mich at 99-100, and *In re Hicks*, 500 Mich at 85, I believe this Court is bound to restrict termination of parental rights without reunification efforts to only those instances with aggravated circumstances as set forth in MCL 712A.19a(2).

condition with characteristics associated with FAS. Petitioner also identified MCL 712A.19b(3)(k)(*iii*), (*iv*), and (*v*) as statutory grounds for the termination of respondent's parental rights. Termination is appropriate under these subparagraphs, respectively, when clear and convincing evidence establishes that a parent's abuse of a child included "[b]attering, torture, or other severe physical abuse"; "[l]oss or serious impairment of an organ or limb"; or "[l]ife-threatening injury," language mirroring that in MCL 722.638(1)(a)(*iii*), (*iv*), and (*v*). Thus, the grounds on which petitioner sought termination of respondent's parental rights in its original petition reasonably suggest that petitioner believed respondent's prenatal conduct constituted severe physical abuse resulting in the conditions associated with FAS and that this conduct fell under MCL 722.638(1) and (2).[7]

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[7] Also supporting this inference is an order dated October 16, 2018. In that order, the court indicated that reasonable efforts to avoid or eliminate the child's removal from the home were not required because the parents subjected the child to "severe physical abuse as provided in MCL 722.638(1) and (2), and as evidenced by child born with fetal alcohol symdrome [sic] and other injuries." This is the only order that refers to MCL 722.638 and indicates that reunification services are not required. Two orders issued September 20, 2018, indicate that petitioner had to make reasonable efforts at reunification and do not indicate the presence of aggravated circumstances under MCL 712A.19a(2)(a) through (d) or MCL 722.638(1) or (2). The same is true for two orders issued on November 7, 2018, one after the conclusion of the twice-continued preliminary hearing and the other after the pretrial hearing, both of which occurred on the same date. In the order following termination of respondent's parental rights, the court reported that reasonable efforts were made to preserve and unify the family to make it possible for the child to safely return home and that those efforts were unsuccessful. "[I]t is axiomatic that a court speaks through its orders." *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971). In this case, however, it is not entirely clear what the court is saying. But the record is clear that no case service plan was ever prepared and that no services were ever offered or provided to respondent.

However, according to its plain language, MCL 722.638(1) applies to a "child," and our Legislature has not expressly defined "child" to include an embryo or fetus for purposes of the statutes governing the termination of parental rights or child protection. MCL 712A.2, the chapter in the Probate Code, MCL 710.21 *et seq*., governing jurisdiction, procedure, and disposition in termination of parental rights cases, does not define "child." Elsewhere, the Probate Code defines "child" as "an individual less than 18 years of age." MCL 710.22(j) (adoption code). The Child Protection Law, MCL 722.621 *et seq*., defines "child" as "a person less than 18 years of age[,]" see MCL 722.622(f), as does the Child Abuse and Neglect Prevention Act, MCL 722.601 *et seq*., see MCL 722.602(1)(a).[8] The Probate Code defines "person" as "an individual, partnership, corporation, association, governmental entity, or other legal entity." MCL 710.22(q). Thus, neither the Probate Code, nor the Child Protection Law, nor the Child Abuse and Neglect Prevention Act specifically define "child" or "person" to include an embryo or fetus.

In addition, this Court has declined to accomplish by judicial amendment that which the Legislature has not expressly intended. See *In re Dittrick Infant*, 80 Mich App 219, 223; 263 NW2d 37 (1977). In *Dittrick*, this Court considered whether the probate court had jurisdiction under MCL 712A.2 to enter an order concerning the custody of an unborn child under MCL 712A.2. *Id*. at 222. At the time the case was decided, MCL 712A.2(b)(2) granted the probate court "[j]urisdiction in proceedings

[8] Although the Probate Code, MCL 710.21 *et seq*., uses "individual" to refer to a child and the compilation of statutes dealing with children uses "person," there is no meaningful difference between the two words. In 1994, the Legislature substituted the word "individual" for "person" in many sections of the Probate Code. 1994 PA 222, effective January 1, 1995.

concerning any child[9] under 17 years of age found within the county" when certain circumstances made the child's home or environment an unfit place for the child to live. In *Dittrick*, 80 Mich App at 221, the respondent-mother became pregnant while the respondent-parents were undergoing the termination of their parental rights to an older child based on the physical and sexual abuse of the child. Believing birth to be imminent, the petitioner filed a petition seeking temporary custody of the unborn child. *Id*. In determining that the probate court could not take jurisdiction over an unborn child, this Court reasoned:

> We recognize that the word 'child' could be read as applying even to unborn persons. However, our reading of other sections of Chapter XIIA of the Probate Code convinces us that the Legislature did not intend application of these provisions to unborn children.

The Court went on to make the following suggestion:

> The Legislature may wish to consider appropriate amendments to the Probate Code. Indeed, the background of the present case has convinced us that such amendments would be desirable. However, the Code as now written did not give the probate court jurisdiction to enter its original order in the present case. We decline by judicial amendment to do that which, at the time of enactment, the Legislature did not contemplate. [*Id*.]

In *In re Baby X*, 97 Mich App 111, 115; 293 NW2d 736 (1980), a case with facts similar to the present one, this Court was asked to decide "whether prenatal conduct—specifically, extensive narcotics ingestion by the mother—can constitute neglect sufficient for the probate court's assertion of jurisdiction" under

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[9] In 1996 PA 250, effective January 1, 1997, the Legislature replaced "child" with "juvenile."

MCL 712A.2(b). The petitioner argued that the mother had so neglected her child during pregnancy by taking narcotics that the probate court should exercise jurisdiction. *Id*. at 113. The probate court found sufficient evidence of neglect to take temporary custody of Baby X, and the circuit court affirmed that decision. The mother appealed in this Court, arguing that "prenatal conduct cannot constitute neglect or abuse under the Probate Code; therefore, the probate court wrongly asserted jurisdiction." *Id*. at 114. This Court noted that "while there is no wholesale recognition of fetuses as persons . . . fetuses have been accorded rights under certain limited circumstances." *Id*. at 115 (indicating tort actions available to fetuses and to children born, but who suffered injury as fetuses). Reasoning that because fetuses have "a legal right to begin life with a sound mind and body," *id*., and because "this Court recognized that mistreatment of a child is probative of how a parent may treat other soon-to-be-born siblings," *id*. at 116, this Court concluded that "prenatal treatment can be considered probative of a child's neglect as well," *id*. On that reasoning, the Court held that "a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court." *Id*. The Court continued, however, "We pass no judgment upon whether such conduct will suffice to permanently deprive a mother of custody. Such custody determinations will be resolved at the dispositional phase where prenatal conduct will be considered along with postnatal conduct." *Id*.[10]

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[10] The Court recognized that under the probate code, "a permanent custody order must be based on circumstances which establish or seriously threaten neglect of the child for the long-run future. The quantum of neglect sufficient for temporary custody or merely establishing jurisdiction implicitly must be less, *i.e.* temporary neglect." *Baby X*, 97 Mich App at 115-116 (quotation marks omitted).

The Legislature has amended the relevant statutes multiple times since resolution of *Dittrick* and *Baby X*, yet it has not specifically included embryos and fetuses in those statutes' protections.[11] The relevant statutory language does not signal the Michigan Legislature's intent that a mother's prenatal conduct constitutes "child abuse." See *People v Jones*, 317 Mich App 416, 429, 432; 894 NW2d 723 (2016) (holding that a fetus is not a "person" for purposes of first-degree child abuse, and noting that when the Legislature has intended to provide protections for embryos or fetuses, it has done so by specifically including them in the statutory language). The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). The first criterion in determining intent is the specific language of the statute at issue. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). In the absence of any

[11] Coincidentally, this very topic was addressed in a recent article by Frank E. Vandervort in the Michigan Bar Journal. Vandervort, *Prenatal Drug Exposure as Aggravated Circumstances*, 98 Mich B J 24 (Nov 2019). Mr. Vandervort points out that "federal law allows each state to define a set of 'aggravated circumstances' cases in which the state need not make efforts to reunify an abused or neglected child with his or her parent, but may instead seek immediate termination of parental rights." *Id*. at 26. Citing MCL 722.638 and MCL 712A.19a(2), he then concludes that "[p]renatal exposure, therefore, constitutes aggravated circumstances" and that "[a] petition alleging prenatal exposure must seek termination of parental rights at the initial disposition." *Id*. & n 19. Mr. Vandervort fails to acknowledge that our Legislature has not deemed a fetus a child for purposes of MCL 722.638. It may be time for the Legislature to consider whether a parent's prenatal conduct can result in injuries that constitute aggravated circumstances for purposes of MCL 722.638 and MCL 712A.19a(2). However, given the significant ramifications of such a policy decision, I believe it for the Legislature to decide, not for this Court to impose by judicial amendment. See *Dittrick*, 80 Mich App at 223.

indication of legislative intent that a mother's prenatal conduct constitutes abuse of the child, I do not think that MCL 722.638(1) applies to respondent's prenatal conduct.[12] Accordingly, Subsection (2) neither required petitioner to seek termination in its original petition nor allowed it to omit making reasonable efforts at reunification. The very purpose of MCL 712A.19a(2) is to give parents a chance to rectify the conditions that caused their child's removal from the home, absent specifically delineated aggravated circumstances. In this instance, LR was in safe hands, and petitioner owed respondent reasonable efforts to overcome her obstacles, as serious as they were.

Because I believe respondent was entitled to reunification services, I would reverse the trial court and remand for further proceedings. Respondent is entitled to reasonable efforts at reunification before the trial court proceeds to a termination decision. MCL 712A.18f(c) and (d); MCL 712A.19a(2). "As part of these reasonable efforts, the department must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *In re Hicks*, 500 Mich at 85-86. See also *In re Mason*, 486 Mich at 156, and *In re Rood*, 483 Mich at 76 (opinion by CORRIGAN, J.) ("[W]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.") (quotation marks and citation omitted).

Given my conclusion that termination at the initial disposition was improper, respondent's best-interests argument would be rendered moot.

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[12] Per *In re Baby X*, respondent's prenatal conduct can certainly be considered along with her postnatal conduct at the dispositional phase after services are provided in accordance with MCL 712A.19a(2). *In re Baby X*, 97 Mich App at 116.

PEOPLE v WALKER

Docket No. 343844. Submitted October 2, 2019, at Petoskey. Decided November 14, 2019, at 9:05 a.m. Leave to appeal denied 505 Mich 1081 (2020).

Dallas Walker was convicted following a jury trial in the Grand Traverse Circuit Court of second-degree murder, MCL 750.317, and concealing or tampering with evidence, MCL 750.483a(5)(a). Walker was charged with open murder, MCL 767.71, and admitted that he had killed the decedent, but he argued that the charge of first-degree murder should not have been submitted to the jury. The prosecution presented evidence that Walker had killed the decedent because he was angry that the decedent's friendship and alcohol consumption with Walker's father had caused tension between Walker's parents. The prosecution also presented evidence that the decedent had been disabled from working and physically frail as the result of suffering multiple strokes. Walker testified that he had unintentionally killed the decedent after the decedent had attempted to sexually assault him. Walker returned home after the assault, removed his blood-stained clothes, and placed them in garbage bags. The police later found the garbage bags at Walker's home. The trial court, Kevin A. Elsenheimer, J., instructed the jury on the offense of first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter, and the jury convicted Walker of second-degree murder, as well as of concealing or tampering with evidence. The trial court sentenced Walker to 25 to 50 years in prison for second-degree murder and 11 months in jail for concealing or tampering with evidence.

The Court of Appeals *held*:

1. The evidence was sufficient to submit the charge of first-degree murder to the jury. First-degree murder is distinguished from second-degree murder by the element of premeditation, which may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. Premeditation may also be established by circumstantial evidence tending to show that the defendant had an opportunity to think about, evaluate, or take a

"second look" at his or her actions. The evidence showed that the decedent suffered multiple blunt-force injuries, including at least eight areas of blunt-force trauma to his head, and Walker admitted that he punched the decedent two or three times as the decedent lay prone. When viewed in the light most favorable to the prosecution, the evidence supported a finding that the killing was premeditated, either because Walker decided to beat the decedent to death or because he had an opportunity to take a "second look" during the assault when the decedent was unconscious. Therefore, the evidence was sufficient to submit the charge of first-degree murder to the jury.

2. The evidence was sufficient to support the jury's conviction of Walker for concealing and tampering with evidence. Walker argued that he should not have been convicted under MCL 750.483a(5)(a) because no official proceedings had yet begun when he attempted to dispose of his blood-stained clothing. However, the statute specifically forbids knowingly and intentionally concealing or tampering with evidence to be offered in "future" proceedings. Although Walker contended that the prosecution failed to prove that he knew the items he had attempted to dispose of would be used in an official proceeding, it is incredible that a person would not recognize that a violent killing would eventually result in an official proceeding. The jury could have found from the evidence that Walker was aware that his blood-stained clothing would connect him to the decedent's death and that he acted to conceal or tamper with this evidence knowing that it could be offered in a future criminal proceeding.

3. Under MCL 777.37(1)(a), the trial court properly assessed 50 points for Offense Variable (OV) 7. The statute provides four alternative grounds for assessing 50 points. The trial court found that a 50-point score was appropriate because the circumstances of the killing showed egregious conduct designed to substantially increase the decedent's fear *and* excessive brutality. Regardless of whether Walker's conduct substantially increased the decedent's fear and anxiety, the trial court did not err by assessing 50 points for OV 7 because the evidence clearly supported a finding that Walker treated the decedent with excessive brutality.

Affirmed.

CRIMINAL LAW — MCL 750.483a — CONCEALING OR TAMPERING WITH EVIDENCE — WORDS AND PHRASES — "OFFICIAL PROCEEDING."

Under MCL 750.483(5)(a), a person may not knowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding;

> official proceedings in a criminal prosecution need not have commenced in order for a defendant to violate MCL 750.483a(5)(a); the statute specifically refers to "future" proceedings, so if a criminal prosecution is likely to occur in the future, such as when an intentional killing has occurred, a defendant who conceals or tampers with evidence may be convicted under MCL 750.483a(5)(a) even if criminal proceedings have not yet commenced.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Noelle R. Moeggenberg*, Prosecuting Attorney, and *Kyle F. Attwood*, Chief Assistant Prosecuting Attorney, for the people.

Grabel & Associates (by *Timothy A. Doman* and *Scott A. Grabel*) for defendant.

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

RONAYNE KRAUSE, J. Defendant, who was charged with open murder,[1] MCL 767.71, appeals as of right his jury convictions of second-degree murder, MCL 750.317, and concealing or tampering with evidence, MCL 750.483a(5)(a). The trial court sentenced defendant to 25 to 50 years in prison for the murder conviction and 11 months in jail for the tampering with evidence conviction, to be served concurrently. We affirm.

I. FACTS

Defendant was convicted of killing the victim, defendant's next-door neighbor, in the victim's home and then concealing or tampering with evidence related to

[1] The trial court instructed the jury on the offenses of first-degree premeditated murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter.

the killing. There is no dispute that defendant killed the victim; rather, at issue in this case are the circumstances of the killing. The prosecution's theory was that defendant assaulted and killed the victim because defendant was angry that the victim's friendship and alcohol consumption with defendant's father had caused significant tension in defendant's parents' marriage. Defendant's theory of defense was that, after a night of drinking, the victim sexually assaulted him, causing defendant to react by striking the victim in the head in self-defense.

The prosecution presented evidence that the victim often socialized with defendant's father and that the two frequently consumed alcohol together. The victim was disabled from working because of a series of strokes, and witnesses described him as weak and slow. Defendant testified on his own behalf that the victim invited defendant over in the early morning. Defendant accepted the invitation, and after watching television for some time, the victim physically attacked defendant, held defendant down, attempted to pull defendant's pants and underwear off, and threatened to get a knife. Defendant testified that he punched the victim once, whereupon the victim fell to the floor, and defendant then "instinct[ively]" punched the victim two or three more times. Expert medical testimony established that the victim died from blunt-force injuries, including at least eight definitive areas of blunt-force trauma to his head.

After assaulting the victim, defendant returned to his home, changed clothes, and took a shower. Later that morning, the police found a garbage bag near the front door of defendant's home that contained a pair of shorts that appeared to have been stained with blood. In another garbage bag in defendant's bedroom the

police found a sock that appeared to have been stained with blood and a sandal that matched another sandal that was found inside the victim's home. The blood on defendant's clothing matched the victim's DNA. As noted, the trial court's instructions to the jury included instructions on first-degree murder, second-degree murder, voluntary manslaughter, and involuntary manslaughter.

II. SUFFICIENCY OF THE EVIDENCE

We review a challenge to the sufficiency of the evidence de novo. *People v Harverson*, 291 Mich App 171, 175-177; 804 NW2d 757 (2010). We must review the "evidence in a light most favorable to the prosecutor to determine whether any trier of fact could" have found each element of the charged crime proved beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of [a] crime," *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010), and "it does not matter that the evidence gives rise to multiple inferences or that an inference gives rise to further inferences," *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

A. PREMEDITATED FIRST-DEGREE MURDER

Defendant first argues that he is entitled to a new trial because there was insufficient evidence to submit the charge of first-degree premeditated murder to the jury. Defendant further argues that even though the

jury convicted him of only second-degree murder, the erroneous submission of the greater charge was not harmless because it likely caused the jury to compromise on a verdict of second-degree murder. We disagree.

First-degree premeditated murder is defined as "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." MCL 750.316(1)(a). Defendant argues that there was insufficient evidence that he committed a deliberate and premeditated killing to submit the first-degree murder charge to the jury. We disagree.

At common law, a killing constituted murder if it was done with malice aforethought. See *People v Mesik (On Reconsideration)*, 285 Mich App 535, 545-546; 775 NW2d 857 (2009). Common-law murder evolved into statutory second-degree murder. See *People v Hansen*, 368 Mich 344, 350-351; 118 NW2d 422 (1962). First-degree premeditated murder is only distinguished from second-degree murder by the element of premeditation. *People v Carter*, 395 Mich 434, 437-438; 236 NW2d 500 (1975). Premeditation is not statutorily defined and cannot be evaluated in "a rigid and mechanical" manner. *People v Oros*, 502 Mich 229, 240-241; 917 NW2d 559 (2018); see also *People v Tilley*, 405 Mich 38, 44-46; 273 NW2d 471 (1979). Premeditation cannot be found where a defendant acts "on a sudden impulse." *Tilley*, 405 Mich at 44-45 (quotation marks and citation omitted). The brutality and violence of a killing does not, by itself, show premeditation. *People v Hoffmeister*, 394 Mich 155, 159-160; 229 NW2d 305 (1975). However, premeditation may be established by circumstantial evidence tending to show that a defendant had an opportunity to think about, evaluate, or take a "second look" at their actions. *Oros*, 502 Mich at 242-244. The opportunity must be adequate, but it

need not be long. *Id*. at 243. "Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Although the jury chose not to find that defendant acted with premeditation or deliberation, there was sufficient evidence for the trial court to submit the charge of first-degree premeditated murder to the jury. The prosecutor presented substantial evidence that the victim's prior strokes had rendered him frail and slow. This evidence contradicted defendant's testimony that the victim was physically able to commit a prolonged attack on defendant before defendant was able to defend himself and punch the victim. Defendant sustained no injury during the alleged struggle. In contrast, according to the medical examiner, the victim had apparent defensive wounds on his arms and hands in addition to multiple injuries to his face and head. Defendant admitted that he struck the victim, claiming that he hit the victim after the victim allegedly tried to pull defendant's pants down and assault him. Defendant stated that after he punched the victim once in the face, the victim fell back, hit a table, and then fell face down onto the floor. However, the medical examiner's testimony did not support defendant's claim that the trauma to the victim's eyes came from a blow to the victim's nose or that falling face-first would have caused all of the victim's injuries. Defendant also admitted that he punched the victim two or three more times as the victim lay prone. Defendant stated that the later blows were "instinctual," but defendant's version of the killing does not explain why the victim

would have defensive wounds or why defendant had bruising on his elbows as well as his fists.

Taken together and viewed in a light most favorable to the prosecution, the evidence and defendant's testimony supported a finding that defendant either (1) decided to beat the victim to death, or (2) had the opportunity to take a "second look" while he continued to beat the victim as the victim lay unconscious on the floor. Defendant's claim that he was provoked and sexually assaulted is contradicted by the evidence of the victim's general frailty, that the victim had never acted sexually or physically aggressive with anyone before, that the victim had never previously expressed a sexual interest in men and in fact had expressed homophobia, the medical examiner's testimony, and the absence of signs of a struggle.[2]

Moreover, the jury could have believed parts of defendant's account, but still found that his testimony and the extent of the victim's injuries supported a finding that defendant knocked the victim out after the first punch, causing the victim to fall face down on the floor, rendering him helpless. See *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883). Thus, the jury was not obligated to accept defendant's testimony, but rather was only precluded from speculating. *People v Bailey*, 451 Mich 657, 673-675, 681-682; 549 NW2d 325 (1996). The jury also could have found that the victim was no longer within defendant's immediate reach after falling to the floor, which would have afforded defendant with an opportunity to take a "second look"

[2] Although the victim's DNA was found on the waistband of defendant's shorts and underwear, defendant had a significant amount of the victim's blood on him after the killing, and a forensic scientist testified that a person could get DNA from another person on their own clothing if they touched the other person and then touched their own clothing.

before continuing to strike the then-helpless victim. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to support submitting the charge of first-degree premeditated murder to the jury. Because the trial court did not err in submitting the charge to the jury, we need not consider defendant's argument that any error was not harmless.[3]

B. CONCEALING OR TAMPERING WITH EVIDENCE

Defendant next argues that the evidence was insufficient to support his conviction of concealing or tampering with evidence. We disagree.

MCL 750.483a(5)(a) provides that "[a] person shall not . . . [k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding." The term "official proceeding" is defined as

> a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding. [MCL 750.483a(11)(a).]

The factual basis for defendant's conviction was his alleged concealment of several articles of clothing that he was wearing when he killed the victim. Testimony was presented that after the killing, defendant returned to his home, removed his clothing, including a sandal

[3] In any event, because jurors are presumed to follow their instructions, acquittal of an improperly submitted charge generally cures the erroneous submission. *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). Defendant argues that our Supreme Court wrongly decided *Graves*, but we are bound to follow our Supreme Court's decisions. *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191; 880 NW2d 765 (2016).

that matched another sandal found in the victim's home, and placed these items in garbage bags for disposal. The police found the articles in garbage bags in defendant's home after the killing. The jury could reasonably find from this evidence that defendant knew that his clothing could connect him to the victim's death, and that he placed the items in garbage bags intending to dispose of and conceal them from discovery by authorities.

Defendant first argues that he cannot have concealed or tampered with evidence under the statute, because no official proceeding had commenced when he acted. An "official proceeding" is defined by MCL 750.483a(11)(a) as

> a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding.

This Court has explained that "the term 'proceeding' encompasses the entirety of a lawsuit, from its commencement to its conclusion." *People v Kissner*, 292 Mich App 526, 536; 808 NW2d 522 (2011). Importantly, MCL 750.483a(5)(a) specifically includes *future* proceedings. The word "future" is undefined in the statute and is not a term of art, so we will give the word its plain and ordinary meaning. *Kissner*, 292 Mich App at 536. The word "future" means, in relevant part, something that is "going to happen." *Merriam-Webster's Collegiate Dictionary* (11th ed). A proceeding that is "going to happen" has necessarily not yet commenced. The statute therefore unambiguously encompasses proceedings that have not yet begun. We therefore reject defendant's argument that he cannot have concealed or

tampered with evidence to be offered in a proceeding on the grounds that no such proceeding was yet pending.

Defendant next argues that the prosecution was required to prove that defendant knew the items of evidence at issue would be offered in an official proceeding. We accept for purposes of this appeal, although we need not decide, that the word "knowingly" in the statute likely includes knowledge of an official proceeding. See *Rehaif v United States*, 588 US ___, ___; 139 S Ct 2191, 2194-2197; 204 L Ed 2d 594 (2019). Nevertheless, state of mind may be proved with "[m]inimal circumstantial evidence." *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). It is incredible that any person would believe that a violent killing would *not* certainly be the eventual subject of an official proceeding. Given the evidence that defendant's clothing was soaked with blood that contained the victim's DNA, the jury could reasonably find that defendant was aware that the clothing would connect him to the victim's beating death and that he acted to conceal or otherwise tamper with this evidence knowing that it would be offered in a future criminal proceeding. Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow the jury to find that defendant "[k]nowingly and intentionally . . . conceal[ed] . . . or otherwise tamper[ed] with evidence to be offered in a . . . future official proceeding." MCL 750.483a(5)(a). Therefore, we reject defendant's argument that the evidence was insufficient to support his conviction.

III. OV 7

Defendant finally argues that the trial court erred by assessing 50 points for offense variable (OV) 7 of the sentencing guidelines. We disagree.

When reviewing a trial court's scoring decision, "the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

MCL 777.37 governs OV 7 and provides that 50 points should be assessed if "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Our Supreme Court has recognized that OV 7 provides four alternative grounds for assessing 50 points under OV 7. *Hardy*, 494 Mich at 441. Thus, the "similarly egregious conduct" clause specifically requires "that this conduct must have been similarly egregious to sadism, torture, or excessive brutality." *People v Rodriguez*, 327 Mich App 573, 579; 935 NW2d 51 (2019). However, the "similarly egregious conduct" clause is a discrete alternative to conduct that does constitute sadism, torture, or excessive brutality. In other words, if a defendant treated a victim with excessive brutality, 50 points should be scored under OV 7 even if the defendant did not intend to substantially increase the victim's fear and anxiety.

Before *Hardy* was decided, MCL 777.37(1)(a) provided that 50 points were properly assessed when "[a] victim was treated with sadism, torture, *or excessive brutality or conduct* designed to substantially increase" the victim's fear and anxiety during the offense. 2002 PA 137 (emphasis added). After *Hardy* was decided, the Legislature amended the statute to pro-

vide that a 50-point-score is appropriate when "[a] victim was treated with sadism, torture, *excessive brutality or similarly egregious conduct* . . . ." MCL 777.37(1)(a), as enacted by 2015 PA 137. Usually, a change in statutory language is presumed to effectuate a substantive change. *People v Arnold*, 502 Mich 438, 479; 918 NW2d 164 (2018). However, here it is clear that the Legislature only intended a stylistic change to improve clarity. See *id*.; see also *Indenbaum v Mich Bd of Med (After Remand)*, 213 Mich App 263, 282; 539 NW2d 574 (1995). In *Hardy*, the Court relied on the fact that the word "or" is a disjunctive. *Hardy*, 494 Mich at 441. However, commas generally demark items in a list, and an "or" before the final item indicates that the entire list is disjunctive. *Caldwell v Chapman*, 240 Mich App 124, 131; 610 NW2d 264 (2000). Thus, the comma and "or" have no effect on the meaning of the statute. This Court has already addressed the addition of the "similarly egregious" language, which is clearly a direct reference to our Supreme Court's holding in *Hardy*. See *Rodriguez*, 327 Mich App at 579 n 3. We need not further address the significance of that language in light of the disjunctive nature of the statute, because the final clause is not at issue in this matter.

The trial court found that a 50-point score was appropriate because defendant's conduct "was enough certainly to substantiate the requirements of OV-7 for egregious conduct designed to substantially increase fear *and* excessive brutality." (Emphasis added.) We need not consider whether the evidence supported a finding that defendant's conduct was designed to substantially increase the victim's fear, because the evidence clearly supports a finding that defendant treated the victim with excessive brutality.

"[E]xcessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Rosa*, 322 Mich App 726, 743; 913 NW2d 392 (2018) (quotation marks and citation omitted). The evidence indicated that the victim was frail and weak from having suffered a series of strokes. The victim sustained at least eight areas of blunt-force trauma to the head that were caused by multiple blows. In addition, the victim's nose had been struck and had flattened against his face. The medical examiner also testified that the victim's injuries were consistent with someone either having smashed the victim's head against the floor or having struck the back of the victim's head as he lay face down on the floor. The victim had multiple areas of bleeding underneath his scalp and on the surface of his brain. The swelling and bruises to defendant's hands and elbows indicated that defendant did not simply strike the victim with his fists. By defendant's own admission, he repeatedly struck the victim as he lay face down on the floor either stunned or unconscious. A preponderance of the evidence supports the trial court's finding that defendant treated the victim with excessive brutality. Accordingly, the trial court did not err by assessing 50 points for OV 7, regardless of whether defendant's conduct substantially increased the victim's fear and anxiety during the offense. See *People v James*, 267 Mich App 675, 680-681; 705 NW2d 724 (2005).

Affirmed.

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

PEOPLE v CLARK

Docket No. 343607. Submitted September 5, 2019, at Grand Rapids. Decided November 19, 2019, at 9:00 a.m. Leave to appeal denied 506 Mich 917 (2020).

Jay Clark was convicted following a jury trial in the Hillsdale Circuit Court of first-degree murder, MCL 750.316(1)(a), and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The victim died of multiple gunshot wounds, and the medical examiner recovered one .45 caliber bullet from the victim's body and two .45 caliber bullets from the victim's clothing. As part of their investigation of the victim's death, police officers interviewed Ashley Hoath, who had dated the victim at one time. Ashley provided the police with information that led them to arrest Clark in connection with the victim's death. Police officers did not immediately interview Clark upon his arrest because he was intoxicated. However, when two police officers interviewed Clark the morning after his arrest, the officers stated that he was alert and communicative. Before interrogating Clark, the officers read him his rights pursuant to *Miranda v Arizona*, 384 US 436 (1966). The officers then suggested that Ashley blamed Clark for the victim's death. Clark quickly asserted his right to counsel, and the officers ceased the interview. As a different officer escorted Clark back to his jail cell, Clark asked him to tell the interviewing officers that he would agree that "however Ashley said it happened, I'm willing to sign whatever." The officer agreed to relate the message and secured Clark in his cell. Soon after Clark spoke to the officer, he was escorted back to the interview room and a second interview commenced. The interviewing officers reminded Clark that he had invoked his right to counsel, but they did not reread his *Miranda* rights. Clark stated that he had changed his mind and wished to talk to the officers, and he reiterated that "whatever Ashley said happened is how it happened." The officers told Clark that they wanted to know his version of the events and could not simply accept Ashley's version. Clark stated that he shot the victim with a .45 caliber revolver while the victim was seated in Clark's Chevrolet Tahoe. Clark further admitted that he had destroyed the firearm he had used to shoot the victim, burned the backseat of the Tahoe, and then cleaned the rest of the vehicle

with chlorine and peroxide. Clark later moved to suppress his statements from the second interview. Clark acknowledged that he had understood his rights when they were read to him during the first interview and that the officers had not threatened or coerced him to talk, but he claimed that the officer who had escorted him back to jail after the first interview had said something to him that had "spurred" him to reinitiate discussions. At the hearing on his motion, Clark argued that the interviewing officers were required to reread his *Miranda* rights before they could speak to him again after he had asserted his right to counsel. The trial court, Michael R. Smith, J., disagreed that the law required the police officers to reread Clark his *Miranda* rights, determined that Clark had understood his rights and waived them, and admitted the statements. Following his convictions, Clark appealed.

The Court of Appeals *held*:

1. The United States Supreme Court held in *Edwards v Arizona*, 451 US 477 (1981), that an accused's assertion of his right to counsel is a per se invocation of his right to remain silent, and so it would be inconsistent with *Miranda* to allow police officers to reinterrogate an accused in custody who had clearly asserted the right to counsel. However, an exception to the rule exists: an officer may reinterview a suspect who has asserted the right to remain silent without providing counsel if the accused initiates further communication. Clark suggested that the Supreme Court established a bright-line rule in *Bradshaw v Oregon*, 462 US 1039 (1983), requiring officers to readvise a suspect of his or her *Miranda* rights before continuing to communicate following the suspect's assertion of the right to counsel. However, this was not the rule established by *Bradshaw*. Rather, the Court set forth a two-part test requiring a court to first determine whether the defendant had reinitiated a conversation on the subject matter of the investigation and then decide whether, under the totality of the circumstances, the defendant had knowingly and intelligently waived his rights to counsel and to remain silent. The Court of Appeals held in *People v Littlejohn*, 197 Mich App 220, 223 (1992), that "police are not required to read *Miranda* rights every time a defendant is questioned." Clark relied on *People v Kowalski*, 230 Mich App 464 (1998), for the proposition that police officers must give new and adequate warnings before again interrogating a person who has previously asserted his right to counsel. However, his reliance was misplaced. The *Kowalski* Court construed and applied the law as it existed before *Edwards* because of *Kowalski*'s unusual procedural history and

focused on whether the defendant was subject to police-initiated interrogation before he confessed, rather than on whether police officers were required to reread the defendant his *Miranda* rights after he reinitiated contact with them. The trial court did not err when it determined that there was no binding authority for the proposition that the police officers were required to readvise Clark of his *Miranda* rights simply because he had earlier invoked his right to counsel. Rather, the question for the court after it determined that Clark renewed communications with the police was whether, under the totality of the circumstances, Clark knowingly and intelligently waived his right to counsel and his right to remain silent. The officers' reminder to Clark that his *Miranda* rights had recently been read to him, given the brief time lapse since that reading, was adequate to establish that Clark knowingly and intelligently waived his rights.

2. Clark's argument that the trial court erroneously admitted his statements under MRE 106 and MCL 763.8 was not supported by the law. The first 30 to 45 seconds of Clark's second interview were not recorded, but the entire videorecording that existed was played for the jury and neither party contended that the video had been altered in any way. MRE 106 has no bearing on the admissibility of the underlying evidence; rather, it allows the adverse party to supplement the record to provide a complete picture. The fact that the police officers failed to record part of the interrogation does not implicate MRE 106, as Clark has not identified any other recording or writing that ought to have been considered contemporaneously with his taped confession. Additionally, the trial court did not err by not sua sponte reading the jury a curative instruction according to MCL 763.9, assuming that the missing portion of the interview fell within MCL 763.8. MCL 763.8(2) requires a law enforcement agency with recording equipment to record the "entire interrogation" of an individual who has been subject to custodial interrogation pertaining to the individual's involvement in a major felony. Even if the police violated the statute, no relief was warranted because the only remedy for a violation of MCL 763.8 is a curative jury instruction, provided by the Legislature in MCL 763.9. The Legislature did not codify an exclusionary rule for the portion of the interrogation that exists, and no such rule will be read into the statute.

3. During the interrogation, a police officer stated that Ashley had suggested that Clark was a killer-for-hire or a serial killer. Clark asserted that the statement should have been excluded as inadmissible hearsay, irrelevant, and highly prejudicial other-acts evidence, under *People v Musser*, 494 Mich 337 (2013). Clark

has not shown that his substantial rights were affected by the admission of this statement. There was substantial evidence that Clark killed the victim, including Clark's own admissions, as well as physical evidence. Further, the statement was brief, and Clark immediately denied it. Clark was not entitled to relief on the basis of any error by the trial court in admitting this part of the video.

4. Clark did not show that his trial counsel was ineffective for failing to move to exclude the recording of his second interrogation or to ask the trial court to redact it. Clark has not shown that counsel's actions fell below an objective standard of reasonableness. Counsel argued that police officers prodded Clark to give answers to their questions that fit their theory of the offense and suggested that Clark had only confessed to the murder in order to cover for Ashley. Therefore, there was a legitimate strategic reason for failing to request the exclusion of the video or a redaction of it. Regardless of whether defense counsel's performance fell below an objective standard of reasonableness, it was not reasonably probable that any of counsel's alleged failures affected the outcome of the trial. Evidence of Clark's guilt was overwhelming, and he did not identify any valid grounds for precluding the introduction of the video at trial.

5. Clark did not establish that he was deprived of his right to confront Ashley. During trial, Ashley took the stand and attempted to withdraw her plea deal that required her to testify, before asserting the Fifth Amendment and refusing to testify. The Michigan Supreme Court held in *People v Gearns*, 457 Mich 170, 182, 184 (1998), that a defendant's right to confront a witness in the context of the witness's assertion of the Fifth Amendment does not arise unless there was substantial evidence put before the jury in the form of testimony or its functional equivalent. The prosecution was not able to ask Ashley any questions before she asserted the Fifth Amendment, so her assertion of the privilege was not associated with any questions that could serve as the functional equivalent of testimony. Under these circumstances, Clark was not deprived of his right to confront Ashley. Clark also has not established that the prosecutor committed misconduct by merely calling Ashley as a witness, nor has Clark established a plain evidentiary error in the absence of evidence that the prosecutor knew that Ashley would assert the Fifth Amendment in front of the jury. The record showed that Ashley agreed to testify as part of her plea deal, had already pleaded guilty, and that both the prosecution and defense counsel expected her to testify. Although another witness, a police officer, testified regard-

ing statements made by Ashley, Clark was not prejudiced by the admission of these statements and his right to confront Ashley was not implicated by this testimony. The witness did not relate the actual statements Ashley made to police but merely stated that information given to them by Ashley led to Clark's arrest. Although the prosecution misstated the witness's testimony that Ashley was awaiting sentencing for second-degree murder when he remarked during closing argument that Ashley had pleaded guilty to second-degree murder, the misstatement was fleeting and was consistent with the defense theory that Ashley alone was responsible for the victim's death. Any prejudice caused by the prosecutor's comment was cured by the trial court's instruction that the attorneys' remarks were not evidence.

6. The trial court did not err when it admitted the testimony of Ashley's sister, Jolene Hoath, regarding Ashley's identification of Clark as the shooter. Jolene testified that Ashley had made statements suggesting that she alone killed the victim and that "some man" other than Clark was involved in the killing. On cross-examination, the prosecutor clarified that Ashley had identified Clark as the shooter. The court admitted Jolene's testimony on cross-examination after concluding that defense counsel had opened the door to it. Clark contended that Jolene's identification statements were inadmissible hearsay. Although Jolene's testimony regarding Ashley's statements that "some guy" had been involved in the shooting was inadmissible under MRE 801(c) and MRE 802, the trial court had discretion to allow the prosecutor to cross-examine Jolene and correct any false impressions the jury might have had as a result of defense counsel's questioning. The court's decision was within the range of reasonable outcomes. Further, the admission of Jolene's statements did not violate Clark's right to confrontation, as there was nothing about the context in which Ashley made the statements to Jolene that would lead one to conclude that the statements were testimonial in nature.

7. Clark's substantial rights were not affected by any improper remarks by the prosecutor during closing argument or rebuttal. Clark contended that the prosecutor improperly stated that the jury did not have to rely solely on Clark's recorded statement to police because it could also rely on the testimony of Clark's former cellmate from jail. When considered in context, the prosecutor's statement did not improperly vouch for the witness or imply that he had special knowledge that the witness was telling the truth. Similarly, the prosecutor's remarks on the defense's theory of the case did not improperly suggest that

defense counsel did not believe her client. Rather, they were proper commentary on the arguable weaknesses of the defense theory and did not deprive defendant of a fair trial.

8. Clark was not entitled to relief based on his claim that the evidence was insufficient to establish premeditation. Under MCL 750.316(1)(a) and (b), first-degree murder is murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing, or murder committed in the perpetration of certain felonies. Minimal circumstantial evidence is sufficient to establish that a defendant had the intent to kill with deliberation and premeditation. Clark told police officers that he had driven in his vehicle with Ashley and the victim for 30 minutes before he shot the victim multiple times in the backseat of his vehicle. Clark also indicated to officers that the victim was preventing Ashley from being reunited with her children and that no one was "helping" her, suggesting that Clark had a motive to kill the victim. The record was sufficient to establish premeditation.

Affirmed.

CONSTITUTIONAL LAW — FIFTH AMENDMENT — *MIRANDA* WARNINGS — REINTERROGATION.

When police officers have advised a defendant of his or her rights pursuant to *Miranda v Arizona*, 384 US 436 (1966), the officers are not required to read those rights to the defendant a second time if, after exercising the right to counsel, the defendant reinitiates communication with the police on the subject matter of the investigation and the totality of the circumstances establishes that the defendant has knowingly and intelligently waived the right to remain silent and the right to have counsel present during interrogation (US Const, Am V).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Daniel Ping*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Chari K. Grove* and *Lindsay Ponce*) for defendant.

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

SWARTZLE, P.J. Police take a person into custody for questioning related to a murder. Police explain to the person his rights under *Miranda v Arizona*. The person exercises his right to remain silent, but while being escorted to a cell, he reinitiates a discussion, and police immediately return him to the interview room. He is reminded that his *Miranda* rights had been read to him earlier, and he agrees to talk. Under this fact pattern, must the person's incriminating statements made during the reinitiated interview be suppressed?

Defendant asks us to hold so, but he does so without support. Instead, we hold that there is no bright-line rule that in the absence of rereading the person his *Miranda* rights a second time when discussions are reinitiated, the person's subsequent statements must be suppressed. Rather, the test is whether, under the totality of the circumstances, the person voluntarily, knowingly, and intelligently waived his right to counsel and to remain silent. Under the circumstances here, there is no basis to suppress defendant's incriminating statements made to police. Further concluding that there is no other ground for reversal, we affirm defendant's convictions for first-degree murder and felony-firearm.

I. BACKGROUND

A. THE BODY

On April 2, 2017, the victim's body was found in a wooded area in Hillsdale County. The medical examiner determined that the victim died because he was shot five times; four bullets entered his left side and one bullet entered his right side. The medical examiner opined that the shots had been fired contemporaneously and that the single gunshot wound to the victim's

right side appeared to be from a smaller bullet. Police recovered two .45 caliber bullets from the victim's jacket and sweatshirt, and concluded that both of those bullets had been fired from the same weapon. In addition, the medical examiner recovered a .45 caliber bullet from the victim's body during the autopsy.

B. DEFENDANT CONFESSES BUT LATER MOVES TO SUPPRESS

Police officers interviewed Ashley Hoath,[1] a woman who dated the victim at various times. Ashley ultimately pleaded guilty to second-degree murder arising from the victim's death, and the trial court sentenced her to serve 25 to 40 years in prison. This Court denied her delayed application for leave to appeal, *People v Hoath*, unpublished order of the Court of Appeals, entered June 29, 2018 (Docket No. 343918), and our Supreme Court also denied her application for leave to appeal, *People v Hoath*, 503 Mich 889 (2018). Based on information that Ashley provided, police arrested defendant in connection with the victim's death. Police did not immediately interview defendant at the time of his arrest because he was intoxicated.

Deputy Wesley Ludeker and Sergeant Kevin Bradley of the Hillsdale County Sheriff's Department interviewed defendant on the morning after his arrest. Defendant subsequently moved to suppress the statements he gave to police that day.

Sergeant Bradley testified at the pretrial hearing on defendant's motion to suppress that when they questioned him, defendant was cogent, alert, and communicating well. Police recorded defendant's first inter-

[1] Because we discuss the testimony of both Ashley Hoath and her sister Jolene Hoath in this opinion, we refer to these witnesses by their first names.

view, and during this interview, Deputy Ludeker read defendant his *Miranda* rights from a prepared card. Defendant asked, "So I can stop answering questions any time I want?" According to Sergeant Bradley, Deputy Ludeker agreed that defendant could do so, and defendant said, "Okay, then." Deputy Ludeker told defendant that he had spoken with Ashley and she was "selling him down the river" because she blamed him entirely and denied any involvement in the victim's death. At that point, defendant asserted his right to counsel and police ceased the interrogation. The recording of this first interview indicates that it lasted only four minutes.

Deputy Jeffrey Miller testified that he retrieved defendant from the interview room and began escorting him to the jail. Deputy Miller did not recall saying anything to defendant as he escorted defendant back to his cell. When they were just a few feet away from the interview room, defendant said, "Hey, could you tell those guys however Ashley said it happened, I'm willing to sign whatever." Deputy Miller agreed to convey that message, and he secured defendant in his jail cell. Deputy Miller then told Deputy Ludeker what defendant said, and another police officer escorted defendant back to the interview room. Importantly, only a few minutes passed between the initial reading of defendant's *Miranda* rights, his invocation of his right to counsel, and his subsequent decision to submit a signed statement.

Sergeant Bradley testified that after defendant's first interview, he went to the undersheriff's office. Deputy Ludeker then informed the sergeant that defendant reinitiated a discussion, and the two police officers returned to the interview room. Although they did not restart the recording device, they instructed

another police officer to do so. Sergeant Bradley admitted that neither he nor Deputy Ludeker reread defendant his *Miranda* rights verbatim from the prepared card after defendant reinitiated the discussion with them.

According to Sergeant Bradley, Deputy Ludeker reminded defendant that he had invoked his right to counsel and asked him if he had changed his mind and wanted to talk to them. Defendant told them that he had changed his mind, he wanted to speak with them, and he immediately informed the officers, "Whatever Ashley said happened, is what happened." Sergeant Bradley testified that after they had been speaking with defendant for some time, an officer knocked on the door of the interview room and asked him to step outside. Sergeant Bradley learned that the recording of this second discussion had missed the initial 30 to 45 seconds. Sergeant Bradley then reentered the interview room and told defendant that he respected him for speaking with police about the victim's death, waiving his rights, and telling police what happened. Sergeant Bradley said defendant responded, "Yeah" and "Thanks."

Deputy Ludeker testified that defendant left the interview room after his first interview, but then asked to return and agreed to waive his rights to counsel and to remain silent. According to Deputy Ludeker, he reminded defendant that he had been read his *Miranda* warnings, then asked defendant if he understood his rights, and defendant said, "Yes." Defendant then explained that he remembered being read his rights, understood them, waived them, and was prepared to give a statement. Deputy Ludeker testified that defendant's first statement after waiving his rights was, "Whatever Ashley said happened is how it happened."

Defendant also testified during the hearing on his pretrial motion to suppress. He acknowledged that Deputy Ludeker read him his *Miranda* rights during the first interview. Although he asserted that he had just been on a nine-day alcohol and drug binge, defendant nevertheless admitted that he understood his rights when they were first read to him. Defendant also admitted that he was brought back to the interview room after stating that he wanted to speak with the two investigating officers. The police officers did not threaten him and treated him "great."

Although defendant conceded that he initiated the second interview with police and that he voluntarily spoke with the police officers during the second interview, he stated that he was "spurred" to do so by Deputy Miller, who said something to get his mind going about Ashley, and he feared that Ashley might be in jail. Yet, defendant did not elaborate on what specifically "spurred" him, and there is nothing in the record to suggest that Deputy Miller badgered defendant to reinitiate discussions. Defendant testified that the police officers did not reread his *Miranda* rights to him before the second interview, but he admitted that Deputy Ludeker reminded him that he had invoked his right to counsel and asked if he wanted to speak to police again.

After the close of proofs at the suppression hearing, defense counsel argued that it was not enough that defendant voluntarily spoke to the officers during the second interview. Instead, defense counsel argued that there was a bright-line rule that the officers had to reread defendant's *Miranda* rights to him verbatim before they could speak to him again. The trial court disagreed with defense counsel that this was the law. The trial court then found that defendant understood

his rights and had waived them, and the court concluded that defendant's statements made during the second interview were admissible:

> It would appear clearly to this Court based on the facts that I have before me that the five minute hiatus, Mr. Clark waived his rights. He invoked them. He knew them. He understood them. He initiated conduct [sic]. He was reminded of the fact that those rights were read to him. He [was] asked if essentially he understood them. And that he wished to talk. He admitted yes in all that regard.
>
> I do not believe that the case law that had been cited referring to Michigan and federal cases require[s] a specific second reading verbatim of *Miranda* rights. And that's what I base my ruling on. If I am mistaken, obviously the rights weren't read and if that's what the appellate courts are standing on the proposition they must be read verbatim, obviously it did not take place here.
>
> But I don't believe that's what the case law interprets. I don't think that's what the case law requires. So, I deny the motion to suppress. Statements are admissible.

C. THE TRIAL

Defendant's Second Interview. Defendant's second interview was played at trial for the jury. It lasted approximately 30 minutes, including several breaks. As noted earlier, the recording does not capture the beginning of the interview. Instead, the recording begins abruptly with defendant and a police officer already speaking. On the recording, the officers told defendant that they could not simply take Ashley's word for what transpired and that they needed to hear defendant's version of events. The officers also told defendant that they wanted the truth and that they did not want someone to confess if that person was not responsible for the shooting.

During the second interview, defendant told police that he shot the victim with a .45 caliber revolver, that the victim was dead, and that he definitely "pulled the trigger." Defendant admitted that he shot the victim several times, estimating that he had fired "three or four" shots while the victim was seated in defendant's Chevrolet Tahoe. Although defendant stated that he drove 20 to 30 minutes outside of town before he shot the victim, he explained that he could not remember exactly where the shooting occurred because he was intoxicated from the consumption of alcohol and methamphetamine.

Defendant first insisted that Ashley was not with him when he shot the victim. When police told him that Ashley had admitted being there, defendant responded that Ashley did not lie, and if she said that she was there, then she was there. Although defendant never stated to police that he planned to kill the victim, he nevertheless complained that no one was helping Ashley and stated that her father could not "do it." He also told the officers that he had never met the victim prior to the shooting and that he had needed Ashley to identify the victim for him.

Police asked defendant about the firearm used to shoot the victim. Defendant stated that the officers would never find the firearm because he had melted it down at his stepfather's house. Police also asked defendant about his Chevrolet Tahoe, and defendant explained that he cleaned the vehicle with a mix of chlorine and peroxide and traded it for the Ford Mustang that he was driving on the day of his arrest. When police asked why the Tahoe's back seat had been burned, defendant asked, "How did you know that I burned the seat?" Defendant then stated that after he burned the back seat, he disposed of it and some bicycles in a scrap yard.

During the second interview, a police officer also told defendant that he had heard—and not just from Ashley—that defendant might have done something like this before. Defendant explained that he told Ashley all kinds of "stuff" to make her feel that he was okay with the victim's death. The police officer responded that Ashley made it sound like defendant used to do "this for a living," implying that defendant was a killer-for-hire. Defendant responded that the victim was the only person he had ever killed.

Investigation of Vehicle and Ohio Property. When police arrested him, defendant was driving a Ford Mustang with an Ohio license plate. Jason Eisenmann, who lived in Ohio, testified that he advertised a Ford Mustang for sale online, that defendant offered to trade the Tahoe for the Mustang, and that he accepted the offer. When defendant delivered the Tahoe, Eisenmann saw that it did not have a back seat, but it appeared to be otherwise clean. Eisenmann did not clean the Tahoe; he only drove it for about a week before the fuel pump failed, and police seized the vehicle about two weeks later.

Detective-Lieutenant Lance Benzing, also of the Hillsdale County Sheriff's Department, testified that he seized the Tahoe from Eisenmann's property. He stated that the Tahoe was missing a back seat and a large section of carpet. Based on information from an informant, Detective-Lieutenant Benzing also searched a property in Ohio owned by members of defendant's family. The property included a "garage-type barn" with a camper. The garage housed vehicles, mechanic's tools, welding equipment, and motorcycles; it appeared to be used for both storage and as a place to work on vehicles. The detective saw a burn spot behind the barn and found items within the burn spot—metal bracketing, a

piece of vinyl, and a seatbelt buckle—that were consistent with the interior of a Tahoe. He seized a burned vehicle seat on which bicycles had been piled. He transported the vehicle seat back to Michigan, and it fit into the Tahoe. The detective also searched the Ohio home of defendant's brother. He seized a .22 caliber handgun from the brother's residence and found property that belonged to defendant there.

Several forensic scientists employed by the Michigan State Police testified that they were unable to recover evidence from the Tahoe. One stated that she tested the Tahoe and did not find any indication of blood around the area where the back seat would have been. She did recover some blood drops, but they did not match the victim. She stated that, although the chemical used for testing is very sensitive, bleach and other detergents will degrade samples. Another forensic scientist testified that he tested the Tahoe for fingerprints and did not find any that matched the victim, defendant, or Ashley. Finally, a third forensic scientist testified that he was unable to identify any fibers from the Tahoe on the victim's clothing and did not find any fibers from the victim's clothing in the Tahoe.

Testimony of Temples and Jolene. Michael Temples testified that he was a resident of the county jail. For several days, he shared a cell with defendant. Temples testified that defendant was often upset, crying, and distraught. According to Temples, defendant told him that he had already talked to police and that he was in jail because he shot and killed the victim. Defendant told Temples that he turned around in his Tahoe and shot the victim because the victim had called Ashley an unflattering name. Defendant also claimed that the victim was abusing Ashley. Defendant explained that he told the police officers that he cut up the gun he

used, but in reality, he put the gun in the sewage tank of a camper. Defendant also told Temples that he washed the Tahoe with bleach and peroxide, removed the Tahoe's back seat, and burned it near the camper. Temples testified that he related defendant's statements to police because "it was the right thing to do."

Defense counsel called Jolene Hoath, Ashley's sister, to testify on defendant's behalf. Counsel asked whether Ashley had spoken to her about the victim's death, and Jolene answered that she had. Jolene testified that Ashley stated that she knew that the body that was recently found was the victim's body. Jolene asked Ashley how she knew that the body was the victim's, and Ashley told her that she "did it."

Defense counsel then asked Jolene whether they had other conversations about the victim's death, and Jolene said that they spoke about the matter again the next day. She related that Ashley was distraught, and Ashley stated that she was scared of "the guy" and that the "guy did it." Jolene further testified that Ashley "never said a name." Defense counsel asked Jolene whether Ashley was a habitual liar, but the prosecutor objected and the trial court sustained the objection. Defense counsel then elicited testimony from Jolene that Ashley did not have a reputation for telling the truth.

On cross-examination, the prosecutor asked Jolene about the day when Ashley was crying. The prosecutor asked her if Ashley ever told her the name of the man of whom she was afraid. Jolene stated that Ashley said that she was afraid of defendant. Jolene indicated that Ashley did not say why, just that she was afraid defendant would hurt her. The prosecutor then asked whether Ashley told her that defendant was the person who shot the victim. Defense counsel objected, and the trial court overruled the objection. The prosecutor

asked the question in a different way: "She told you that this other guy was the one who shot" the victim. Jolene stated, "Yes, she did." On redirect, Jolene explained that Ashley finally told her that defendant was the one who shot the victim after information regarding the victim's death came out in the news.

Ashley Refused to Testify. The prosecutor also called Ashley as a witness at defendant's trial, but she refused to testify. Although both parties appear to have believed that Ashley would testify, she refused to do so after she was called to the witness stand. Ashley agreed to testify against defendant as part of a plea deal that allowed her to plead guilty to second-degree murder, and police made defendant aware of the substance of her statements implicating him in the shooting. The prosecutor gave defendant notice that he intended to call Ashley as a witness at his trial and provided defense counsel with a summary of her criminal convictions, which suggests that the prosecutor expected that Ashley would testify and be subject to cross-examination.

In the prosecutor's opening statement, he stated that Ashley would be testifying. He informed the jury that she had initially denied any role in the shooting, but that she subsequently admitted participating in the shooting and pleaded guilty to second-degree murder. He stated that Ashley told police that defendant shot the victim, but did not otherwise elaborate about her proposed testimony. Similarly, in her opening statement, defense counsel informed the jury that Ashley would testify. She predicted that when Ashley did so, the jury would see that her statements blaming defendant were not credible, that she was not an innocent victim, and that she was a liar. Defense counsel told the jury that she would also be asking

Ashley about an incident during which she beat her sister into unconsciousness and stated that there would be evidence that Ashley once paid the victim's bond to get him out of jail. Finally, defense counsel argued that the police officers did not conduct a thorough investigation regarding the victim's death, but only chose to investigate those details that fit Ashley's version of events.

On the afternoon of the first day of trial, the prosecutor informed the trial court that his next witness was Ashley, but that she had not yet arrived. The trial court ordered a brief recess. After the trial court resumed proceedings and the jury was seated in the courtroom, the prosecutor called Ashley to the witness stand. The trial court then placed her under oath and asked her to spell her name, which she did. After the trial court told the prosecutor that he could begin his examination, the following exchange occurred in the presence of the jury:

> *The Witness*: Your Honor, I want to file a verbal motion to withdraw my plea.
>
> *The Court*: Ma'am—ma'am—ma'am.
>
> *The Witness*: It was not willful—
>
> *The Court*: Ma'am, you're out of order. This is not the place nor the—the time for that situation, so.
>
> *The Witness*: Well, then I want to plead the Fifth and I ask you to please escort me back to the county jail.
>
> *The Court*: Okay, would you escort the jury back out for a moment, please?

The transcript shows that the entire episode—from the prosecutor's calling Ashley to the witness stand to the jury's departure from the courtroom—lasted one minute.

After the jury departed, the trial court advised Ashley that she could not validly assert the Fifth Amendment because she had already pleaded guilty. The trial court further informed her that it would not entertain a motion to withdraw her guilty plea in an unrelated proceeding. After a brief recess, Ashley returned and informed the trial court outside of the jury's presence that she would not testify. As a result, the trial court had her taken back to jail. Before the jury returned, the trial court asked the parties if they wanted a curative instruction to address Ashley's outburst, but both declined.

Parties' Closing Statements. In his closing statement, the prosecutor told the jury that it did not have to rely solely on defendant's recorded statement to police to conclude that he shot the victim because it could also rely on the testimony of Temples:

> But you don't have to necessarily believe the testimony that you saw on the screen. I want you to remember two words: a name, Michael Temples. Now, it's one thing to lie to the police or it's one thing to give the police a story, but it's something that's completely different, isn't it, when you're talking to a cell mate or somebody who is not involved with the government or is not involved with the case? Michael Temples knew nothing of the murder of Jeremy Barron.
>
> He testified that he hadn't heard about it. He couldn't come up with the statement that he gave to Detective Lieutenant Benzing without it coming from the defendant himself. And you use your judgment. You recall Michael Temples sitting there. You can judge his credibility based upon circumstances—stances whether he could create this or not. How could he? It came from the defendant himself. Volunteered. And what did he tell Michael Temples?
>
> He told Michael Temples that not only did he clean the interior of the car with peroxide, but Michael Temples said bleach and peroxide; you recall that? And what do we

> know about bleach? It is one thing that will remove the DNA according to our expert that testified. A thorough job to be sure.
>
> And what else did Michael Temples know from the defendant? Well, that the defendant shot him; certainly that's important, but what happened to the seat and where it was? We didn't know that information. We didn't know exactly where it was until Michael Temples told Detective-Lieutenant Benzing so that he could get a search warrant and find it which he did which also led us to the burn spot. Makes sense that he would go to the location that has the torches; that has a location where he can be in a safe position to destroy evidence and take care of it without officers from Michigan coming and inspecting until we know the truth.
>
> Michael Temples, I submit to you ladies and gentleman, is someone who had nothing to gain; simply stating what he heard and stating the truth.

During her closing arguments, defense counsel spent a considerable amount of time discussing the testimony that she elicited from police officers, which, she argued, showed that the officers did not conduct a thorough investigation. She informed the jury that it should consider whether the "facts fit" with what the prosecutor was trying to "sell" to the jury. She argued that there was no evidence that put the victim in defendant's vehicle. Defense counsel faulted the police officers for not sending for analysis a bloody sheet seized from Ashley's house and for failing to follow up on a piece of leather that they also seized. She also faulted them for failing to follow up on leads that suggested that the victim was still alive after the date when defendant supposedly killed him, accused the police officers of not doing their jobs, and argued that the police only investigated things that supported Ashley's version of events. Defense counsel continued to identify flaws in the investigation throughout her

closing statement and then informed the jury that the police officers had to be able to "explain everything" and they had failed to do so.

The prosecutor rose in rebuttal and attacked defense counsel's theory that the police officers' investigation was so flawed that the jury could not determine what really happened. He argued that the defense was compelled to point out the flaws in the investigation because the defense had to overcome the fact that defendant twice admitted to the murder:

> A little bit of inside baseball here for you, ladies and gentleman. In the defense world, when you have [a] case that doesn't look good for your client or your client made admissions where there's something there that's very obvious; something he said, you shift blame.
>
> Where's the blame being shift—shifted now? Who's the bad guy here? The police. So now, all of a sudden and by the way, I would think that you would probably not want to run out and become a police officer because you can't win. If you work hard to get evidence and you don't find evidence then that's counted against you. But if you don't work hard enough, that's counted against you. How do you win when you're a police officer?
>
> All you can do is follow leads; all you can do is your job. But, for a defendant who's trying to get himself out of trouble, they're a good whipping boy, aren't they? They're a good person to pick on for not finding the real killer, like who might that be? Is there evidence of anyone else? Aliens, what, who else? There is no one. You can't suggest that they didn't do a good job because the real killer's out running loose now.
>
> What we have is the defendant who admitted killing the deceased. And even in spite of that, the police did a tremendous job looking for further evidence. As it turns out the defendant did a good job of concealing it. It's a distraction when you start talking about somebody who saw pictures on Facebook who now believes she saw a dead man that was alive. That's a distraction. Distraction away from something that is more important.

The prosecutor conceded that defense counsel identified areas that the police officers might have investigated further, but he argued that those leads were not in fact worthy of further investigation—they were mere distractions—and did not undermine the evidence that defendant admitted that he shot the victim in the Tahoe:

> Ladies and gentlemen, it is a distraction away from this. The words of the defendant: I shot him. In the world of defending someone, if you can talk about small things like head rests then you poke a little tiny hole in, I shot him. You talk about fingerprints or fibers that are on a floor where you might not even expect them or even on the back of a vinyl seat, you're pokin' a little hole in this big statement, I shot him.
>
> Again, another little hole; fingerprints, where are they? Why didn't you take the headrest in and do what with it? Well, you didn't do it. So, there you go. I just poked another hole and you know what, she wants you to do. You know what the defendant wants you to do. They want you to look at that hole so closely, so closely that you don't see the big picture when you stand back. These words: I shot him.

The prosecutor closed his rebuttal by arguing that the police officers in fact did an "outstanding job" investigating the victim's murder and opined that "our streets are safer because of that."

After deliberating, the jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). The trial court sentenced defendant to serve life in prison without the possibility of parole for his first-degree murder conviction and to serve two years in prison for his felony-firearm conviction.

This appeal followed.

II. ANALYSIS

On appeal, defendant claims that the trial court should not have allowed the jury to hear the recording of his second interview with police officers, should not have allowed the jury to hear that Ashley pleaded guilty to second-degree murder for her role in the victim's death, should not have allowed Ashley to assert her right to remain silent in the jury's presence, and should not have allowed Jolene to offer hearsay testimony that Ashley implicated defendant in the murder. Defendant also maintains that the prosecutor deprived him of a fair trial through his closing statements, that his trial counsel was ineffective in several respects, and that the prosecutor presented insufficient evidence of premeditation to support the jury's verdict of first-degree murder. As we explain, all of the claims are without merit.

A. MOTION TO SUPPRESS

1. PRESERVATION

We first address defendant's claim that the trial court erred when it denied his motion to suppress evidence of statements he made to police during his second interrogation. To preserve this claim of error for appellate review, defendant had to object before the trial court and specify the same ground for objection that he asserts on appeal, which he did. See *People v Douglas*, 496 Mich 557, 574; 852 NW2d 587 (2014). Defendant also raises on appeal grounds for excluding his interrogation that he did not raise in the trial court. To obtain relief on those unpreserved claims, defendant must demonstrate plain error that affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

2. STANDARD OF REVIEW

This Court reviews for clear error a trial court's factual findings in a ruling on a motion to suppress evidence. *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014). A trial court's factual findings are clearly erroneous when this Court is left with a definite and firm conviction that the trial court made a mistake. See *People v Johnson*, 502 Mich 541, 565; 918 NW2d 676 (2018). "The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Johnson*, 502 Mich at 564. "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *Tanner*, 496 Mich at 206 (cleaned up).

3. CONSTITUTIONAL CLAIM

In *Miranda v Arizona*, 384 US 436, 467; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court established procedures designed to safeguard the right to remain silent protected by the Fifth Amendment, US Const, Am V. The Supreme Court held that when an officer interrogates a person who is in custody, that person must be "informed in clear and unequivocal terms" that he has the right to remain silent and that anything that he says can be used against him in court. *Id*. at 467-469. The Court also determined that the right to have counsel present during the interrogation is indispensable to the protection of the Fifth-Amendment right. *Id*. at 469. Accordingly, a person in custody must

also be advised that he has the right to consult a lawyer and have the lawyer present during interrogation, and that, if he cannot afford a lawyer, one will be appointed for him. *Id*. at 471-473.

The Court also established several rules to prevent abuses of these constitutional rights. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id*. at 473-474. Any statements that occur after that point are deemed to be the product of compulsion. *Id*. at 474. Unless the person in custody has been given the required warnings and still waives his rights, "no evidence obtained as a result of interrogation can be used against him." *Id*. at 479. A person in custody may waive his rights if the waiver is made voluntarily, knowingly, and intelligently. *Id*. at 444.

In a case soon after *Miranda*, the Supreme Court had occasion to address what happens when a person in custody asserts his right to counsel. The Court explained in *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981), that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him." The assertion of the right to counsel during a custodial interrogation is a per se invocation of the right to remain silent. *Id*. at 485. The Court emphasized that it was "inconsistent with *Miranda*" to allow police officers, "at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id*. There is, however, an exception to this rule—an officer may again interrogate a suspect who has asserted the right to remain silent, without first providing the suspect with the requested lawyer, if the suspect "initiates further communication, exchanges, or conversations with the police." *Id*. at 484-485.

On appeal in this case, defendant does not argue that the statements he made during his second interview with police were inadmissible because he did not, in fact, reinitiate contact with the officers. Rather, defendant argues that the trial court should have excluded evidence of his statements at trial because the police officers did not explicitly advise him a second time of his *Miranda* rights before resuming the interrogation. Defendant's position is, however, without support in the law.

The Supreme Court discussed the proper application of the *Edwards* rule in *Oregon v Bradshaw*, 462 US 1039; 103 S Ct 2830; 77 L Ed 2d 405 (1983). In that case, the issue before the Court was whether the initiation by the defendant of a conversation with a police officer constitutes, by itself, a waiver of the defendant's Fifth Amendment rights. *Id*. at 1041-1044 (opinion by Rehnquist, J.). Justice Rehnquist—writing for four justices—did not agree that that was the case, and concluded that—even after a defendant reinitiates a conversation with police—the burden remains on the prosecutor to show that the defendant waived his Fifth Amendment rights. *Id*. at 1044-1045. Justice Rehnquist then determined that there was no violation of the rule in *Edwards* because the defendant initiated the conversation with the police officer, who reasonably understood that the defendant's question related to the investigation. *Id*. at 1045-1046. After making that determination, Justice Rehnquist explained that the relevant question was whether the defendant validly waived his right to counsel and the right to remain silent under the totality of the circumstances, which included the necessary fact that the accused, not the police officer, reopened the dialogue. *Id*. at 1046. Justice Rehnquist agreed that the trial court properly

concluded that the defendant's statements were voluntary and the result of a knowing waiver of his rights. *Id*. at 1046-1047.

Justice Marshall, who also wrote for four justices, dissented. He did not agree that the defendant initiated a conversation that satisfied the rule in *Edwards* because, in his view, the defendant's statement did not concern the subject matter of the criminal investigation. *Id*. at 1055-1056 (Marshall, J., dissenting). Justice Marshall, however, clarified that the only dispute concerned the application of the law to the facts. Eight justices, he wrote, agreed that *Edwards* established a two-part test: under the first part, courts must ask whether the defendant initiated further communication with the police, and, under the second part, courts must ask whether the defendant made a knowing and intelligent waiver of his rights. *Id*. at 1054 n 2.

Reading the lead and dissenting opinions from *Bradshaw* together, it is evident that the Supreme Court did not, as defendant suggests in this case, adopt a bright-line rule requiring police officers to readvise a suspect of his *Miranda* rights before speaking with him after he asserts his right to counsel but subsequently reinitiates a conversation with police. Rather, the proper inquiry is whether the defendant reinitiated a conversation on the subject matter of the investigation and whether, under the totality of the circumstances, the defendant knowingly and intelligently waived his rights to counsel and to remain silent. *Id*. at 1046 (opinion by Rehnquist, J.); *id*. at 1048 (Powell, J., concurring); *id*. at 1054 n 2 (Marshall, J., dissenting).

Indeed, the rule announced in *Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."

VanHook v Anderson, 488 F3d 411, 415-416 (CA 6, 2007). The *Edwards* rule embodies two independent inquiries:

> First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. [*Id*. at 416.]

See also *Smith v Illinois*, 469 US 91, 95; 105 S Ct 490; 83 L Ed 2d 488 (1984); *United States v Velasquez*, 885 F2d 1076, 1084 (CA 3, 1989) (recognizing that the Supreme Court adopted a two-part test in *Bradshaw*). The fact that police officers do not again fully advise the defendant of his *Miranda* rights after he reinitiates communication with them is just one factor to consider under the totality of the circumstances. See *Pittman v Black*, 764 F2d 545, 547 (CA 8, 1985) ("Following the invocation of his right to counsel, [the defendant] himself initiated further conversation with the police. The officers' response to [his] question and the interrogation following that response would not have caused [the defendant] to forget the rights of which he had been advised and which he had understood moments before.") (cleaned up); see also *Kansas v Brown*, 305 Kan 674, 683, 686-687; 387 P3d 835 (2017) (stating that the test is whether the defendant initiated the renewed interrogation and, in doing so, knowingly and intelligently waived his previously asserted right to counsel, and further stating that whether the law requires renewed *Miranda* warnings depends on the totality of the circumstances); *California v Jackson*, 1 Cal 5th 269, 340-341; 376 P3d 528 (2016) (noting that whether the officers must renew *Miranda* warnings depends on the totality of the circumstances and that

renewed warnings were not required in that case because the interview was reinitiated minutes after the break in questioning, was in the same location, and was with the same police officers). Additionally, this Court has held that "police are not required to read *Miranda* rights every time a defendant is questioned." *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992) (citation omitted). Indeed, the *Littlejohn* Court stated that it was sufficient that the police officer reminded the defendant that he had earlier been advised of his rights and asked whether he still understood them after the defendant "independently initiated contact" with the officer. *Id*.

In this case, defendant relies heavily on *People v Kowalski*, 230 Mich App 464; 584 NW2d 613 (1998), for the proposition that police officers must give new and adequate warnings before again interrogating a person who has previously asserted his right to counsel. Because the *Kowalski* case presented an "unusual procedural history," *id*. at 466, and this Court construed and applied the law as it existed in 1975, *id*. at 472, before the United States Supreme Court's decision in *Edwards*, we reject defendant's reliance on *Kowalski* for guidance here. In any event, the *Kowalski* Court did not focus on whether police officers were required to reread the defendant his *Miranda* rights verbatim after he reinitiated contact with police, but on whether the defendant was subject to police-initiated interrogation before he gave his confession. *Id*. at 483-484.

Defendant admitted that he reinitiated contact, and the record confirms this. He told Deputy Miller to convey to the other officers that whatever Ashley said happened was what happened, and he was even willing to sign a statement to that effect. As the trial court recognized, defendant's statement demonstrated that he wanted to make a statement right then about the

shooting and that he intended his statement to concede that events were as Ashley described to police. The trial court did not err when it determined that there was no binding authority for the proposition that the police officers were required to readvise defendant of his *Miranda* rights simply because he had earlier invoked his right to counsel. Rather, once it found that defendant initiated the renewed interrogation, the remaining question was whether, under the totality of the circumstances, defendant knowingly and intelligently waived his right to counsel and his right to remain silent.

Apart from attempting to draw a bright-line rule where none exists, defendant has not argued on appeal that he could satisfy the totality-of-the-circumstances standard. And, indeed, he cannot. The time lapse between when defendant initially invoked his right to counsel, reinitiated discussions, and then began talking again with the officers was only a few minutes. A typical bathroom break during an interrogation might last as long as the time lapse here. Moreover, as the trial court found, the officers reminded defendant that his *Miranda* rights were recently read to him, and he continued talking with the officers. Given the brief time lapse, the reminder was adequate under the circumstances, and defendant's claim fails.

B. MRE 106

Defendant next argues that the trial court erroneously admitted the recording of his statements in violation of MRE 106. The rule provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." MRE 106 has no

bearing on the admissibility of the underlying evidence; rather, it allows the adverse party to supplement the record to provide a complete picture. See *People v McGuffey*, 251 Mich App 155, 161; 649 NW2d 801 (2002). "Thus, the rule of evidence would only be pertinent if defendant sought, but was denied, permission to have a complete writing or recorded statement introduced." *Id*.

On appeal, defendant does not complain that the prosecutor played only a part of the videorecording of his statements and that the trial court prevented him from playing the remainder or offering another recording or writing that would have provided a fuller picture for the jury. The record shows that the jury watched all those portions of the police officers' encounter with defendant that were recorded. The fact that the officers failed to record a few moments of the second interrogation does not implicate MRE 106. The jury saw the complete recording that existed, and defendant has not identified on appeal any other recording or writing that ought to have been considered contemporaneously with his confession. Moreover, nothing prevented defendant from eliciting testimony from the police officers to fill in the gaps created by the failure to record defendant's entire interview.

Defendant relies on authorities outside the jurisdiction for the proposition that the rule of completeness stated in rules analogous to MRE 106 bars the admission of video evidence where the video does not show the whole interrogation. Specifically, defendant cites *Arizona v Steinle ex rel Maricopa Co*, 237 Ariz 531; 354 P3d 408, 412 (2015), vacated in relevant part and remanded for further proceedings 239 Ariz 415 (2016), and *United States v Yevakpor*, 419 F Supp 2d 242, 252 (ND NY, 2006), in support. Both of those cases, how-

ever, involved situations where the recording had been modified and the original erased. Under those circumstances, the courts determined that it would be fundamentally unfair to allow the prosecutors to admit the altered videos. *Steinle*, 237 Ariz at ¶¶ 11-12; *Yevakpor*, 419 F Supp 2d at 251-252. In this case, no one contends that the video at issue had been altered in any way; defendant merely finds fault with the officers' failure to start the recording device earlier. In short, neither MRE 106 nor the other authorities lend support to defendant's argument.

C. MCL 763.8

Defendant also claims that the trial court erroneously admitted the recording of his statements in violation of MCL 763.8. Under this provision, the Legislature requires any law enforcement agency that has recording equipment to record the "entire interrogation" of an individual who has been subjected to a custodial interrogation regarding his involvement in a major felony. See MCL 763.8(2). Even assuming arguendo that the police violated this provision, the violation does not warrant relief here.

The Legislature provided a specific and limited remedy for any violation of MCL 763.8: the "jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony" and that it "may consider the absence of a recording in evaluating the evidence relating to the individual's statement." MCL 763.9. The Legislature also provided that evidence of the individual's statement may still be admitted if otherwise admissible under the law. See *id*. That is to say, the Legislature's remedy applies to evidence concerning an unrecorded statement.

With MCL 763.8, the Legislature codified its preference for recorded statements. With MCL 763.9, the Legislature set forth the remedy for violating the prior section—a jury instruction. The Legislature did not codify an exclusionary rule for the part of the interrogation that was recorded, and we will not create one here. See *People v Hawkins*, 468 Mich 488, 500, 507-511; 668 NW2d 602 (2003). The Legislature went so far as to state that the provision for recordings did not give the interrogated person any substantive rights. See MCL 763.10 ("The requirement in section 8 of this chapter to produce a major felony recording is a directive to departments and law enforcement officials and not a right conferred on an individual who is interrogated."). The trial court did not plainly err when it allowed the recorded portions of defendant's second interrogation to be played for the jury notwithstanding any violation of MCL 763.8(2). See *Carines*, 460 Mich at 763. As to whether the trial court erred by not instructing sua sponte the jury in accordance with MCL 763.9, assuming the missing minute or so fell within MCL 763.8, we conclude that the absent instruction did not affect defendant's substantial rights.

D. *MUSSER* ERROR

Defendant also briefly argues that the recording of his statements to police should have been excluded because an interrogating officer asserted on the video that Ashley said that defendant was a killer-for-hire or a serial killer, which was inadmissible hearsay, irrelevant, and highly prejudicial other-acts evidence. An interrogator's questions are not ordinarily offered for the proof of the matter asserted; accordingly, the questions are typically not hearsay. See MRE 801(c). Nev-

ertheless, it may be proper for the trial court to redact an interrogator's question or statement when the statement is not relevant to providing context for the accused's answer or is otherwise excludable under MRE 403. See *People v Musser*, 494 Mich 337, 354-359; 835 NW2d 319 (2013).

On appeal, the prosecutor concedes that admission of the police officer's questions relating to Ashley's purported statement qualifies as plain error. Yet, because defendant did not object to the question, defendant must also show that the error affected his substantial rights. See *Carines*, 460 Mich at 763.

Defendant has not shown this. There was significant evidence that defendant killed the victim. Defendant admitted—both in the second interview and to a fellow inmate—that he shot and killed the victim and then took steps to conceal the crime. Physical evidence corroborated his admissions. Moreover, the officer's comment was brief, and defendant immediately denied that he had killed anyone else. He also offered a plausible explanation for how Ashley might have come to the conclusion—he stated that he told her things to make her think he was okay with the victim's death. The officers appeared to accept this explanation and did not ask defendant any further questions regarding the issue. On this record, any error in the trial court's admission of this portion of the recording does not merit relief. See *id*.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues—with scant discussion of the record or relevant law—that defense counsel was ineffective for failing to raise various grounds for excluding the second interrogation. Defendant did not move for a new trial or for a remand to seek a hearing under

People v Ginther, 390 Mich 436, 442-443; 212 NW2d 922 (1973). Accordingly, we review only for those errors evident in the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 19; 815 NW2d 589 (2012), remanded for resentencing 493 Mich 864 (2012).

Defendant's cursory treatment of his claims of ineffective assistance amounts to the abandonment of his claims on appeal. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). In any event, defendant has not shown that defense counsel's failure to raise the now-desired objections or ask for a redaction of the recorded interview amounted to ineffective assistance of counsel that warrants a new trial.

As already explained, MCL 763.8 and MRE 106 did not provide a plausible basis for excluding the recording at issue. Defense counsel cannot be faulted for failing to make a meritless motion to exclude the recording from evidence under MCL 763.8 or MRE 106. See *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Moreover, defendant has not shown that defense counsel's failure to request the redaction of part of the recording fell below an objective standard of reasonableness under prevailing professional norms. *Gioglio*, 296 Mich App at 22. Defense counsel argued that the jury should closely examine defendant's body language and demeanor during the video. She suggested that the police officers prodded him and got him to give answers that fit their theory (the version of events offered by Ashley), but that the totality of the circumstances showed that defendant did not really know what happened. She further suggested that the evidence showed that defendant only confessed to the murder because he was trying to cover for Ashley. Given this theory, a

reasonable trial lawyer might conclude that it would be better to allow the jury to see the whole recording rather than redact portions and leave the jury guessing about the redacted portions. Indeed, defendant responded to the inadmissible question about other killings by informing the officers that he told Ashley things to make her feel better about the victim's death. The statement fit with the defense theory that defendant would say or do anything to help Ashley, which permitted an inference that defendant might not have been telling the truth when he told the officers that he killed the victim. Because this Court can conceive of a legitimate strategic reason for failing to request the redaction, we cannot conclude that defense counsel's failure to request the redaction fell below an objective standard of reasonableness under prevailing professional norms. See *id*.

Finally, even if we were to assume that defense counsel's performance fell below an objective standard of reasonableness, we nevertheless conclude that it was not reasonably probable that these failures affected the outcome of the trial. The evidence of defendant's guilt was overwhelming and whatever prejudice might have been caused by these failures did not affect the outcome of the trial. See *id*. Defendant has not identified any ground for precluding the introduction of the recording at issue at trial, and he has not shown that defense counsel's handling of the admission of that recording constituted ineffective assistance. The trial court did not err when it admitted the recording.

F. ASSERTION OF THE FIFTH AMENDMENT

1. STANDARDS OF REVIEW

We next consider defendant's claim that the trial court and prosecutor deprived him of a fair trial when

they allowed Ashley to assert her Fifth Amendment rights in the presence of the jury. This Court reviews de novo claims of constitutional error, prosecutorial misconduct, and interpretation of evidentiary rules. *People v Abraham*, 256 Mich App 265, 271-272; 662 NW2d 836 (2003). This Court reviews the effect of an unpreserved constitutional error under the plain-error standard, *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009), and a trial court's evidentiary decision for an abuse of discretion, *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009).

2. ANALYSIS

Our Supreme Court discussed the types of error implicated when a witness asserts his Fifth Amendment rights before the jury in *People v Gearns*, 457 Mich 170; 577 NW2d 422 (1998),[2] overruled in part on other grounds by *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999). The *Gearns* Court indicated that a witness's assertion of the Fifth Amendment in front of a jury implicates evidentiary error and two types of constitutional error—the defendant's right to confront the witness and prosecutorial misconduct that interferes with the right to due process. *Gearns*, 457 Mich at 180, 187-188, 193 (opinion by BRICKLEY, J.).

Defendant argues that Ashley's assertion of the Fifth Amendment before the jury violated his right to

[2] Although the *Gearns* Court was divided, a majority of the justices concurred with Justice BRICKLEY's recitation and application of the constitutional and evidentiary law. See *Gearns*, 457 Mich at 208 (opinion by CAVANAGH, J.) (concurring in Part IV of Justice BRICKLEY's opinion, which addressed evidentiary error); *id*. at 222 (opinion by WEAVER, J.) (joining Justice BRICKLEY's constitutional analysis, which was Part III of his opinion). Accordingly, Sections III and IV of Justice BRICKLEY's opinion represent binding law. See *Felsner v McDonald Rent-A-Car, Inc*, 193 Mich App 565, 569; 484 NW2d 408 (1992).

cross-examine her. As our Supreme Court stated in *Gearns*, however, a defendant's right to confront a witness in the context of the witness's assertion of her Fifth Amendment right does not arise unless there was substantive evidence put before the jury in the form of testimony or its functional equivalent. *Id*. at 182, 184. The prosecutor never got the opportunity to ask Ashley a question. Thus, her assertion of a privilege was not associated with any questions that could serve as the functional equivalent of testimony. See *id*. at 186-187.

The prosecutor did state in his opening statement that Ashley would testify and had implicated defendant in the shooting, but he did not elaborate on the specifics of her proposed testimony. Furthermore, the prosecutor's statement that Ashley would link defendant to the shooting was not a vital component of the case because that fact was overwhelmingly established by defendant's statement to the police, his admissions to Temples, and the physical evidence that corroborated his statements. Notably, the prosecutor did not paraphrase any proposed statements by Ashley that implicated premeditation, and he did not rely on her statements in his closing argument. Moreover, because the opening statement was separated in time from Ashley's assertion of the privilege, because defense counsel responded to the prosecutor's summary in her opening statement, and because the trial court instructed the jury that the parties' opening statements were not evidence, it cannot be said that the prosecutor's statements amounted to the functional equivalent of testimony. See *id*. Under these circumstances, defendant has not established that he was deprived of his right to confront Ashley. Finally, merely calling Ashley as a witness was insufficient to establish prosecutorial misconduct. *Id*. at 192-193. Consequently, her assertion of

the Fifth Amendment before the jury did not give rise to any plain constitutional error.

Turning to the question of evidentiary error, it is evident that Ashley was an accomplice, codefendant, or otherwise intimately connected to the murder. There is nothing in the record to suggest, however, that the prosecutor knew that Ashley would assert a privilege to avoid testifying. Rather, as already discussed, the record evidence showed that Ashley agreed to testify as part of her plea deal, had already pleaded guilty, and both the prosecutor and defense counsel expected her to testify. In the absence of evidence that the prosecutor knew that Ashley would assert her privilege in front of the jury, defendant cannot establish a plain evidentiary error. See *Carines*, 460 Mich at 763; *Gearns*, 457 Mich at 193.

Defendant also argues in passing that he was deprived of his right to confront Ashley because Sergeant Bradley testified that Ashley's statements led to defendant's arrest and that she was awaiting sentencing for second-degree murder. Defendant appears to raise these issues in the context of his claim that Ashley's assertion of the Fifth Amendment before the jury prejudiced his trial. To the extent that defendant might be asserting independent claims of error premised on that testimony, he abandoned those claims by failing to discuss the relevant law and how it might apply to the facts of this case. *Martin*, 271 Mich App at 315.

In any event, Sergeant Bradley did not relate the actual statement that Ashley made to police. He merely stated that Ashley gave them information and that information led them to arrest defendant. This testimony did not implicate defendant's right to confront Ashley. See *People v Dendel (On Second Re-*

mand), 289 Mich App 445, 452-453; 797 NW2d 645 (2010). Defendant has not explained how Sergeant Bradley's testimony that Ashley was awaiting sentencing for second-degree murder was inadmissible. And his testimony to that fact was consistent with defense counsel's eliciting of testimony from Ashley's sister that she admitted killing the victim. Thus, even assuming error, there was no prejudice. See *Carines*, 460 Mich at 763. Similarly, although the prosecutor remarked in his closing argument that Ashley had pleaded guilty to second-degree murder, which fact was not in evidence because the trial court only allowed Sergeant Bradley to state that Ashley was awaiting sentencing for second-degree murder, that misstatement was fleeting and was consistent with defense counsel's theory that Ashley alone was responsible for the victim's death. Any prejudice occasioned by that statement was minimal, and the trial court's instruction that the attorneys' remarks were not evidence cured whatever marginal prejudice the remark may have caused. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

G. HEARSAY EVIDENCE

1. STANDARD OF REVIEW

Defendant also argues that the trial court erred when it allowed the prosecutor to elicit inadmissible hearsay from Jolene regarding Ashley's identification of defendant as the shooter. The trial court admitted the testimony based on its conclusion that defense counsel opened the door to that testimony. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. See *Roper*, 286 Mich App at 90.

2. ANALYSIS

Hearsay is defined as a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Defense counsel elicited testimony from Jolene that Ashley made various statements that left the impression that Ashley admitted that she alone killed the victim or that some man other than defendant was involved. To the extent that Jolene testified that Ashley implicated "some guy," her testimony was clearly inadmissible hearsay under MRE 801(c) and MRE 802. The trial court had the discretion to allow the prosecutor to inquire further of Jolene and correct any false impressions that the jury might have had as a result of defense counsel's questioning on direct examination. See *Grist v Upjohn Co*, 16 Mich App 452, 482-483, 168 NW2d 389 (1969); *United States v Georgiou*, 777 F3d 125, 144 (CA 3, 2015). Because the prosecutor limited his cross-examination to correcting the false impression that Ashley implicated some man other than defendant, which was the very harm created by defense counsel's questioning, it cannot be said that the trial court's decision to allow Jolene's clarification on cross-examination fell outside the range of reasonable outcomes. See *People v Daniels*, 311 Mich App 257, 264-265; 874 NW2d 732 (2015).

Defendant also argues that the admission of the hearsay statements violated his right to confront the witnesses against him because he could not cross-examine Ashley about her statements to Jolene. The Sixth Amendment to the United States Constitution guarantees the right of an accused to confront the witnesses against him. See US Const, Am VI; see also Const 1963, art 1, § 20. The Confrontation Clause prohibits the admission of out-of-court statements that

are testimonial in nature unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. See *Crawford v Washington*, 541 US 36, 42, 53-54, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A statement is testimonial if the declarant should reasonably have expected that her statement would be used in a prosecutorial manner and an objective witness would believe that the statement would be available for use at a later trial. See *Dendel*, 289 Mich App at 453.

Jolene testified about private conversations that she had with her sister while driving, at work, and at some other unspecified time and place. There was nothing about the context that would lead one to conclude that the statements were testimonial in nature. See *People v Taylor*, 482 Mich 368, 378; 759 NW2d 361 (2008). Accordingly, the Confrontation Clause did not apply.

H. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor deprived him of a fair and impartial trial by making improper remarks during his closing and rebuttal remarks. To preserve a claim of prosecutorial misconduct, the defendant must make a timely and specific objection to the conduct at trial. See *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Because defendant did not object to any of the prosecutor's remarks, he did not preserve these claims for appellate review. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id*. at 382.

"The purpose of closing argument is to allow attorneys to comment on the evidence and to argue their theories of the law to the jury." *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987). A prosecutor may jeopardize the defendant's right to a fair trial during

closing arguments by injecting broader issues than the defendant's guilt or innocence. See *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007).

Defendant argues that the prosecutor improperly stated in his closing remarks that Ashley pleaded guilty to second-degree murder. Defendant, however, abandoned this claim of prosecutorial misconduct by failing to offer any meaningful argument on appeal. See *Martin*, 271 Mich App at 315. Moreover, as already explained, to the extent that the prosecutor's remark improperly asserted a fact not in evidence, the remark did not amount to plain error that prejudiced defendant's trial. See *Carines*, 460 Mich at 763.

Similarly, defendant's claim that the prosecutor improperly vouched for Temples in his closing remarks is without merit. A prosecutor may not vouch for the credibility of a witness by conveying to the jury that he has some special knowledge that the witness is testifying truthfully. See *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). The prosecutor may, however, argue from the facts that a witness is worthy of belief. See *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

The prosecutor told the jury that it did not have to rely solely on defendant's recorded statement to police to conclude that he shot the victim because it could also rely on the testimony of Temples. Although defendant focuses his criticism of the prosecutor's remarks on the last sentence, indicating that Temples stated the truth, the prosecutor's remarks must be examined in context. See *Brown*, 294 Mich App at 382-383. When examined as a whole, it is evident that the prosecutor did not imply that he had special knowledge that Temples was telling the truth. See *Bahoda*, 448 Mich at 277. Rather, he argued that Temples' testimony was credible be-

cause it was corroborated by other evidence, which was a proper argument. See *Seals*, 285 Mich App at 22. Moreover, there was no evidence that Temples had been offered anything or expected anything in exchange for his statements to police. Indeed, he stated that he informed police officers about defendant's statements because it was "the right thing to do." Therefore, the prosecutor could also argue that Temples had nothing to gain by coming forward to the police officers. See *Bahoda*, 448 Mich at 282.

Defendant further argues that the prosecutor improperly argued that defense counsel was trying to mislead the jury, which suggests that defense counsel did not believe her own client. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. See *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). But it is not improper for a prosecutor to comment on the weakness of a defense theory. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Additionally, a prosecutor's remarks, which might be improper in his closing statement, may be proper when offered to rebut an argument proffered by the defense in closing. See *Watson*, 245 Mich App at 593.

The prosecutor's remarks were proper comment on the defense theory of the case. The prosecutor did not denigrate defense counsel or otherwise suggest that defense counsel did not believe her own client. Furthermore, when considered in context and as a response to defense counsel's closing arguments, the prosecutor's remarks during rebuttal did not amount to commenting that defense counsel was intentionally trying to mislead the jury. See *id*. at 592-593. Rather, the remarks were proper commentary on the weakness of the defense theory of the case. See *Fields*, 450 Mich at

115. The prosecutor did not engage in any misconduct that deprived defendant of a fair trial.

I. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that the prosecutor failed to present sufficient evidence from which a reasonable jury could find that he killed the victim with premeditation. This Court reviews a challenge to the sufficiency of the evidence by examining the "record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *Roper*, 286 Mich App at 83.

First-degree murder is, in relevant part, "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing," or murder "committed in the perpetration of, or attempt to perpetrate" certain enumerated offenses. MCL 750.316(1)(a) and (b). It is, in essence, second-degree murder with an added element. See *People v Carter*, 395 Mich 434, 437; 236 NW2d 500 (1975). When first-degree murder is premised on premeditation, the prosecutor must prove that the defendant acted with the intent to kill the victim and must show that he acted deliberately and with premeditation. See *People v Dykhouse*, 418 Mich 488, 495; 345 NW2d 150 (1984).

A murder is committed deliberately if done without adequate provocation—that is to say while undisturbed by hot blood, *People v Scott*, 6 Mich 287, 293-294 (1859); *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971), rejected not in relevant part by *People v Reese*, 491 Mich 127, 147-148; 815 NW2d 85 (2012) (stating that then Judge LEVIN's discussion of imperfect self-defense was obiter dictum), and it is

premeditated if the perpetrator had the opportunity to consider his or her actions for some length of time before completing the murder, *People v Tilley*, 405 Mich 38, 44-46; 273 NW2d 471 (1979); see also *People v Oros*, 502 Mich 229, 242-244; 917 NW2d 559 (2018) (discussing the proofs necessary to show premeditation and deliberation).

In proving an actor's state of mind, the jury may rely on circumstantial evidence and the reasonable inferences arising from that evidence; indeed, minimal circumstantial evidence is sufficient to establish that a defendant had the intent to kill and proceeded with deliberation and premeditation. *Unger*, 278 Mich App at 223. The prosecutor may establish premeditation and deliberation through evidence of the parties' prior relationship, the defendant's actions before the killing, the circumstances surrounding the killing itself, or the defendant's conduct after the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

The prosecutor presented defendant's own words to establish that defendant shot the victim in the back seat of defendant's vehicle. Defendant told police that he shot the victim three or four times with a .45 caliber revolver. Defendant indicated that he was with Ashley, that the victim was in the backseat, and that they had driven outside of town for about 30 minutes when he shot the victim. Additionally, defendant indicated to the officers that he loved Ashley and her children, and he stated that the victim was preventing Ashley from being reunited with her children, which suggested that defendant had a motive to kill the victim. Defendant also indicated that no one else was helping Ashley and that her father was not in a position to "do it." He stated that he had never met the victim before the day of the shooting, and he even needed Ashley to identify

the victim. Therefore, there was sufficient evidence to establish premeditation, and defendant's final claim for relief fails.

III. CONCLUSION

After being taken into custody for questioning and being advised of his *Miranda* rights, defendant invoked his right to remain silent. Just moments later, he reinitiated discussions with the police and confessed. Under the totality of the circumstances, the police did not need to reread defendant's *Miranda* rights to him before the second discussion began. Furthermore, as explained, there is no other ground to reverse defendant's convictions for first-degree murder and felony-firearm. Accordingly, we affirm his convictions.

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

FERRANTI v ELECTRICAL RESOURCES COMPANY

Docket No. 342934. Submitted November 7, 2019, at Lansing. Decided November 19, 2019, at 9:05 a.m.

Thomas A. Ferranti filed a lawsuit in the Livingston Circuit Court against Electrical Resources Company (the Company) and its employee, Terry Grieve, alleging age discrimination and failure to pay sales commissions. During discovery, Ferranti and his attorney, Francyne B. Stacey, sought to examine the Company's sales records. Ferranti and the Company stipulated to an order allowing Ferranti's forensic expert to access the sales records using a cloud-based server, called Epicor. When Ferranti's expert had difficulty accessing the records, Stacey contacted the Company's attorney and requested a username and password in order to access the records via the Internet. Counsel for the Company sent Stacey a username and password, which Stacey then gave to Ferranti. Ferranti accessed the records, downloaded some of them, and sent the records electronically to Stacey. An Epicor employee later determined that someone had used the username and password sent to Stacey to modify or remove metadata from the electronic records. Ferranti acknowledged that he had accessed the records, but he denied intentionally altering or removing any data. The Company moved to dismiss Ferranti's lawsuit as a sanction for violating the stipulated order and also moved to hold Ferranti and Stacey in criminal contempt for violating the order. Ferranti and Stacey moved for discovery in the contempt action, seeking certain documents and an independent forensic examination of relevant stored documents and other files. The trial court, David J. Reader, J., denied the motion for discovery and entered a criminal-contempt show-cause order. Ferranti and Stacey moved for leave to appeal.

The Court of Appeals *held*:

1. The trial court lacked sufficient information to support its show-cause order. To establish criminal contempt, the charged party must have willfully disregarded or willfully disobeyed a court order. MCR 3.606(A) provides that a contempt committed outside the immediate presence of the court must be based on a proper showing on an ex parte motion, supported by affidavits. To

be valid, an affidavit in a contempt proceeding must be made by someone with personal knowledge of the facts stated in the affidavit. Further, the affidavit must sufficiently state facts that, along with legitimate inferences from the facts, constitute contempt as a matter of law. The affidavit submitted by Grieve and the Company in support of their contempt motion was not executed, and it failed to identify any specific order that had been violated, any contemptuous action, or the individual responsible for the alleged conduct. The affidavit also failed to conform to the requirements for affidavits set forth in MCR 2.119(B)(1). Although the affidavit was later executed, the affiant did not necessarily have personal knowledge of the contents of the affidavit and was not aware whether the username associated with the manipulated data had been provided to Ferranti. The affiant's testimony at his deposition also did not support the contempt action, as he could not establish that Ferranti was responsible for the changes made in the database, whether Ferranti had violated any order, or even whether the contents of any documents were modified. No show-cause hearing should have been ordered on the basis of the submitted affidavit.

2. The trial court improperly denied Ferranti and Stacey's request for discovery under MCR 6.201. Although criminal contempt is considered a "quasi-crime," criminal-contempt proceedings encompass many of the same due-process safeguards that protect individuals who are charged with traditional crimes. For instance, in criminal proceedings, except for information protected from disclosure by constitution, statute, or privilege, a party must provide to all other parties, upon request: the names and addresses of all lay and expert witnesses; written or recorded statements of lay witnesses; information about expert witnesses, including a written description of the substance of the testimony and the expert's opinion; any criminal record intended to be used for impeachment and the criminal convictions of potential witnesses; and a description of and opportunity to examine physical evidence. The nature of criminal contempt, the necessity for due process, and the possibility of imprisonment as a penalty warrant the application of the court rules governing discovery to criminal-contempt proceedings.

3. The trial court did not err when it appointed defense counsel to act as the prosecutor in the contempt proceeding. The Court of Appeals has held in other cases that the attorney for a private party may be appointed to act as the prosecutor in criminal-contempt proceedings.

Reversed and remanded.

CRIMINAL LAW — CRIMINAL CONTEMPT — DUE PROCESS — DISCOVERY — MCR 6.201.

In a criminal-contempt proceeding, a party is entitled to certain due-process protections, including discovery under MCR 6.201, in light of the potential deprivation of rights, including imprisonment, associated with criminal contempt.

Carole M. Stanyar for Thomas A. Ferranti.

Mogill, Posner & Cohen (by *Kenneth M. Mogill*) for Francyne B. Stacey.

Berry Moorman PC (by *Randolph T. Barker* and *Andrea M. Pike*) for Electrical Resources Company and Terry Grieve.

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

PER CURIAM. Appellants, plaintiff Thomas A. Ferranti and his counsel, Francyne B. Stacey, appeal by leave granted the trial court order denying discovery following a show-cause notice of criminal contempt, arising from a purported violation of a discovery order.[1] We reverse.

I. BASIC FACTS

Ferranti was a sales representative for defendant Electrical Resources Company (the Company). He left the Company in 2015, and brought a lawsuit alleging age discrimination and failure to pay sales commissions against the Company and one of its employees, defendant Terry L. Grieve. During discovery, appellants sought to examine the Company's sales records. The parties stipulated to a discovery order that re-

[1] *Ferranti v Electrical Resources Co*, unpublished order of the Court of Appeals, entered October 10, 2018 (Docket No. 342934).

quired the Company to provide Ferranti's expert with access to the sales records, which were stored in a cloud-based server called Epicor. The order provided, in relevant part, as follows:

> Plaintiff's forensic expert, Fortz Legal, shall be provided access to and the opportunity to copy all sales information contained in Defendant Electric Resources Company's ("ERC") electronic sales records from October 2014 up to and including the present. Plaintiff's expert may specifically access any customer or sales tracking or cloud software or services utilized by ERC during the stated time period.

Ferranti's expert encountered problems accessing the electronic sales records. After an exchange of e-mails across numerous dates, Stacey, Ferranti's counsel, then requested that the Company's counsel send a username and password to access the records via the Internet. The Company's counsel sent the username and password to Stacey.[2]

Stacey gave the username and password to Ferranti, and he accessed the records, downloaded certain records, and sent the downloaded records to Stacey electronically. An Epicor specialist later determined that a user who logged in with the provided username and password during the same timeframe had modified or removed metadata from the electronic records. Ferranti acknowledged that he had accessed the records, but denied intentionally modifying or removing any data.

The Company filed a motion to dismiss the civil suit as a sanction for violation of the stipulated discovery

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[2] Although there is an extensive e-mail discussion between counsel for the parties regarding a different expert, access, and fees, we render no opinion regarding whether this discussion fell within the confines of the disputed stipulated order, particularly where it is unclear if all e-mail communications were submitted in the lower court record.

order. In the same motion, the Company sought to hold appellants in criminal contempt for violation of the stipulated order. The trial court held a hearing on the contempt motion and, after confirming that the Company wished to proceed with criminal contempt, the court advised appellants of the contempt allegations. Appellants stood mute to the charges, and the court entered not-guilty pleas on their behalf. The court appointed defense counsel to act as the prosecutor in the criminal-contempt proceeding. Appellants retained separate counsel, and a motion for discovery was filed on their behalf. The discovery motion included a request for documents in accordance with MCR 6.201(B)(1) as well as the opportunity for an independent forensic examination of relevant stored documents and files among other items. Defendants opposed the motion, asserting that appellants were seeking discovery and information pertinent to restitution that presented an inquiry separate and distinct from the criminal-contempt proceeding. The trial court denied the motion for discovery. We granted appellants' application for leave to appeal.

II. CRIMINAL-CONTEMPT SHOW-CAUSE AFFIDAVIT

Appellants initially contend that the information provided to the trial court was insufficient to warrant the issuance of an order to show cause for criminal contempt. We agree. A trial court's decision regarding a contempt motion is reviewed for an abuse of discretion, while its factual findings are reviewed for clear error. *DeGeorge v Warheit*, 276 Mich App 587, 591; 741 NW2d 384 (2007). "If the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion." *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007). Further, "[c]lear error

exists when this Court is left with the definite and firm conviction that a mistake was made." *In re Contempt of Henry*, 282 Mich App 656, 669; 765 NW2d 44 (2009). Additionally, questions of law related to the trial court's decision are reviewed de novo. *Id*. at 668.

A trial court has inherent and statutory authority to enforce its orders. MCL 600.611; MCL 600.1711; MCL 600.1715. "Contempt of court is defined as a willful act, omission, or statement that tends to . . . impede the functioning of a court." *In re Contempt of Dudzinski*, 257 Mich App 96, 108; 667 NW2d 68 (2003) (quotation marks and citation omitted). MCR 3.606(A), which specifically governs the initiation of contempt proceedings for conduct occurring outside the immediate presence of the court, states as follows:

> Initiation of Proceeding. For a contempt committed outside the immediate view and presence of the court, on a proper showing on ex parte motion supported by affidavits, the court shall either
>
> (1) order the accused person to show cause, at a reasonable time specified in the order, why that person should not be punished for the alleged misconduct; or
>
> (2) issue a bench warrant for the arrest of the person.

Accordingly, a trial court's order to show cause why a party should not be held in contempt must be based on "a proper showing on ex parte motion supported by affidavits." MCR 3.606(A). "[T]here must be a sufficient foundation of competent evidence, and legitimate inferences therefrom," before a show-cause order may be issued. *In re Contempt of Steingold*, 244 Mich App 153, 158; 624 NW2d 504 (2000) (quotation marks and citation omitted). To be valid, an affidavit in a contempt proceeding must be made by someone who has personal knowledge of the facts stated in the affidavit. *Id*. The affidavit must sufficiently state facts

that, along with legitimate inferences from the facts, constitute contempt as a matter of law. *Id*. To establish criminal contempt, the charged party must have willfully disregarded or willfully disobeyed a court order. *People v Mysliwiec*, 315 Mich App 414, 416-417; 890 NW2d 691 (2016).

In this case, defendants sought dismissal of the civil case on the basis that appellants, or someone else who was provided the username and password, had "manipulated metadata," moved documents within the system, and attempted to modify the account password. Further, defendants sought to hold appellants in criminal contempt for violation of the stipulated order and suggested that they be required to pay any costs incurred in restoring their records to their original configuration. However, at the time of filing their motion, defendants attached an unexecuted affidavit stating that metadata was modified or deleted. The attached affidavit did not sufficiently state facts that, along with legitimate inferences from the facts, constitute contempt as a matter of law.

First, the affidavit did not identify any specific orders that were violated, identify any contemptuous actions, or even identify the individual or individuals responsible for the alleged conduct.[3] Further, the affidavit did not meet the requirements of an affidavit under MCR 2.119(B)(1), which requires the affidavit to:

> (a) be made on personal knowledge;

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[3] The affidavit submitted in support of the motion seeking dismissal and criminal contempt did not contain a name of the DocStar employee or his title at the company. Moreover, it merely delineated a series of modifications on four different dates, correlated to a user with a specific login, the same login that was given to Stacey.

> (b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and
>
> (c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

As noted above, at the time that defendants filed the motion, the affidavit submitted was unexecuted and unsworn. The affidavit was later executed by Mark Sanges, a technical support manager for DocStar. At Sanges's deposition, he indicated that he provided the content for his affidavit "after asking members of [his] support team and [the] operations team to pull the data that was being requested." Thus, the affidavit that he ultimately signed was not necessarily premised on personal knowledge. Further, Sanges was not aware whether the username associated with the audited activity was provided to Ferranti. Accordingly, it is clear that he could not establish that Ferranti was responsible for the changes made in DocStar or violated any order. Additionally, while Sanges acknowledged that the system could recognize that changes were made to certain documents, he could not detail what changes were made or whether the contents of the documents were modified. Accordingly, Sanges's affidavit, even when coupled with his testimony, remained insufficient to establish contemptuous acts. "If an inadequate affidavit is the predicate which underlies the contempt proceeding or if no affidavit at all accompanies the petition, the court lacks jurisdiction over the person of the alleged contemnor." *In re Steingold*, 244 Mich App at 159 (citation and quotation marks omitted). Accordingly, the trial court erred by ordering a show-cause hearing on the basis of the submitted affidavit.

III. DISCOVERY[4]

Appellants also contend that the trial court improperly denied their request for discovery in light of the deprivation of rights, including imprisonment, and consequences associated with criminal contempt.[5] We agree.

"The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant." *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 708; 624 NW2d 443 (2000). Because contempt power is so great, it has the equally great responsibility to be applied judiciously and only when clearly and unequivocally shown. *Id*. "Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both." *In re Henry*, 282 Mich App at 666 (quotation marks and citations omitted).

> Although criminal contempt is really only a "quasi-crime," criminal contempt proceedings encompass many of the same due process safeguards available to defendants charged with traditional crimes. For instance, an alleged

[4] Because defendants may seek to correct any defects in the affidavit proffered in support of the order to show cause of criminal contempt, we provide the following direction for purposes of guidance on remand.

[5] We note that in discussing the discovery issue, the trial court noted that the issue was limited to whether there was a violation of a court order. Although defendants' counsel concurred in that representation, counsel acknowledged that it would pursue "restitution." However, the contempt statutes address penalties, MCL 600.1715, and damages of actual loss or injury, MCL 600.1721. Because the issue of contempt as raised by defendants was not limited to a correction of appellants' acts or behavior, but sought to be made whole for the alleged acts, it rendered the issue of actual loss pertinent to the purported criminal contempt.

> criminal contemnor is presumed innocent and is protected from compelled self-incrimination. The alleged contemnor must be allowed to offer a defense to the contempt charge, as well as adequate time in which to prepare the defense. [*In re Auto Club Ins Ass'n*, 243 Mich App at 713-714 (citation omitted).]

Criminal-contempt proceedings require some of the due-process safeguards provided in an ordinary criminal trial. *Porter v Porter*, 285 Mich App 450, 456; 776 NW2d 377 (2009). Therefore, an individual charged with criminal contempt is presumed innocent, must be informed of the nature of the charge, has the right against self-incrimination, has the opportunity to prepare a defense, has the opportunity to secure counsel, and the contempt must be proven beyond a reasonable doubt. *Id*. Further, criminal penalties may not be imposed upon an individual who was not afforded the protections that the Constitution requires in criminal proceedings. *Int'l Union, United Mine Workers of America v Bagwell*, 512 US 821, 826; 114 S Ct 2552; 129 L Ed 2d 642 (1994).

"No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. While Michigan courts have recognized that there is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), it is well established that disclosure of exculpatory material and impeachment evidence is mandated by due-process principles, *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), overruled on other grounds *People v Chenault*, 495 Mich 142, 146; 845 NW2d 731 (2014). The essence of the right of due process is the principle of fundamental fairness. *In re Adams Estate*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003). What process is due in a particular proceeding depends on the nature of the proceeding, the

risks involved, and the private and governmental interests that might be affected. *In re Brock,* 442 Mich 101, 111; 499 NW2d 752 (1993).

The purposes of discovery are to promote the fullest possible presentation of the facts, minimize the opportunities for falsification of evidence, and "eliminate vestiges of trial by combat." *People v Valeck*, 223 Mich App 48, 51-52; 566 NW2d 26 (1997). Under the Michigan Rules of Professional Conduct, a prosecutor has a duty to timely disclose to the defense all evidence and information known that tends to negate the defendant's guilt or mitigates the degree of the offense. MRPC 3.8(d); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Further, in criminal proceedings, except for information protected from disclosure by constitution, statute, or privilege, MCR 6.201(C); *People v Holtzman*, 234 Mich App 166, 181; 593 NW2d 617 (1999), a party must provide to all other parties, upon request, the following information about witnesses or evidence that the party intends to produce at trial: (1) names and addresses of all lay and expert witnesses or the names of witnesses and an opportunity to interview them; (2) any written or recorded statement pertaining to the case by a lay witness, except that a defendant is not obliged to provide the defendant's own statement; (3) the curriculum vitae of an expert the party might call at trial and the expert's report or a written description of the substance of the testimony, the expert's opinion, and the basis for that opinion; (4) any criminal record intended for impeachment purposes; (5) a description or list of criminal convictions known to the party of any witness that the party might call at trial; and (6) a description of and opportunity to inspect any tangible physical evidence, including documents, with copies provided on request,

MCR 6.201(A); *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 449-450; 722 NW2d 254 (2006).

Pertinent to this appeal, the court may also order that a party be given the opportunity to test, without destruction, any tangible physical evidence upon a showing of good cause. MCR 6.201(A)(6); *Greenfield*, 271 Mich App at 450. Further, on good cause shown, the court may order a modification of the requirements and limitations of the rule. MCR 6.201(I).

We conclude that the nature of criminal contempt, the necessity for due process, and the possibility of imprisonment as a penalty warrant application of the court rules governing discovery, MCR 6.201. However, we decline to set specific parameters regarding the extent and timing of the discovery. Rather, we have entrusted the broad power of the trial court to exercise its discretion regarding the extent of discovery, particularly to prevent ambush and surprise. *People v Lemcool (After Remand)*, 445 Mich 491, 497-498; 518 NW2d 437 (1994). Accordingly, if defendants seek to cure the defect in the affidavit, the scope of discovery in the criminal-contempt proceeding must be presented to the trial court in accordance with MCR 6.201.[6]

IV. APPOINTMENT OF PROSECUTOR

Finally, appellants challenge the appointment of defense counsel as the prosecutor. However, this Court

[6] We note that civil contempt only requires that an accused be accorded "rudimentary due process." *Cassidy v Cassidy*, 318 Mich App 463, 506; 899 NW2d 65 (2017) (quotation marks and citation omitted). That is, the accused need only be given notice and an opportunity to present a defense, and the burden of proof is preponderance of the evidence. *Id*. However, defendants chose not to pursue this course of action.

has previously indicated that a private party's attorney may act as the prosecutor in a criminal-contempt proceeding. *In re Henry*, 282 Mich App at 666-668; *DeGeorge*, 276 Mich App at 600. Moreover, defense counsel represented that a new member of her firm would pursue the contempt, and he appeared and argued the discovery issues. This claim of error is without merit under the circumstances.

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

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

PEOPLE v COWHY

Docket No. 348542. Submitted November 5, 2019, at Detroit. Decided November 19, 2019, at 9:10 a.m. Leave to appeal denied 506 Mich 1032 (2020).

Andrew T. Cowhy was charged in the St. Clair Circuit Court with three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b); six counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); and one count of accosting a child for immoral purposes, MCL 750.145a. The charges against defendant were based on allegations that between 2002 and 2011, defendant had sexually abused his niece, nephew, and three of his cousins. In October 2015, pursuant to a plea agreement in which the prosecution dismissed the CSC-I charges, defendant pleaded guilty to six counts of CSC-II; three counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d; three counts of first-degree child abuse, MCL 750.136b(2); and one count of accosting a child for immoral purposes. Before sentencing, the prosecution and the defense stipulated that defendant would submit to a risk assessment/evaluation for the purposes of sentencing. Defendant met with Leo Niffeler, a licensed social worker, who evaluated defendant and authored the risk assessment/evaluation. Defendant admitted to Niffeler that he had sexually abused each of the children named in the information. The risk assessment/evaluation was submitted to the court before sentencing. In his statement to the court, defendant accepted responsibility for his crimes and stated his intent to seek treatment. The trial court sentenced him to 10 to 15 years' imprisonment for the CSC-III convictions, 225 to 360 months' imprisonment for the first-degree child abuse convictions, and two to four years' imprisonment for the conviction of accosting a child for immoral purposes. William P. Hackett was defendant's lawyer from August 2015 through sentencing in November 2016. In February 2016, defendant moved to withdraw his guilty plea, arguing that his plea was defective. Defendant also submitted a signed and notarized affidavit in which he asserted that he was a juvenile when he sexually abused the children. The court denied the motion to withdraw the plea. Defendant filed a delayed application for leave to appeal in the Court of Appeals, which the Court denied in an unpublished order entered on

September 22, 2016 (Docket No. 334140). Defendant sought leave to appeal in the Supreme Court, and the Supreme Court remanded the matter to the Court of Appeals for consideration as on leave granted. 500 Mich 1008 (2017). While his case was pending, defendant filed a legal-malpractice suit against Hackett. In his answer to the complaint, Hackett asserted that defendant had admitted to him that defendant had sexually molested the children and that defendant purposely waived his preliminary examination because he did not want to hear the children testify and did not want his father to testify against him concerning the admissions he had made to his father. In February 2018, the malpractice action was stayed until the conclusion of defendant's criminal appeal. In an unpublished per curiam opinion issued on July 31, 2018 (Docket No. 334140), the Court of Appeals, SERVITTO, P.J., and GLEICHER and STEPHENS, JJ., held that defendant's plea was defective because his sentence for first-degree child abuse violated the Ex Post Facto Clauses of the federal and state Constitutions and defendant had not waived the violation. Accordingly, the Court of Appeals vacated the order denying defendant's motion to withdraw his plea and remanded the case to allow defendant an opportunity to withdraw his plea. In November 2018, the legal-malpractice action against Hackett was dismissed by stipulation. In the meantime, defendant withdrew his plea. The case was bound over to the circuit court. Before trial, the prosecution moved to admit statements from a redacted version of an affidavit that defendant had submitted to the trial court in support of his motion to withdraw his guilty plea. Defendant also moved to exclude Hackett's testimony and Niffeler's testimony, arguing that pursuant to MRE 410, any testimony and evidence from Hackett and Niffeler would be inadmissible. Defendant further argued that his statements to Hackett were protected by attorney-client privilege and that his statements to Niffeler were protected by psychologist-patient privilege. The trial court, Daniel J. Kelly, J., held that MRE 410 precluded the admission of all the evidence at issue and entered an order excluding defendant's affidavit, Hackett's testimony, and Niffeler's testimony. The prosecution appealed.

The Court of Appeals *held*:

1. The trial court failed to properly apply MRE 410. Determining whether a statement was made in the course of plea discussions for purposes of MRE 410(4) involves application of a two-pronged test. MRE 410 applies when (1) the defendant has an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) that expectation is reasonable given the

totality of the objective circumstances. Although MRE 410(4) provides that the statements are only inadmissible if made in the course of plea discussions with an attorney for the prosecuting authority, it is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions. In this case, at the time that defendant made inculpatory statements to Niffeler, defendant did not have a subjective expectation to negotiate a plea, and even if he did, his expectation was not reasonable under the totality of the circumstances. When defendant spoke to Niffeler, the plea agreement had already been entered and defendant had pleaded guilty pursuant to it. Defendant used the risk assessment/evaluation at sentencing as part of his argument in favor of a more lenient sentence. Therefore, defendant's expectation at the time he made the statements was to receive a more lenient sentence, not to receive a better plea agreement with the prosecution. The trial court abused its discretion by excluding the statements to Niffeler under MRE 410. Similarly, defendant did not expect to negotiate a plea with a lawyer for the prosecuting authority when he submitted his affidavit in support of withdrawing his guilty plea; his expectation when he made the inculpatory statements in the affidavit was to have his plea withdrawn. Furthermore, even if defendant had a subjective expectation to negotiate a better plea after withdrawing his original plea, there was nothing on the record indicating that such a belief was reasonable given the totality of the objective circumstances. Accordingly, the trial court abused its discretion by excluding the statements in the affidavit under MRE 410. Finally, the trial court abused its discretion by excluding statements defendant made to Hackett under MRE 410. Defendant made the statements to Hackett before defendant entered into a plea agreement with the prosecution—the statements were used to inform Hackett's advice to defendant regarding the plea. Therefore, the statements were not made in the course of plea negotiations with a lawyer for the prosecuting authority or at the direction of a lawyer for the prosecuting authority.

2. MRE 401 provides that evidence is relevant if it has a tendency to make a fact of consequence more probable than it would be without the evidence. MRE 403 provides that unfairly prejudicial evidence may be excluded. In this case, the evidence contained in defendant's affidavit—evidence of defendant's guilt and the children's credibility—was relevant and was not unfairly prejudicial. Defendant could not show that the evidence should be excluded under MRE 403.

3. Communications made to a psychologist or other mental-health professional are privileged and are generally not discoverable in criminal cases. MCL 330.1700(h) defines a privileged communication as a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment, or a communication made privileged under other applicable state or federal law. Under MCL 330.1750(2)(b), a privileged communication may be disclosed if the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding. Under MCL 330.1750(2)(e), a privileged communication may be disclosed if the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered. In this case, MCL 330.1750(2)(b) did not allow for the admission of Niffeler's testimony regarding defendant's risk assessment/evaluation at trial: although defendant would have been informed that the communications could be used in the sentencing memorandum or discussed during sentencing, there was no evidence that defendant was aware that the contents of his risk assessment/evaluation would be subject to disclosure if he were permitted to withdraw his plea and proceeded to trial. Similarly, with regard to MCL 330.1750(2)(e), the risk assessment/evaluation was agreed to by the parties and ordered by the trial court, but MCL 330.1750(2)(e) contains a provision stating that disclosure is warranted if the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered. Accordingly, although the communications between defendant and Niffeler were not privileged with regard to the sentencing hearing, they were otherwise protected by the psychologist-patient privilege because there was nothing in the record suggesting that defendant was informed that his statements to Niffeler could be used in a later proceeding. Additionally, there was no evidence in the record that defendant expressly waived the psychologist-patient privilege for anything other than sentencing. Accordingly, defendant did not waive the psychologist-patient privilege with regard to the risk assessment/evaluation performed by Nieffeler.

4. A client who attacks the adequacy of the representation he or she received at trial waives the attorney-client privilege to the extent necessary to permit an inquiry concerning the adequacy of

his or her representation. However, the waiver of privilege in the context of a claim against a defendant's lawyer does not amount to a waiver for all time and all purposes; it relates only to the specific claim of malpractice or ineffectiveness. In this case, although defendant waived his attorney-client privilege in the civil legal-malpractice lawsuit, he only did so to the extent necessary for the trial court *in the legal-malpractice lawsuit* to determine whether Hackett adequately represented him. The allegations that Hackett provided ineffective assistance to defendant had been resolved, and Hackett's testimony was no longer required to rebut defendant's assertion that Hackett was ineffective. Although defendant waived his attorney-client privilege in relation to his earlier appeal from the trial court's order denying his motion to withdraw his guilty plea, defendant did not waive his attorney-client privilege in these proceedings, which were unrelated to the claim of ineffective assistance. Accordingly, Hackett's statements were inadmissible because they were protected by the attorney-client privilege.

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

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael D. Wendling*, Prosecuting Attorney, and *Hilary B. Georgia*, Assistant Prosecuting Attorney, for the people.

Lawrence S. Katz for defendant.

Before: M. J. KELLY, P.J., and FORT HOOD and SWARTZLE, JJ.

M. J. KELLY, P.J. In this interlocutory appeal, the prosecution appeals by leave granted[1] the trial court order (1) denying the prosecution's motion to admit into evidence a redacted affidavit from defendant, Andrew Cowhy, and (2) granting Cowhy's motion in limine to exclude certain testimony and documents from Cowhy's former defense lawyer, William P.

[1] *People v Cowhy*, unpublished order of the Court of Appeals, entered June 19, 2019 (Docket No. 348542).

Hackett, and from Leo Niffeler, a licensed social worker who evaluated Cowhy at Hackett's request and authored a report for use at sentencing. We conclude that the trial court abused its discretion by excluding the testimony from Niffeler, the testimony from Hackett, and Cowhy's affidavit under MRE 410. However, the statements made by Cowhy to Hackett are protected by attorney-client privilege and are therefore inadmissible. Similarly, statements made by Cowhy to Niffeler are protected by the psychologist-patient privilege—which applies to social workers—and are also inadmissible. Accordingly, we affirm the trial court's order excluding testimony and documentary evidence from Hackett and Niffeler. But because Cowhy's redacted affidavit is relevant and is not inadmissible under MRE 410, we reverse the court's order to the extent that it excluded the affidavit from evidence.

I. BASIC FACTS

In August 2015, Cowhy was charged with three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b); six counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); and one count of accosting a child for immoral purposes, MCL 750.145a. The charges against Cowhy were based upon allegations that, between 2002 and 2011, Cowhy had sexually abused his niece, nephew, and three of his cousins. In October 2015, pursuant to a plea agreement in which the prosecution dismissed the CSC-I charges, Cowhy pleaded guilty to six counts of CSC-II; three counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d; three counts of first-degree child abuse, MCL 750.136b(2); and one count of accosting a child for immoral purposes.

Before sentencing, the prosecution and the defense stipulated that at the defense's request Cowhy would submit to "a risk assessment/evaluation . . . for the purposes of sentencing."[2] Thereafter, Cowhy met with Niffeler and admitted to sexually abusing each of the children named in the information. A copy of Niffeler's report was submitted to the court before sentencing, along with numerous support letters from Cowhy's friends and family. In his statement to the court, Cowhy accepted responsibility for his crimes and the pain that they caused, and he stated that he intended to seek treatment. The trial court sentenced him to 10 to 15 years' imprisonment for the CSC-III convictions, 225 to 360 months' imprisonment for the first-degree child abuse convictions, and two to four years' imprisonment for the accosting a child for immoral purposes conviction.

Hackett represented Cowhy from August 2015 through sentencing in November 2015.

In February 2016, Cowhy moved to withdraw his guilty plea, arguing that his plea was defective because (1) he was a juvenile when he sexually abused the children, (2) there was no factual basis for his plea to the CSC-II and first-degree child abuse charges, and (3) he was misinformed of the maximum possible sentence for his first-degree child abuse convictions, which resulted in a violation of the Ex Post Facto Clauses of the federal and state Constitutions. In connection with the motion to withdraw his plea, Cowhy submitted a signed and notarized affidavit that included the following statements:

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[2] We note that Cowhy was not required by law to submit to the risk assessment for purposes of sentencing. His decision to do so was voluntary.

> 1. That all of the sexual incidents he pled guilty [to] occurred when he was between the ages of 13 and 15, or possibly right after he turned 16.
>
> 2. That one reason why he remembers his age at the time of the offenses he [sic] because he is sure that they all occurred before he had his driver's license which he got at age 16.

The court denied the motion to withdraw the plea.

Cowhy filed a delayed application for leave to appeal in this Court, which was denied.[3] Thereafter, he appealed the denial of his delayed application for leave to appeal in the Michigan Supreme Court, which remanded to this Court for consideration as on leave granted. *People v Cowhy*, 500 Mich 1008 (2017).

Relevant to this appeal, while his case was pending before this Court, Cowhy filed a legal-malpractice suit against Hackett. In his answer to the malpractice complaint, Hackett asserted that Cowhy "admitted the truth of the allegations made against him" to Hackett and that Cowhy admitted he "had sexually molested all five of the children consistent with the victims' versions of the incidents." Additionally, Hackett stated that Cowhy admitted to him "that the molestation of [Cowhy's] minor family members continued until shortly after [Cowhy's] twentieth birthday." Hackett also stated that Cowhy had purposefully waived his preliminary examination because he "was very adamant that he did not want to hear the children testify about the sexual assaults that he committed against them and he did not want his father to testify against him concerning the admissions [he] made to his father." In February 2018, the malpractice action was stayed until the conclusion of Cowhy's criminal appeal.

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[3] *People v Cowhy*, unpublished order of the Court of Appeals, entered September 22, 2016 (Docket No. 334140).

Subsequently, this Court determined that Cowhy's plea was defective because his sentence for first-degree child abuse violated the Ex Post Facto Clauses of the federal and state Constitutions and Cowhy had not waived the violation. *People v Cowhy*, unpublished per curiam opinion of the Court of Appeals, issued July 31, 2018 (Docket No. 334140), p 7. Accordingly, this Court vacated the order denying Cowhy's motion to withdraw his plea and remanded to allow him an opportunity to withdraw his plea. *Id*.

In November 2018, the legal-malpractice action against Hackett was dismissed by stipulation.

In the meantime, on remand from this Court, Cowhy withdrew his plea. Following a preliminary examination, the case was bound over to the circuit court. Before trial, the prosecution filed a motion to admit statements from a redacted version of an affidavit that Cowhy had submitted to the trial court in support of his motion to withdraw his guilty plea.[4] Additionally, Cowhy filed a motion to exclude testimony from Hackett and a motion to exclude testimony from Niffeler. He argued that pursuant to MRE 410, any testimony and evidence from Hackett and Niffeler would be inadmissible. Additionally, he contended that his statements to Hackett were protected by attorney-client privilege and his statements to Niffeler were protected by psychologist-patient privilege. The trial court held that MRE 410 precluded the admission of all the evidence at issue and entered an order excluding Cowhy's affidavit, Hackett's testimony, and Niffeler's testimony.

This interlocutory appeal follows.

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[4] The redacted version of the affidavit eliminates Cowhy's reference to pleading guilty to sexually abusing five of his relatives. Although the prosecution argued before the trial court that it could introduce the plea transcript because Cowhy had waived MRE 410 by voluntarily referencing his plea in his affidavit, it has not revived that position on appeal, so we will not address it further.

II. ADMISSIBILITY OF EVIDENCE

A. STANDARD OF REVIEW

The prosecution argues that the trial court abused its discretion by excluding Cowhy's affidavit, Hackett's testimony, and Niffeler's testimony. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). Whether a confidential communication is privileged is reviewed de novo. *Krug v Ingham Co Sheriff's Office*, 264 Mich App 475, 484; 691 NW2d 50 (2004).

B. ANALYSIS

1. MRE 410

The trial court held that the challenged statements were barred by MRE 410, reasoning that the purpose of this Court's remand permitting Cowhy to withdraw his plea was "meant to put him back in the position he was before he entered the plea." The court noted that the challenged evidence came out after Cowhy's plea, that each of the statements flowed "from the plea that he has been allowed to withdraw," and that "none of these things would have happened but for the plea being withdrawn." In doing so, the court failed to properly apply MRE 410.

As with statutory interpretation, this Court applies the plain and unambiguous language of a court rule. *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003). "[J]ust as we cannot read into an unambiguous statute a provision not written by the Legislature, we

likewise cannot read into a court rule a provision not written by the Supreme Court." *Orr*, 275 Mich App at 595 (citation omitted). MRE 410 provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
>
> (2) A plea of nolo contendere, except that, to the extent that evidence of a guilty plea would be admissible, evidence of a plea of nolo contendere to a criminal charge may be admitted in a civil proceeding to support a defense against a claim asserted by the person who entered the plea;
>
> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.
>
> However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

At this time, the prosecution is not attempting to introduce evidence of a guilty plea that was later withdrawn, a plea of *nolo contendere*, or a statement made in the course of a proceeding under MCR 6.302 or a comparable state of federal procedure.[5]

[5] We note that in the proceedings before the trial court, the prosecution sought to admit a copy of Cowhy's plea transcript. On appeal, the prosecution does not directly argue that the trial court abused its

Accordingly, none of the challenged statements is barred under MRE 410(1), (2), or (3).

Whether a statement was made in the course of plea discussions for purposes of MRE 410(4) involves application of a two-pronged test adopted in *People v Dunn*, 446 Mich 409, 415; 521 NW2d 255 (1994). "In *Dunn*, our Supreme Court held that MRE 410 applies when (1) the defendant has an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) that expectation is reasonable given the totality of the objective circumstances." *People v Smart*, 304 Mich App 244, 249; 850 NW2d 579 (2014) (quotation marks and citation omitted). The phrase " '[i]n the course of' means 'in the process of, during the progress of.' " *Id*. at 252, quoting I *Oxford English Dictionary* (compact ed, 1971), p 1088. In addition, although MRE 410(4) provides that the statements are only inadmissible if made "in the course of plea discussions with an attorney for the prosecuting authority," this Court has held that "[i]t is conceivable that a defendant may speak to persons other than an attorney for the prosecuting authority in the course of plea discussions," *Smart*, 304 Mich App at 252. Under such circumstances, it is helpful to examine whether the discussions with other persons occurred at the direction of a lawyer for the prosecuting authority. *Id*.

In *Dunn*, the defendant contacted the police after being arrested in order to "work out a plea bargain." *Dunn*, 446 Mich at 413. The police, however, told him that until they knew " 'what information he had,' " they could not talk to the prosecutor with regard to a

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discretion in excluding the plea transcript. To the extent that the prosecution makes an indirect argument for the admission of the plea transcript, we conclude that it is plainly inadmissible under MRE 410(1) and MRE 410(3).

plea bargain. *Id*. The defendant cooperated with the police and made a number of inculpatory statements; however, he was unable to work out a plea bargain with the prosecution, so he proceeded to trial. *Id*. at 413-414. Our Supreme Court concluded that at the time the defendant made the inculpatory statements, he had a subjective expectation to negotiate a plea and that his "expectation was reasonable given the totality of the objective circumstances." *Id*. at 415-416. Accordingly, the Court held that the statement was barred by MRE 410. *Id*. at 414-415.

In *Smart*, the defendant wanted to obtain a favorable plea bargain for charges in another case. *Smart*, 304 Mich App at 247-248. In pursuit of that goal, he met with several law enforcement officers on March 15, 2011, and made some inculpatory statements (to the surprise of his lawyer). *Id*. at 248. Thereafter, he entered into a written plea agreement. *Id*. The defendant, however, chose to contact law enforcement again to determine if he reached the best possible plea agreement. *Id*. The defendant's lawyer asked the police detective to tell the defendant that his agreement would not improve; the prosecutor's office urged the officer to nevertheless meet with the defendant to obtain additional information. *Id*. On June 8, 2011, the defendant again met with law enforcement and, after being told that the deal would not improve, made additional inculpatory statements. *Id*. This Court noted that under the circumstances the defendant initiated the June 8, 2011 meeting in order to obtain a more favorable plea. *Id*. at 254-255. At the prosecution's directive, the meeting was held despite the prosecution's position that it would not offer a more favorable plea. *Id*. at 255. This Court held that given that the meeting was held "with the knowledge that [the] defendant requested and would appear at the

meeting in an attempt to negotiate a better plea deal," the detective gave the defendant a reasonable belief that the requested plea negotiations would occur. *Id*. This Court also reasoned that, although the defendant was told that he would not receive a more favorable agreement, he was advised that the prosecution—who was responsible for offering a better plea agreement—would be " 'very interested' " in the information the defendant could provide. *Id*. As a result, the detective bolstered, rather than diminished, the defendant's belief that he could obtain a more favorable plea agreement. *Id*. This Court acknowledged that the plea agreement was being "tweaked" even after the June 8, 2011 meeting and concluded that under the totality of the circumstances, the defendant's belief that he was negotiating a plea was reasonable. *Id*. at 256-257.

Relevant to this appeal, the prosecution challenges the trial court's decision to exclude testimony and documentary evidence from Niffeler, Cowhy's redacted affidavit, and testimony from Hackett. We address each in turn.

First, at the time that Cowhy made inculpatory statements to Niffeler, he did not have a subjective expectation to negotiate a plea, and even if he did, his expectation was not reasonable under the totality of the circumstances. When Cowhy spoke to Niffeler, the plea agreement had already been entered and Cowhy had pleaded guilty pursuant to it. See also *United States v Marks*, 209 F3d 577, 582 (CA 6, 2000) ("[S]tatements made after a plea agreement is finalized are not made in the course of plea discussions.") (quotation marks and citation omitted). Indeed, prior to making the statements, Cowhy and the prosecution entered into a stipulated agreement stating that Niffeler would conduct "a risk assessment/evaluation" of Cowhy at the jail "for the

purposes of sentencing." Niffeler's report was subsequently submitted to the court prior to sentencing, and it focused on sentencing issues, i.e., Cowhy's rehabilitative potential. Cowhy used the report at sentencing as part of his argument in favor of a more lenient sentence. Therefore, unlike the defendants' expectations in *Dunn* and *Smart*, Cowhy's expectation at the time he made the statements was to receive a more lenient sentence, not to receive a better plea agreement with the prosecution. The trial court abused its discretion by excluding the statements to Niffeler under MRE 410.

Similarly, Cowhy did not expect to negotiate a plea with a lawyer for the prosecuting authority when he submitted his affidavit in support of *withdrawing* his guilty plea. His expectation when he made the inculpatory statements in the affidavit was to have his plea withdrawn. Furthermore, even if Cowhy had a subjective expectation to negotiate a better plea *after* withdrawing his original plea, there is nothing on the record indicating that such a belief was reasonable given the totality of the objective circumstances. Moreover, unlike the defendants in *Dunn* and *Smart*, Cowhy was not leveraging his inculpatory statements against a more favorable plea agreement with the prosecution. He was not, in fact, engaged in *any* discussions with a lawyer for the prosecuting authority, or anyone acting at the direction of the prosecuting authority, when he made the statements. See MRE 410(4) (barring statements "made in the course of plea discussions *with an attorney for the prosecuting authority*") (emphasis added); *Smart*, 304 Mich App at 252. Accordingly, the trial court abused its discretion by excluding the statements in the affidavit under MRE 410.

Finally, the trial court abused its discretion by excluding statements Cowhy made to Hackett under

MRE 410. Based on the information before this Court, it is apparent that the statements were made by Cowhy to Hackett before Cowhy entered into a plea agreement with the prosecution because they were used to inform Hackett's advice to Cowhy regarding the plea. Therefore, the statements were not made in the course of plea negotiations with a lawyer for the prosecuting authority or at the direction of a lawyer for the prosecuting authority. See *Smart*, 304 Mich App at 252. And, although the information may have been used by Hackett to advise Cowhy regarding his legal options, there is nothing in the record to suggest that when Cowhy made the statements he had a subjective expectation to negotiate a plea with the prosecuting authority or that such an expectation would be reasonable under the totality of the circumstances. Accordingly, on this record, we conclude that the statements between Cowhy and Hackett were not protected by MRE 410.

2. RELEVANCY

In the alternative, Cowhy asserts that his statements in his redacted affidavit should be excluded because they are not relevant and would be unfairly prejudicial. Cowhy's affidavit only includes admissions that he sexually abused his relatives while he was a juvenile. That evidence is relevant because it has a tendency to make a fact of consequence—Cowhy's guilt and the children's credibility—more probable than it would be without the evidence. See MRE 401.[6] Furthermore, although evidence that is unfairly prejudicial may be excluded under MRE 403,

[6] Even if the statements in the affidavit only related to crimes that Cowhy allegedly committed as a juvenile, such evidence would be admissible under MCL 768.27a. MCL 768.27a provides for the admission of evidence of other acts of sexual abuse committed against minors

People v McGhee, 268 Mich App 600, 637; 709 NW2d 595 (2005), to be considered "unfairly prejudicial," evidence must be more than merely damaging to a defendant's case, *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). "Unfair prejudice may exist where there is a tendency that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *Id*. Unfairly prejudicial evidence will generally elicit "the jury's bias, sympathy, anger, or shock." *McGhee*, 268 Mich App at 614 (quotation marks and citation omitted). Here, the evidence contained in the affidavit, while damaging to Cowhy's case, is not unfairly prejudicial; rather, without going beyond the merits of the charges against Cowhy, it bears directly on his guilt and on the credibility of the children. Therefore, Cowhy cannot show that the evidence should be excluded under MRE 403.

3. PSYCHOLOGIST-PATIENT PRIVILEGE

Cowhy argues that, regardless of whether MRE 410 prohibits the admission of Niffeler's testimony, any testimony from Niffeler regarding the risk assessment/evaluation of Cowhy must be considered confidential in accordance with the psychologist-patient privilege.[7]

Communications made to a psychologist or other mental health professional are privileged and are

for " 'any matter to which it is relevant,' " including for propensity purposes. *People v Watkins*, 491 Mich 450, 469-471, 487-489; 818 NW2d 296 (2012), quoting MCL 768.27a.

[7] Niffeler is a social worker. The psychologist-patient privilege also extends to social workers. See *People v Carrier*, 309 Mich App 92, 110; 867 NW2d 463 (2015). Indeed, "[t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker . . . ." *Id*. (quotation marks and citation omitted). Thus, the psychologist-patient privilege applies in this case, notwithstanding that Niffeler is a social worker, not a psychologist.

generally not discoverable in criminal cases. *People v Carrier*, 309 Mich App 92, 106; 867 NW2d 463 (2015). A privileged communication is defined as any "communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law." MCL 330.1700(h). Under MCL 330.1750(1), "[p]rivileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section." Under MCL 330.1750(2), the particular circumstances under which a privileged communication may be disclosed include:

> (a) If the privileged communication is relevant to a physical or mental condition of the patient that the patient has introduced as an element of the patient's claim or defense in a civil or administrative case or proceeding or that, after the death of the patient, has been introduced as an element of the patient's claim or defense by a party to a civil or administrative case or proceeding.
>
> (b) If the privileged communication is relevant to a matter under consideration in a proceeding governed by this act, but only if the patient was informed that any communications could be used in the proceeding.
>
> (c) If the privileged communication is relevant to a matter under consideration in a proceeding to determine the legal competence of the patient or the patient's need for a guardian but only if the patient was informed that any communications made could be used in such a proceeding.
>
> (d) In a civil action by or on behalf of the patient or a criminal action arising from the treatment of the patient against the mental health professional for malpractice.

> (e) If the privileged communication was made during an examination ordered by a court, prior to which the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered.
>
> (f) If the privileged communication was made during treatment that the patient was ordered to undergo to render the patient competent to stand trial on a criminal charge, but only with respect to issues to be determined in proceedings concerned with the competence of the patient to stand trial.

The proceedings in this case are criminal and do not pertain to Cowhy's mental conditions or competency to stand trial. See MCL 330.1750(2)(a), (c), (d), and (f). Therefore, the only provisions which may apply to the risk assessment/evaluation include MCL 330.1750(2)(b) or MCL 330.1750(2)(e). We address each in turn.

With regard to MCL 330.1750(2)(b), there may be information relevant to the prosecution's case-in-chief contained in the evaluation, including evidence of Cowhy's guilt. This evidence could ostensibly be elicited by the prosecution via Niffeler's testimony. However, MCL 330.1750(2)(b) applies "only if the patient was informed that any communications could be used in the proceeding." Although Cowhy would have been informed that the communications could be used in the sentencing memorandum, or discussed during sentencing, there is no evidence that he was aware that the contents of his risk assessment/evaluation would be subject to disclosure if he were permitted to withdraw his plea and proceeded to trial. Accordingly, MCL 330.1750(2)(b) does not allow for the admission of Niffeler's testimony regarding Cowhy's risk assessment/evaluation at trial.

Similarly, with regard to MCL 330.1750(2)(e), the risk assessment/evaluation was agreed to by the

parties and ordered by the trial court, but MCL 330.1750(2)(e) contains a provision stating that disclosure is warranted if "the patient was informed that a communication made would not be privileged, but only with respect to the particular purpose for which the examination was ordered." Accordingly, although the communications between Cowhy and Niffeler were not privileged with regard to the sentencing hearing, they are otherwise protected by the psychologist-patient privilege because there is nothing in the record suggesting that Cowhy was informed that his statements to Niffeler could be used in a later proceeding. The communications between Cowhy and Niffeler could only be disclosed to the trial court for sentencing purposes in accordance with MCL 330.1750(2)(e) and must otherwise remain protected by the psychologist-patient privilege.

The psychologist-patient privilege may be expressly waived by a party or may be impliedly waived if the party placed his or her mental state in controversy. Yet, there is no evidence in the record that Cowhy expressly waived the psychologist-patient privilege for anything other than sentencing. Further, the prosecution presented no evidence that by allowing the trial court to view the risk assessment/evaluation report Cowhy intended to expressly waive the psychologist-patient privilege for any and all additional purposes. Additionally, although a risk assessment/evaluation was completed, Cowhy has not placed his mental state in controversy by claiming an insanity defense or otherwise calling his mental state into question. See *People v Toma*, 462 Mich 281, 320; 613 NW2d 694 (2000) (KELLY, J., dissenting) (stating that "[b]y raising an insanity defense, the defendant has placed his mental state at issue and waived the [psychologist-patient] privilege in that regard"). Accordingly, on this record,

Cowhy did not waive the psychologist-patient privilege with regard to the risk assessment/evaluation performed by Niffeler.

As the prosecution correctly notes, the trial court did not address the psychologist-patient privilege at the hearing regarding defendant's motion to exclude Niffeler's testimony and only excluded the testimony by finding that it was inadmissible under MRE 410. Testimony from Niffeler would not be precluded at trial by MRE 410 but is precluded because of the operation of the psychologist-patient privilege. See *People v McLaughlin*, 258 Mich App 635, 652 n 7; 672 NW2d 860 (2003) (stating that this Court will generally "not reverse a trial court's order if it reached the right result for the wrong reason").

4. ATTORNEY-CLIENT PRIVILEGE

Finally, Cowhy argues that, even if not protected by MRE 410, his statements to Hackett are inadmissible because they are protected by attorney-client privilege. In response, the prosecution contends that Cowhy waived attorney-client privilege by filing a legal-malpractice complaint against Hackett. The prosecution cites two cases in support of the argument that defendant waived his attorney-client privilege. First, in *Everett v Everett*, 319 Mich 475, 483; 29 NW2d 919 (1947), the Michigan Supreme Court opined that a party may waive his or her attorney-client privilege by making a claim of "fraud or other improper or unprofessional conduct" against his or her lawyer. (Quotation marks and citation omitted.) Second, in *People v Houston*, 448 Mich 312, 332; 532 NW2d 508 (1995), the Michigan Supreme Court held that a defendant waives attorney-client privilege by asserting a claim of ineffective assistance of counsel against his or her lawyer.

The prosecution asserts that *Everett* supports the argument that Cowhy completely waived his attorney-client privilege by filing a civil legal-malpractice lawsuit against Hackett. *Everett*, however, is not dispositive. In *Everett*, our Supreme Court stated that an affidavit from the plaintiffs' former lawyer was "admissible under the circumstances to refute the charge," indicating that the attorney-client privilege was waived only for the purpose of determining whether the plaintiffs' lawyer acted competently. *Everett*, 319 Mich at 484. Yet, as explained by this Court in *People v Thomas*, 33 Mich App 664, 676; 190 NW2d 250 (1971), "[a] client who attacks the adequacy of the representation he received at his trial waives the attorney-client privilege *to the extent necessary to permit an inquiry concerning the adequacy of his representation*." (Emphasis added.) Accordingly, although Cowhy waived his attorney-client privilege in the civil legal-malpractice lawsuit, he only did so to the extent necessary for the trial court *in the legal-malpractice lawsuit* to determine whether Hackett adequately represented him.[8]

Similarly, although Cowhy argued in his first appeal in this Court that Hackett provided ineffective assistance, Cowhy's claim only waived attorney-client privilege as it related to the claim of ineffective assistance. The prosecution's reliance on *Houston*, 448 Mich 312, is misplaced. In *Houston*, the defendant asserted at sentencing that his lawyer provided ineffective assistance, and in response the trial court directed the defendant's lawyer to answer questions regarding the

[8] Because Cowhy only waived attorney-client privilege in the legal-malpractice proceedings, the prosecution's argument that Cowhy is attempting to reassert privilege after waiving it is without merit. Cowhy did not waive attorney-client privilege in the pending criminal case.

assistance he provided to the defendant. *Id*. at 316, 330. Our Supreme Court held that a defendant could not simultaneously assert that his lawyer was ineffective and use attorney-client privilege to prevent his lawyer from rebutting the allegations. *Id*. at 333. In contrast, in this case, the allegations that Hackett provided ineffective assistance to Cowhy have been resolved and Hackett's testimony is no longer required to rebut Cowhy's assertion that he was ineffective in this case. Again, the waiver of privilege in the context of a claim against a defendant's lawyer does not amount to a waiver for all time and all purposes. It relates only to the specific claim of malpractice or ineffectiveness. Consequently, although Cowhy waived his attorney-client privilege in relation to his earlier appeal from the trial court's order denying his motion to withdraw his guilty plea, he has not waived his attorney-client privilege in the current proceedings, which are unrelated to the claim of ineffective assistance.

In sum, although Hackett's statements are not precluded by MRE 410, they are inadmissible because they are protected by attorney-client privilege. See *McLaughlin*, 258 Mich App at 652 n 7.

III. CONCLUSION

The trial court abused its discretion by excluding all of the statements challenged on appeal under MRE 410. Cowhy's statements in his affidavit are admissible. His statements to Niffeler, however, are protected by psychologist-patient privilege, and his statements to Hackett are protected by attorney-client privilege. Accordingly, we affirm the exclusion of the statements to Niffeler and Hackett, but we reverse the exclusion of the statements in Cowhy's affidavit.

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

FORT HOOD and SWARTZLE, JJ., concurred with M. J. KELLY, P.J.

In re WHITE, Minor

Docket No. 342771. Submitted October 2, 2019, at Detroit. Decided November 19, 2019, at 9:15 a.m.

Respondent pleaded no contest in the Oakland Circuit Court, Family Division, to unlawfully driving away an automobile, MCL 750.413, and driving while license suspended, MCL 257.904(1), in connection with his stealing of a Ford Escape owned by Christopher Giarmo. When the police recovered and returned the car to Giarmo, the key fob he kept in the center console was missing; the key fob was able to electronically lock, unlock, and start the vehicle and contained a separate key that could physically lock, unlock, and start the car. Giarmo paid $154 to have the vehicle professionally cleaned, removing fingerprint dust used by the police and the smell of smoke, and $98.88 to purchase a new key fob and to have the new key fob and the existing one in his possession reprogrammed. The newly programmed key fobs prevented an individual from using the missing key fob to electronically unlock or start the car, but the missing key could still be used to physically unlock and drive the car. Because Giarmo did not feel safe with the key not being returned, he obtained an estimate of $1,521.37 to replace the car's locks and ignition; Giarmo did not have the work performed on the car because his insurance company refused to reimburse him for that expense. Instead, because the car was worth less than what he owed for it, he turned the car into a dealership and leased a new vehicle. At the restitution hearing, the court, Victoria A. Valentine, J., ordered respondent to pay $1,774.25 in restitution to Giarmo; the ordered amount included the cost of professionally cleaning the car, the cost of the new key fob and the reprogramming of the two key fobs, and the cost of replacing the car's locks and ignition. With regard to the $1,521.37 cost of replacing the locks and ignition, the court reasoned that the cost was incurred in the fashion of Giarmo having to lease a new car. Respondent appealed by leave granted.

The Court of Appeals *held*:

MCL 712A.30 and MCL 712.31 authorize a trial court to order a juvenile offender to pay restitution to the victim of his or her

offense. The purpose of restitution is to allow crime victims to recoup losses suffered as a result of criminal conduct. The controlling factor in awarding restitution under MCL 712A.30 and MCL 712A.31 is the amount of a victim's loss, but restitution cannot be premised on the replacement value of damaged property or calculated on the basis of speculative or conjectural loss. Thus, the focus of a restitution award is not on what the defendant took but what a victim lost because of the defendant's criminal activity. Because a restitution award must include the cost required to put the victim back in the position he or she was in *before* the defendant caused the loss, the victim need not actually incur the expense of fixing damaged property for it to be included in the award; instead, the victim's restitution award should be calculated by determining whether the defendant's criminal activity reduced the fair market value of the victim's property—that is, whether the activity reduced the amount of money that a ready, willing, and able buyer would pay for the asset on the open market before and after the damage or loss—and the award must be supported by a reasonably certain factual foundation. In this case, respondent did not challenge the amount of restitution ordered for the costs associated with the key fobs and for the professional cleaning. And Giarmo did not have to install the new car locks and ignition to obtain an award of restitution for the loss resulting from the missing key. However, the court erred by calculating Giarmo's loss by relying on the cost to return the car to the condition it was in before the damage. Instead, Giarmo's loss should have been calculated on the basis of any reduction in fair market value that resulted from the missing key. Because petitioner failed to present evidence regarding the fair market value of his car when he turned it into the dealership and failed to present any evidence that the missing key reduced that value, the trial court erred by awarding Giarmo $1,521.37 for the lost key.

Restitution order vacated and case remanded for correction of the award.

RESTITUTION — JUVENILE CODE — CALCULATION OF RESTITUTION — REDUCTION IN FAIR MARKET VALUE OF VICTIM'S PROPERTY.

MCL 712A.30 and MCL 712.31 authorize a trial court to order a juvenile offender to pay restitution to the victim of his or her offense; the controlling factor in awarding restitution under those provisions is to determine the amount of the victim's loss; because a restitution award must include the cost required to put the victim back in the position he or she was in before the defendant caused the loss, the victim need not actually incur the expense of fixing damaged property for it to be included in the award; the

> victim's restitution award should be calculated by determining any reduction in the property's fair market value from the defendant's criminal activity—that is, the amount of money that a ready, willing, and able buyer would pay for the asset on the open market before and after the damage or loss (MCL 712A.1 *et seq*.).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Louis F. Meizlish*, Assistant Prosecuting Attorney, for petitioner.

Larry O. Smith for respondent.

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

K. F. KELLY. Respondent pleaded no contest and was adjudicated responsible for unlawfully driving away an automobile, MCL 750.413, and driving while license suspended, MCL 257.904(1). The trial court entered an order of disposition that placed respondent in Children's Village. After a hearing, respondent was ordered to pay a total of $1,774.25 in restitution. Respondent appeals by leave granted,[1] solely challenging the restitution order. We vacate the restitution order and remand for proceedings consistent with this opinion.

I. BASIC FACTS

On or about January 4, 2017, respondent stole a 2008 Ford Escape belonging to the victim, Christopher Giarmo, from his residence. The police returned Giarmo's vehicle to him five or six days after the theft. Giarmo kept his vehicle in "pristine" condition. When

[1] *In re R E White, II*, unpublished order of the Court of Appeals, entered August 9, 2018 (Docket No. 342771).

it was returned to him, the contents of the glove box were strewn about the vehicle, the interior smelled of smoke, the interior was coated in dust because of the police attempt to lift fingerprints, and an extra key fob kept hidden in a false bottom of the vehicle's center console was missing; the extra key fob was able to electronically lock, unlock, and start the vehicle and contained a separate key that could physically lock, unlock, and start the vehicle.

After his vehicle was returned, Giarmo paid $154 to have the vehicle professionally cleaned to remove the smell and the fingerprint dust. Additionally, he expended $98.88 to replace his car keys. This cost included the replacement of the electronic key fob that Giarmo had in his possession as well as the hidden key fob that was taken from the vehicle's center console. These new key fobs were the only keys programmed to *electronically* lock, unlock, and start Giarmo's vehicle. However, the missing key could still be used to *physically* lock, unlock, and start his vehicle. In order to prevent an individual from using the missing key to enter, start, and drive the vehicle away, Giarmo obtained an estimate of $1,521.37 to replace his vehicle's locks and ignition. Giarmo's insurance company refused to reimburse for this replacement because the cylinders were not damaged during the theft. Giarmo testified that he did not feel safe with the original key fob still missing.[2] He opined that he could not securely lock items in his vehicle and that someone could unlock the vehicle and lay in wait to prey upon his wife. Giarmo determined that his vehicle had an estimated value of $5500, but he still owed approximately $6,000

[2] On the record, counsel for respondent represented that she had inquired if respondent was aware of the location of the missing key fob, but he did not know what happened to it.

on the vehicle. Because it was not cost-effective to replace the vehicle's locks and ignition in light of the balance owed, Giarmo elected to turn his vehicle in to a dealership and lease a new vehicle. At the restitution hearing, the trial judge ordered respondent to pay $1,774.25 in restitution to Giarmo. This restitution payment included the costs of replacing the key fobs and the professional cleaning that were incurred, but also included the cost of replacing the locks and the ignition that had not been expended. The trial court justified "the additional amount of the $1,521.37 [in restitution] with regard to the cylinder repair that was incurred in the fashion of having to get a new car."

II. RESTITUTION AND APPLICABLE LAW

"Crime victims have a right to restitution under both the Michigan Constitution and Michigan statutory law." *People v Wahmhoff*, 319 Mich App 264, 269; 900 NW2d 364 (2017). "The purpose of restitution is to allow crime victims to recoup losses suffered as a result of criminal conduct." *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003) (quotation marks and citation omitted). Restitution is not designed to provide a windfall for crime victims, but was created to ensure that victims are made whole for their losses to the extent possible. *People v Corbin*, 312 Mich App 352, 370; 880 NW2d 2 (2015). The juvenile code, MCL 712A.30 and MCL 712A.31, utilizes the same statutory scheme for restitution that was delineated in the Crime Victim's Rights Act (CVRA), MCL 780.766 and MCL 780.767, and therefore, judicial interpretations of the CVRA may be applied to the corresponding provisions in the juvenile code. *In Re McEvoy*, 267 Mich App 55, 61-63; 704 NW2d 78 (2005).

"An order of restitution is generally reviewed for an abuse of discretion." *Id*. at 59. Although the trial court's calculation of a restitution amount is reviewed for an abuse of discretion, its factual findings are reviewed for clear error. *Corbin*, 312 Mich App at 361. "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). "When the question of restitution involves a matter of statutory interpretation, review de novo applies. Statutory interpretation is a question of law subject to a review de novo." *In re McEvoy*, 267 Mich App at 59. Furthermore, "[i]f the plain and ordinary meaning of the language is clear, judicial construction is normally neither permitted nor necessary. Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Id*. at 59-60 (quotation marks and citations omitted).

Under the juvenile code, MCL 712A.30 and MCL 712A.31, trial courts are authorized to order a juvenile to pay restitution. In relevant part, MCL 712A.30 states:

> (3) If a juvenile offense results in damage to or loss or destruction of property of a victim of the juvenile offense, or results in the seizure or impoundment of property of a victim of the juvenile offense, the order of restitution may require that the juvenile do 1 or more of the following, as applicable:
>
> (a) Return the property to the owner of the property or to a person designated by the owner.
>
> (b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the

value, determined as of the date the property is returned, of that property or any part of the property that is returned:

(*i*) The value of the property on the date of the damage, loss, or destruction.

(*ii*) The value of the property on the date of disposition.

(c) Pay the costs of the seizure or impoundment, or both.

(4) If a juvenile offense results in physical or psychological injury to a victim, the order of restitution may require that the juvenile do 1 or more of the following, as applicable:

(a) Pay an amount equal to the cost of actual medical and related professional services and devices relating to physical and psychological care.

(b) Pay an amount equal to the cost of actual physical and occupational therapy and rehabilitation.

(c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the juvenile offense.

(d) Pay an amount equal to the cost of psychological and medical treatment for members of the victim's family that has been incurred as a result of the juvenile offense.

In relevant part, MCL 712A.31 states:

(1) In determining the amount of restitution to order under section 30 of this chapter, the court shall consider the amount of the loss sustained by any victim as a result of the juvenile offense. . . .

* * *

(4) Any dispute as to the proper amount or type of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the juvenile offense shall be on the prosecuting attorney.

"The controlling factor with respect to determining the amount of restitution is the victim's loss," and a restitution award premised on the basis of the replacement value of damaged property is improper. *In re McEvoy*, 267 Mich App at 76-78. The statutes governing restitution permit an award for losses that are factually and proximately caused by the offender. *Wahmhoff*, 319 Mich App at 270. The restitution calculation cannot be premised on speculative or conjectural loss, but, rather, the evidence must support a reasonably certain factual foundation for the amount. *Id*.

In granting trial courts the authority to order restitution, "the Legislature has clearly manifested an intent to make victims of a crime as whole as they can fairly be made and to leave the determination of how best to do so to the trial court's discretion on the basis of the evidence presented" by the petitioner to prove the victim's loss. *People v Gubachy*, 272 Mich App 706, 713; 728 NW2d 891 (2006). When determining the amount of restitution to award a victim, "the focus is consistently not on what a defendant took, but what a victim lost because of the defendant's criminal activity." *Id*. The CVRA bases the value of property lost or damaged on its fair market value, MCL 780.766(3)(b), which this Court has defined as "the amount of money that a ready, willing, and able buyer would pay for the asset on the open market[.]" See *Wolfe-Haddad Estate v Oakland Co*, 272 Mich App 323, 325-326; 725 NW2d 80 (2006).

Furthermore, "[t]here is no requirement that [a respondent] personally benefitted to" the extent of the restitution awarded to the victim, "only that his [or her] criminal acts caused that amount of loss." *People v Lueth*, 253 Mich App 670, 692; 660 NW2d 322 (2002). Thus, compensating a victim for his or her loss encompasses more than simply returning lost or stolen prop-

erty. Rather, restitution can be awarded for other types of losses, such as compensation for the time it takes employees to take inventory and reequip trucks stolen by a defendant, *Gubachy*, 272 Mich App at 707, 713; lost profits, *People v Cross*, 281 Mich App 737, 738-739; 760 NW2d 314 (2008); or the value of time and resources spent investigating a fraudulent insurance claim, *People v Fawaz*, 299 Mich App 55, 66-67; 829 NW2d 259 (2012). A restitution award can also include interest. *People v Law*, 459 Mich 419, 423-428; 591 NW2d 20 (1999). Such forms of restitution are awarded to make victims as whole as they can be and to fully compensate them for their losses.

III. APPLICATION TO THE FACTS

Respondent argues that the trial court erred by ordering him to pay $1,521.37 to replace the locks and ignition of Giarmo's vehicle because Giarmo chose not to physically replace his vehicle's locks and ignition.[3] Because the trial court awarded $1,521.37 in restitution as a "fashioned" remedy for Giarmo's lease of a new vehicle and that amount was speculative with regard to the cost of leasing a new vehicle, we agree.

The trial court ordered respondent to pay $1,521.37 in restitution to Giarmo, in part, to compensate Giarmo for leasing a new vehicle on the basis of his feeling unsafe in his vehicle because of its missing key.[4]

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[3] Ultimately, at the restitution hearing and on appeal, respondent did not challenge the cost of replacing the key fobs and the cost of cleaning after it was discovered that the police report disclosed that fingerprinting of the vehicle occurred.

[4] Because petitioner failed to present any evidence that Giarmo received medical or psychological services related to the theft of his vehicle, the disputed amount of the restitution award could not be supported on this ground. See MCL 712A.30(4) (establishing that

Specifically, the trial court stated that it was "going to allow the additional amount of the $1,521.37 [in restitution] with regard to the cylinder repair that was incurred in the fashion of having to get a new car." Respondent's actions, however, did not force Giarmo to turn his vehicle in and lease a new vehicle. Rather, Giarmo conducted a cost-benefit analysis of the value of his vehicle and found that it was less than the debt owed without even considering the additional expense of replacing the locks and the ignition. As such, any restitution awarded solely to compensate Giarmo for leasing his new vehicle was an error of law and an abuse of discretion because it compensated Giarmo for replacing his vehicle, not for its loss in value. See *In re McEvoy*, 267 Mich App at 76-78 (holding that restitution awards should be premised on the loss of value, not the replacement cost).

Respondent argues that the trial court erred by awarding $1,521.37 in restitution to Giarmo because Giarmo did not actually pay to replace the locks and ignition in his vehicle. However, MCL 712A.30(3) and MCL 712A.31(1) and (4) do not consider whether a victim actually pays to return his or her stolen or damaged property to the condition it was in before it was stolen or damaged by a respondent. Rather, MCL 712A.30(3) and MCL 712A.31(1) and (4) only establish that a victim should be compensated for his or her loss on the basis of the evidence presented to the trial court. See MCL 712A.30(3); MCL 712A.31(1) and (4); *Gubachy*, 272 Mich App at 713. Such compensation follows the Legislature's intent that restitution should put the victim back in the position he or she was in

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restitution for psychological injuries is only permitted to compensate a victim for medical and professional services related to psychological care).

before a respondent caused the loss. See *Gubachy*, 272 Mich App at 713. As such, Giarmo was not required to incur the cost to replace the locks and ignition of his vehicle to obtain an award of restitution for any loss arising out of the missing key.

The trial court based its restitution award, in part, on the replacement cost. The value of a victim's loss due to damaged property, however, is not based on the cost to repair it or to return it to the condition it was in before the damage. Rather, the value of a victim's loss due to damaged property is based on the decrease in the property's fair market value due to the damage. See MCL 712A.30(3)(b); MCL 780.766(3)(b); *Wolfe-Haddad*, 272 Mich App at 325-326. Petitioner presented evidence that the Kelley Blue Book value of a "pristine" 2008 Ford Escape, like Giarmo's vehicle, was $5,500, but petitioner failed to present evidence showing the fair market value of Giarmo's vehicle when he turned it over to the dealer and whether its fair market value decreased because the missing key could physically unlock and start it. Thus, petitioner failed to meet its burden to show that Giarmo was entitled to $1,521.37 in restitution because the amount was speculative with regard to any reduction in the value of his vehicle when it was turned in to the dealer without replacement of the locks and ignition in exchange for a leased vehicle. Accordingly, Giarmo was not entitled to $1,521.37 in restitution.

Vacated and remanded for correction of the restitution award. We do not retain jurisdiction.

RIORDAN, P.J., and CAMERON, J., concurred with K. F. KELLY, J.

Le GASSICK v UNIVERSITY OF MICHIGAN REGENTS

Docket No. 344971. Submitted November 8, 2019, at Lansing. Decided November 19, 2019, at 9:20 a.m. Leave to appeal denied 506 Mich 923 (2020).

Trevor Le Gassick, as trustee of the James A. Bellamy Trust and as personal representative of Bellamy's estate, brought an action in the Washtenaw Circuit Court against the University of Michigan Regents and Andrew D. Martin, alleging that defendants failed to use funds that Bellamy had given to the University of Michigan in accordance with the terms of a gift agreement between Bellamy and the university. Bellamy, a recognized expert in classical Arabic literature who worked at the university from 1959 to 1995, had executed a trust that directed plaintiff to distribute to the university the amount necessary to endow a full professorship named after Bellamy in the field of medieval classical Arabic literature. Bellamy also directed the distribution of at least $300,000 directly to plaintiff, with any remaining sums split between providing fellowship support for graduate students studying with the holder of the professorship and the American Oriental Society. The gift agreement provided that the Dean of the College of Literature, Science, and the Arts (defendant Martin) was responsible for carrying out the intended purpose of the fund and excess amount; the gift agreement further provided that the university was required to loyally honor Bellamy's wishes. Bellamy died in 2015, and in 2016, plaintiff distributed —and the university accepted—a total of $3.5 million from Bellamy's trust. The receipt acknowledged that the funds were to endow a "full" professorship in the "field of medieval classical Arabic literature." In December 2017, the university appointed a professor to the position who was only an associate professor and who specialized in late medieval Arabic literature, a period different than the specialty Bellamy had taught. Plaintiff filed the instant suit, alleging that the university did not loyally honor Bellamy's wishes as set forth in the gift agreement. Defendants moved for summary disposition, arguing that plaintiff lacked standing because the distribution of the $3.5 million created a separate charitable trust over which plaintiff was not the trustee. Plaintiff argued that although he was not the trustee of the resulting charitable trust, the "among others" language in

MCL 700.7405(3) did, in fact, confer him standing. Following oral argument, the probate court, Julia B. Owdziej, J., granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 700.8201(2)(c) of the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., provides that the MTC was created to foster certainty that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust. Under MCL 700.7801, a trustee must administer the trust in good faith and in accordance with its terms and purposes. Furthermore, under MCL 700.7817(e), a trustee must satisfy charitable pledges if in the trustee's judgment the settlor would have wanted the pledge completed under the circumstances. Finally, under MCL 700.7817(x), the trustee has an obligation to prosecute a claim in the performance of the trustee's duties. In this case, plaintiff had standing to challenge the charitable distribution to the university when defendants purportedly failed to satisfy the purpose and terms of Bellamy's trust and gift agreement. Bellamy expressed his wishes to fund a full professorship in his field and student fellowship support for graduate students, as reflected in the gift agreement. Plaintiff, as the trustee, had an obligation to administer the trust in good faith and in accordance with its terms and purposes; therefore, upon learning that the university did not execute Bellamy's intent as expressed in the gift agreement, plaintiff had the right and obligation to file suit to ensure that Bellamy's instructions pertaining to the trust were followed. Accordingly, the trial court improperly granted summary disposition in favor of defendants.

2. MCL 700.7405 governs charitable trusts and their enforcement. Under MCL 700.7405(3), the settlor, a named beneficiary, or the attorney general of Michigan, among others, may maintain a proceeding to enforce a charitable trust. In this case, defendants argued that plaintiff was not the trustee or the settlor of the charitable trust because once the distribution occurred, a charitable trust was created with the university serving as trustee. However, while plaintiff was not the trustee or settlor of the charitable trust, plaintiff fell within the category of "among others" in MCL 700.7405(3) and therefore was able to maintain a proceeding to enforce the trust. The "among others" language of MCL 700.7405(3)—interpreted in accordance with the purpose of the MTC, the powers of the trustee, and the trustee's obligation to facilitate the intentions of the original settlor, Bellamy—gave plaintiff the authority to maintain a proceeding to enforce the charitable trust. This conclusion was consistent with the Report-

ers' Commentary to the Estates and Protected Individuals Code, which outlines factors for determining whether an individual falls within the "among others" category of persons that may challenge a charitable trust. Accordingly, in light of the extraordinary amount of the transfer, the allegation that the settlor of the charitable trust made little to no effort to ensure compliance with Bellamy's wishes, and the deprivation of the intended benefit to the Arabic studies field, plaintiff could maintain an action against the charitable trust.

Reversed and remanded.

Warner Norcross + Judd LLP (by *Laura E. Morris*, *Conor B. Dugan*, and *Zainab S. Hazimi*) for plaintiff.

Miller Canfield Paddock & Stone PLC (by *Thomas C. O'Brien*, *Gerald L. Gleeson II*, *Stephen C. Rohr*, and *James L. Woolard, Jr.*) for defendants.

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

PER CURIAM. Plaintiff, Trevor Le Gassick, as trustee of the James A. Bellamy Trust and as personal representative of the estate of James A. Bellamy, appeals as of right the trial court's order granting summary disposition to defendants, the University of Michigan Regents and Andrew D. Martin, by holding that plaintiff did not have standing to challenge defendants' compliance with the terms of the trust distribution to the University of Michigan. For the reasons stated below, we reverse.

I. BASIC FACTS[1]

Professor James A. Bellamy, a recognized expert in classical Arabic literature, joined the Department of

[1] We summarize the allegations in the complaint to provide a context for the purpose of the trust and the disposition of the issues and do not render factual findings regarding the validity of the allegations.

Near Eastern Studies at the University of Michigan (the University) as an instructor in 1959 and became a full professor in 1968. Professor Bellamy held the title of Professor of Arabic Papyrology until his retirement in 1995. Classical Arabic literature "refers to writings in Arabic from the early Christian era to some hundreds of years thereafter" and "captures ancient Arabic inscriptions, papyri, manuscripts, and textual issues relating to the Qur'an and pre-Islamic poetry." Plaintiff joined the Department of Near Eastern Studies at the University in 1966, specializing in Arabic studies.

On August 6, 1998, after his retirement, Professor Bellamy executed an estate plan establishing the Bellamy Trust and a pour-over will, which he subsequently amended on several occasions. On August 5, 2011, by operation of the second amendment of the trust, plaintiff began serving as cotrustee along with Professor Bellamy. On September 23, 2011, Professor Bellamy executed a third amendment, directing the trustee to distribute to the University the amount necessary "to endow a full professorship, named after the Grantor, in the field of medieval classical Arabic literature" as further set forth in any then-existing gift agreement between the University and the Grantor. Professor Bellamy also directed the distribution of at least $300,000 directly to plaintiff, with any remaining sums split between "provid[ing] fellowship support for graduate students studying with the holder of the James A. Bellamy professorship," as further set forth in any then-existing gift agreement, and the American Oriental Society.

According to the complaint, Professor Bellamy allegedly "had a desire to gift a substantial portion of his money at his death to the University if used by the University to continue his work" and "regularly talked

to Plaintiff as his friend and colleague regarding his gifting intentions." In 2011, with the aid of counsel, Professor Bellamy entered into negotiations with the University and, on October 13, 2011, agreed to execute a gift agreement (the Gift Agreement). The Gift Agreement provided material terms that the funds were to be used for a "medieval classical Arabic literature" professorship and, if there was no one qualified in the University, that the University was required to hire an outside applicant. The Gift Agreement provided that the Dean of the College of Literature, Science, and the Arts (currently defendant Andrew D. Martin) "shall be responsible for carrying out the intended purpose of the Fund and excess amount" and the University was required to loyally honor Professor Bellamy's wishes.

Professor Samer Mahdy Ali joined the Department of Near Eastern Studies in 2014. Plaintiff alleged that Professor Ali specialized in *late* medieval Arabic literature, a period "starkly different" from the classical specialty taught by Professor Bellamy. In 2015, Professor Ali was appointed associate, not full professor. Further, he purportedly acknowledged that he was not an expert in classical Arabic literature and "that his main interest has been and will continue to be in late medieval Arabic literature (the post mid-'Abbasid period)."

Professor Bellamy died on July 21, 2015, at the age of 89. In addition to being Professor Bellamy's colleague, friend, and cotrustee, plaintiff also served as personal representative of Professor Bellamy's estate. In February 2016, plaintiff, as trustee, distributed—and the University accepted—$2,500,000 from the Bellamy Trust pursuant to the Gift Agreement, as evidenced by a receipt. The receipt acknowledged that the funds were to endow a "full" professorship in the

"field of medieval classical Arabic literature." On July 7, 2016, the University acknowledged receipt of an additional distribution of $1,000,000 for funding the graduate student fellowship support for the holder of the professorship.

On December 11, 2017, the University announced the appointment of Professor Ali to Professor Bellamy's position. Plaintiff maintained that Professor Ali was "not qualified to teach classical Arabic literature at the University" and, in any event, was not a full professor. Plaintiff contended that the University was required to conduct a search for a properly qualified professor to fill the position, which it failed to do. When the University initially posted the Bellamy position, it did not adhere to the Gift Agreement requirements for a "full" professorship in "medieval classical Arabic literature" but rather merely sought an associate professor in "Pre-Modern Arabic Culture." Consequently, plaintiff allegedly objected to the accuracy of the posting in light of the requirements of the Gift Agreement. Thereafter, the University withdrew the posting and instead announced the appointment of Professor Ali.

On April 23, 2018, plaintiff filed suit, alleging (1) breach of contract, namely the University's failure to use the funds consistent with the terms of the Gift Agreement, and seeking damages or specific performance; (2) breach of fiduciary duty on account of the University's failure, as trustee of the charitable trust established by Professor Bellamy's gift, to comply with the terms and conditions of the resulting charitable trust; (3) violation of the Uniform Prudent Management of Institutional Funds Act, MCL 451.921 *et seq*.; and (4) the need for injunctive relief prohibiting the dissipation of funds during the pendency of the case. In support of the claims, plaintiff alleged that the Univer-

sity hired Professor Ali in 2015. However, after Professor Bellamy's death, the University did not appoint Professor Ali to the Bellamy professorship. Additionally, when the University received the trust funds for the charitable trust in 2016, Professor Ali was not appointed to the position. Plaintiff asserted that, on the day Professor Ali's appointment was announced, "the Department Chair said in Plaintiff's presence and the presence of others in the Department that the motive behind Professor Ali's appointment was to alleviate Department budget issues by having the [Bellamy] Trust rather than the Department budget pay Professor Ali's salary." The complaint proffered that the University did not loyally honor Professor Bellamy's wishes as set forth in the Gift Agreement and provided statements by several other Arabist professors at the University agreeing that Professor Ali was not qualified for the position. Instead, it was alleged that the University sought to move away from teaching classical Arabic literature and place Professor Bellamy's trust funds in a general fund to support areas of teaching and research other than those specifically directed by Professor Bellamy in the Gift Agreement and contrary to the intent of the bequest.

On June 12, 2018, defendants moved for summary disposition, arguing that plaintiff lacked standing. Defendants maintained that the distribution of the $3,500,000 created a separate charitable trust over which plaintiff was not the trustee. They also submitted that MCL 700.7405(3) applied, limiting enforcement of the resulting charitable trust to the Attorney General and the University. In response, plaintiff argued that, although he was not the trustee of the resulting charitable trust, the "among others" language in MCL 700.7405(3) did, in fact, confer him standing as a person possessing a special interest in its

enforcement. Additionally, MCL 700.7405(3) did not apply to the extent (1) that plaintiff sought the probate court's involvement concerning the possible nondistribution of unallocated Bellamy Trust funds, and (2) that, as personal representative, plaintiff could nevertheless file suit on behalf of the estate seeking damages for the breach of the Gift Agreement.

After oral argument, the probate court held that, under MCL 700.7405(3), the right of a settlor to enforce the terms of a charitable trust is personal to the settlor and cannot be exercised by the settlor's fiduciary. Without any analysis, the probate court concluded that plaintiff did not have any special interest in enforcing the terms of the charitable trust. The probate court did not address plaintiff's argument that, as personal representative, he could independently bring suit for breach of the Gift Agreement on behalf of Professor Bellamy's estate. It also did not address the potential nondistribution of any residual Bellamy Trust funds. Plaintiff now appeals.

II. APPLICABLE LAW

"A decision on a motion for summary disposition and the interpretation of a statute are reviewed de novo."[2]

[2] Defendants moved for summary disposition pursuant to MCR 2.116(C)(5) and alleged that plaintiff did not have standing to pursue the litigation. Summary disposition is appropriate pursuant to MCR 2.116(C)(5) when the "party asserting the claim lacks the legal capacity to sue." However, the doctrine of standing is distinct from the capacity to sue, although the concepts are frequently conflated by parties. See *Flint Cold Storage v Dep't of Treasury*, 285 Mich App 483, 502; 776 NW2d 387 (2009). Even if the trial court grants summary disposition pursuant to the wrong subrule, we may review the issue in light of the correct subrule. *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 313; 696 NW2d 49 (2005). A motion for summary disposition premised on the doctrine of standing as a defense may be

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

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proper pursuant to MCR 2.116(C)(8) or MCR 2.116(C)(10) contingent upon the pleadings or other circumstances of the particular case. *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No. 2*, 309 Mich App 611, 620-621; 873 NW2d 783 (2015). Because the parties presented documentary evidence outside the pleadings, including the trust and Gift Agreement documents, and because the propriety of the distribution in accordance with the settlor's wishes is the subject of the litigation, we treat the motion as having been granted pursuant to MCR 2.116(C)(10). See *Mino v Clio Sch Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003).

implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used." *Frost-Pack Distrib Co v Grand Rapids*, 399 Mich 664, 683; 252 NW2d 747 (1977).

The proper construction of a trust also presents a question of law subject to de novo review. *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019). When interpreting trust language, the court's goal is to determine and give effect to the trustor's intent. *Id*. Interpretation begins with an examination of the trust language, and if there is no ambiguity, the trust terms are interpreted according to the plain and ordinary meaning. *Id*.

III. TRUST LAW AND STANDING

The Michigan Trust Code (MTC), MCL 700.7101 *et seq*.,[3] "shall be construed and applied to promote its underlying purposes and policies." MCL 700.8201(1).

> (2) The following are the underlying purposes and policies of [the MTC]:
>
> (a) To make more comprehensive and to clarify the law governing trusts in this state.
>
> (b) To permit the continued expansion and development of trust practices through custom, usage, and agreement of the parties.
>
> (c) To foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust. [MCL 700.8201(2).]

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[3] The Estates and Protected Individuals Code (EPIC) became effective April 1, 2000. MCL 700.8101. The Michigan Trust Code became effective April 1, 2010, and is also referred to as Article VII of EPIC. MCL 700.8204; see also *Indep Bank v Hammel Assoc, LLC*, 301 Mich App 502, 509; 836 NW2d 737 (2013).

"It is a general principle of trust law that a trust is created only if the settlor manifests an intention to create a trust, and it is essential that there be an explicit declaration of trust accompanied by a transfer of property to one for the benefit of another." *Osius v Dingell*, 375 Mich 605, 613; 134 NW2d 657 (1965).[4] The settlor must have the capacity to create a trust and must indicate an intention to create the trust. MCL 700.7402(1)(a) and (b). The trust must have a definite beneficiary, or is a charitable trust or a trust for a noncharitable purpose. MCL 700.7402(1)(c). The trustee "shall administer the trust in good faith, expeditiously, in accordance with its terms and purposes, for the benefit of the trust beneficiaries . . . ." MCL 700.7801; see also *In re Pollack Trust*, 309 Mich App 125, 156; 867 NW2d 884 (2015). The trustee has the following general powers:

> (1) A trustee, without authorization by the court, may exercise all of the following:
>
> (a) Powers conferred by the terms of the trust.
>
> (b) Except as limited by the terms of the trust, all of the following:
>
> (*i*) All powers over the trust property that an unmarried competent owner has over individually owned property.
>
> (*ii*) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property.
>
> (*iii*) Any other powers conferred by this article.
>
> (2) The exercise of a power is subject to the fiduciary duties prescribed by this article. [MCL 700.7816.]

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[4] The property or an interest in the property need not be transferred concurrently with the signing of the instrument to be valid. MCL 700.7401(2).

In addition to the general powers delineated above, the trustee also has specific powers as set forth in MCL 700.7817, which provides, in relevant part:

> Without limiting the authority conferred by [MCL 700.7816], a trustee has all of the following powers:
>
> * * *
>
> (e) To satisfy a settlor's written charitable pledge irrespective of whether the pledge constitutes a binding obligation of the settlor or was properly presented as a claim, if in the trustee's judgment the settlor would have wanted the pledge completed under the circumstances.
>
> * * *
>
> (x) To prosecute, defend, arbitrate, settle, release, compromise, or agree to indemnify an action, claim, or proceeding in any jurisdiction or under an alternative dispute resolution procedure. The trustee may act under this subdivision for the trustee's protection in the performance of the trustee's duties.

In light of the above statutory provisions, we conclude that plaintiff had standing to challenge the charitable distribution to the University when defendants purportedly failed to satisfy the purpose and terms of the Bellamy Trust and the Gift Agreement. Professor Bellamy attained international recognition in the field of medieval classical Arabic literature. Specifically, he was called upon to decipher and translate "the Paris Louvre Namara inscription of 328 A.D." as well as interpret and explain passages in the Qur'an, particularly addressing mysterious letters that preceded some of the chapters. Consequently, Professor Bellamy sought to ensure that his work would continue and deemed his particular field of Arabic studies necessary to a world-class university program. In conjunction

with that belief, he created a trust and pour-over will to effectuate the continuation of his work. Indeed, his charitable contribution expressed his wishes as reflected in the Gift Agreement to fund a full professorship in his field as well as student fellowship. The MTC was created to foster certainty "that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c). Further, plaintiff, as the trustee, had to administer the trust in good faith, in accordance with its terms and purposes, MCL 700.7801, had to satisfy charitable pledges "if in the trustee's judgment the settlor would have wanted the pledge completed under the circumstances," MCL 700.7817(e), and had the obligation to prosecute a claim in the performance of the trustee's duties, MCL 700.7817(x).

Furthermore, we note that general principles of standing are applicable to trusts. In *In re Pollack Trust*,[5] this Court adopted the following standing principles:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is

[5] The *Pollack* Court adopted the standing principles delineated in *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). The *Pollack* Court also noted that although the parties did not contest the standing to oppose the petition to modify the trust, it addressed the issue of standing for purposes of completeness. The Court stated that "trustees have a special right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large." *In re Pollack Trust*, 309 Mich App at 155. Although this portion of the Court's opinion is arguably obiter dicta, we adopt this reasoning as our own. See *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76, 86 n 7; 910 NW2d 691 (2017).

> sufficient to establish standing to seek a declaratory judgment. Where 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." [*In re Pollack Trust*, 309 Mich App at 155, quoting *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).]

In the present case, plaintiff as the trustee and personal representative of the Bellamy Trust had an obligation to administer the trust in good faith, in accordance with its terms and purposes, MCL 700.7801, and upon learning that the University did not execute Professor Bellamy's intent as expressed in the distribution terms of the Gift Agreement, plaintiff had the right and obligation to file suit, MCL 700.7817(x), to ensure that the settlor's instructions pertaining to the trust were followed, MCL 700.8201(2). Thus, the trustee learned of an injury, and the trust distribution "detrimentally affected" the trust and its beneficiaries in a manner different from the citizenry at large. *In re Pollack Trust*, 309 Mich App at 155. In addition to statutory trust law, the trial court improperly granted summary disposition in favor of defendants in light of general standing principles.

IV. CHARITABLE TRUSTS AND STANDING

Defendants nonetheless assert that once the distribution occurred, a charitable trust was established with the University serving as the trustee and, therefore, plaintiff lacked standing to enforce the charitable trust pursuant to MCL 700.7405. Indeed, MCL 700.7405 governs charitable trusts and enforcement and provides:

> (1) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, any purpose described in section 501(c)(3) of the internal revenue code, 26 USC 501, or other purposes the achievement of which is beneficial to the community.
>
> (2) If the terms of a charitable trust do not identify a particular charitable purpose or beneficiary, the court may select 1 or more charitable purposes or beneficiaries. The selection shall be consistent with the settlor's intention to the extent it can be ascertained.
>
> (3) The settlor, a named beneficiary, or the attorney general of this state, among others, may maintain a proceeding to enforce a charitable trust. The right of the settlor of a charitable trust to enforce the trust is personal to the settlor and may not be exercised by any of the following:
>
> (a) The settlor's heirs, assigns, or beneficiaries.
>
> (b) The settlor's fiduciary, other than the trustee of the charitable trust the enforcement of which is being sought.
>
> (c) An agent of the settlor acting pursuant to a durable power of attorney, unless the right to enforce the trust is expressly conferred on the agent by the power of attorney.

Pursuant to MCL 700.7405(3), "[t]he settlor, a named beneficiary, or the attorney general of this state, among others, may maintain a proceeding to enforce a charitable trust." Defendants contend that plaintiff is not the trustee or the settlor of the charitable trust, as he concedes, and therefore, plaintiff does not fall within the narrow category of "others," thereby precluding this suit. On the latter point, we disagree.

MCL 700.7405 has not been construed by this Court, although it was first enacted by the Legislature in 2010 and is based on the Uniform Trust Code, § 405. See Martin & Harder, Estates and Protected Individuals Code with Reporters' Commentary (ICLE,

February 2019 update), p 552. Accordingly, we consider whether plaintiff may be considered within the category of "among others" to maintain a proceeding to enforce a charitable trust.

As noted, in giving effect to every word, phrase, and clause in a statute, and avoiding interpretations rendering any part of the statute surplusage or nugatory, this Court gives undefined statutory terms their plain and ordinary meanings. *South Dearborn*, 502 Mich at 361. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "other" as "a different or additional one." It defines "among" as "in the number or class of." *Id*. From these definitions, it is evident that the phrase "among others" refers to persons other than the Attorney General, the settlor, or the beneficiaries of the charitable trust, as the statutory text names those persons explicitly. Therefore, defendants' attempt to limit charitable-trust enforcement to those persons is without merit. However, although the plain text of the statute unequivocally recognizes that additional persons may validly seek to enforce a charitable trust, it provides no further guidance addressing whom those additional persons might be.

To determine which individuals qualify as "among others," we interpret the statute in accordance with its plain language, to give effect to the intent of the Legislature. *South Dearborn*, 502 Mich at 360-361; *Briggs Tax Serv, LLC*, 485 Mich at 76. We may not choose any rational construction but "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*, 399 Mich at 683. Prudently, in this instance, the Legislature clearly expressed that the purpose of the MTC was to "foster certainty in the law so that settlors of trusts will have

confidence that their instructions will be carried out as expressed in the terms of the trust." MCL 700.8201(2)(c). We acknowledge that plaintiff is not the settlor or trustee of the charitable trust despite its creation through the Bellamy Trust and Gift Agreement. Nonetheless, the "among others" language of MCL 700.7405(3)—interpreted in accordance with the purpose of the MTC, the powers of the trustee, and the trustee's obligation to facilitate the intentions of the original settlor, Professor Bellamy—grants plaintiff the authority to maintain a proceeding to enforce the charitable trust to ensure that the distribution occurs in accordance with Professor Bellamy's wishes.

Although we render this holding by examination of the plain language of the statute, its purpose, and the powers and authority of the trustee, we note that our conclusion is further buttressed by the Reporters' Commentary to the Estates and Protected Individuals Code. See *In re Lundy Estate*, 291 Mich App 347, 355; 804 NW2d 773 (2011). The Reporters' Commentary explains that

> [t]he inclusion of the phrase "among others" in subsection (3) is intended to recognize the rights of persons with a special interest in the trust to enforce the trust. Notwithstanding the seeming breadth of this provision, it is not an invitation to any member of the public or anyone conceivably affected by the trust to bring suit. [Martin & Harder, p 553.]

Rather, "more than a mere allegation of the possession of a special interest is required before standing to enforce a charitable trust will be found by the courts," and the courts must "evaluate each circumstance and determine whether the party alleging possession of a special interest in fact has a sufficient special interest to pursue the case." *Id*. The Reporters' Commentary sets

forth possible factors relevant to establishing a special interest:

> In general, the plaintiffs must be identifiable beneficiaries or potential beneficiaries in the organization. The plaintiffs must have a specific interest that will be directly affected by the charity's failure to carry out its purpose or by a breach of fiduciary duties. The plaintiff must be a member of an identifiable class of beneficiaries of the charity and not merely a member of the general public who is concerned that the charity be run properly. Courts have been willing to let such beneficiaries sue the charity to protect the "special interest" in a manner analogous to a suit by a beneficiary of a private trust, but the remedy sought must be a benefit to the charity itself and not money damages for the plaintiffs. [*Id*. (quotation marks and citation omitted).]

The Reporters' Commentary lists factors that may be most likely to cause a court to grant standing to private persons as follows:

> (a) the extraordinary nature of the acts complained of and the remedy sought by the plaintiff; (b) the presence of fraud or misconduct on the part of the charity or its directors; (c) the state attorney general's availability or effectiveness; and (d) the nature of the benefitted class and its relationship to the charity. [*Id*. at 554 (quotation marks and citation omitted).]

The Reporters' Commentary provides guidance regarding the factors that allow an individual to qualify as "among others" to challenge a charitable trust. Applying those factors to the present case, we also conclude that plaintiff has standing because he is "among others" entitled to challenge the charitable trust. Plaintiff alleged that Professor Bellamy sought to continue his work through the creation of the Bellamy Trust and Gift Agreement by funding a full professorship in his area of expertise. Although $3,500,000 was transferred to the University to fulfill Professor Bellamy's wishes, plaintiff alleged that de-

fendants did not comply with the terms but appointed an associate professor of a different specialty. Thus, plaintiff, as trustee and personal representative, distributed funds in accordance with his obligations but nonetheless had to ensure that the distribution met the terms of the Gift Agreement. In light of the extraordinary amount of the transfer, the allegation that the beneficiary of the charitable trust made little to no effort to ensure compliance with Professor Bellamy's wishes, and the Arabic studies field that was deprived of the benefit, an action may be maintained against the charitable trust by plaintiff. Indeed, a settlor would have little incentive to create and distribute funds to a charitable trust with specific instructions when no enforcement mechanism is available to protect the settlor's intent.

In summary, we conclude that the purpose of the MTC, the trustee's power to prosecute and enforce the trust, and the general rules of standing allow plaintiff to proceed with this litigation. Further, the involvement of a charitable trust and the limitations on enforcement found in MCL 700.7405(3) cannot preclude this litigation particularly where plaintiff has a specific interest and falls within the category of "among others" that may challenge the trust.[6] Accordingly, the trial court improperly concluded that plaintiff lacked standing; summary disposition was improperly granted to defendants.

Reversed and remanded. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219(A).

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

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[6] In light of our holding, we do not address plaintiff's contention that he has standing pursuant to contractual rights.

JOHNSON v VANDERKOOI (ON REMAND)
HARRISON v VANDERKOOI (ON REMAND)

Docket Nos. 330536 and 330537. Resubmitted August 22, 2018, at Lansing. Decided November 21, 2019, at 9:00 a.m. Leave to appeal granted 507 Mich 880 (2021).

In Docket No. 330536, Denishio Johnson filed an action in the Kent Circuit Court against Captain Curtis VanderKooi and Officer Elliott Bargas of the Grand Rapids Police Department (GRPD) and against the city of Grand Rapids, asserting claims under 42 USC 1981 and 42 USC 1983 in connection with alleged violations of his constitutional rights. In 2011, the GRPD investigated a complaint that a person, eventually identified as Johnson, was looking into vehicles in a parking lot where there had been recent thefts from automobiles. After GRPD officers stopped Johnson in the parking lot and were unable to confirm his identity or age, Bargas photographed and fingerprinted Johnson in accordance with the city's photograph and print (P&P) procedure; VanderKooi, who arrived at the scene during the process, approved Bargas's actions. The GRPD regularly used the procedure to gather identifying information about individuals during the course of a field interrogation or a field stop when the officer deemed it appropriate based on the facts and circumstances of that incident. Johnson was ultimately released and not charged with a crime. VanderKooi, Bargas, and the city moved for summary disposition. The court, George J. Quist, J., granted VanderKooi's and Bargas's motions for summary disposition of Johnson's § 1981 and § 1983 claims and also granted the city's motion for summary disposition, holding that Johnson had failed to establish that the P&P procedure was unconstitutional on its face or as applied. The court also granted the individual defendants' motions for summary disposition of Johnson's unreasonable-search-and-seizure claim under the Fourth Amendment, reasoning that Johnson had no expectation of privacy in his physical features that were readily observable by the public, that Bargas's actions were reasonable given the circumstances, and that Johnson had failed to establish that VanderKooi directed Bargas's actions. Johnson appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed the trial court's orders. 319 Mich App 589 (2017).

In Docket No. 330537, Keyon Harrison brought a separate action in the Kent Circuit Court against VanderKooi and the city. Harrison asserted claims under 42 USC 1981, 42 USC 1983, and 42 USC 1988, alleging violations of his constitutional rights. In 2012, VanderKooi became suspicious, followed, and confronted Harrison after he saw Harrison give someone a large model train engine. Because he was still suspicious after speaking with Harrison, VanderKooi had another officer come to the scene and perform a P&P on Harrison; Harrison was released and was not charged with a crime. VanderKooi and the city moved for summary disposition; the court, George J. Quist, J., granted the motion, holding that Harrison had not shown that the P&P procedure was unconstitutional. Harrison appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed the order in an unpublished per curiam opinion issued May 23, 2017 (Docket No. 330537).

Johnson and Harrison (collectively, plaintiffs) both argued that the city had a policy or custom of performing P&Ps during investigatory stops based on reasonable suspicion of criminal conduct—that is, without probable cause—and that execution of the policy or custom constituted a search and seizure in violation of their Fourth Amendment rights. In both cases, the Court of Appeals reasoned that the city was not liable under a theory of municipal liability because neither plaintiff had demonstrated that any alleged constitutional violation resulted from a municipal policy or a custom that was so persistent and widespread as to practically have the force of law. Given that conclusion, the Court of Appeals did not reach the issue of whether the P&Ps in these cases violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. Plaintiffs filed a joint application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action, directing the parties to address whether any alleged violations of plaintiffs' constitutional rights were the result of a policy or custom instituted or executed by the city. 501 Mich 954 (2018). In lieu of granting leave to appeal, the Supreme Court held that the Court of Appeals erred by affirming the trial court's orders granting summary disposition in favor of the city based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the city; accordingly, the Supreme Court reversed Part III of the Court of Appeals' judgments and remanded the cases to the Court of Appeals to determine whether the P&Ps at issue violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures. 502 Mich 751 (2018).

On remand, the Court of Appeals *held*:

1. A local governmental entity violates § 1983 when its official policy or custom actually serves to deprive an individual of his or her constitutional rights. The custom or policy can be unconstitutional in two ways: (1) facially unconstitutional as written or articulated or (2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. A facially unconstitutional custom or policy is one that may not be applied constitutionally in any circumstance. In this case, because plaintiffs framed the alleged constitutional infirmity as the city authorizing the use of P&Ps in the absence of probable cause, plaintiffs only asserted that the policy or custom was facially unconstitutional.

2. The Fourth Amendment of the United States Constitution guarantees people the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. In general, seizure requires probable cause. However, under *Terry v Ohio*, 392 US 1 (1968), the police may briefly detain a person during an investigatory stop based on a reasonable suspicion that criminal activity has occurred. The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a reasonably articulable suspicion that the person is engaging in criminal activity. A person detained during a valid *Terry* stop retains the Fourth Amendment protection against unreasonable searches. While the United States Supreme Court has never explicitly decided whether the act of the police taking a person's fingerprints or photographs is a search for purposes of the Fourth Amendment, it has suggested that obtaining fingerprints during a *Terry* stop may be permissible in certain circumstances. What a person knowingly exposes to the public, even in his or her own home or office, is not subject to Fourth Amendment protections. As a result, the taking of an individual's voice exemplar or handwriting sample does not constitute a search for purposes of the Fourth Amendment because those items are constantly exposed to the public; a photograph of a person that captures the person's physical appearance and a person's fingerprints are similarly things that a person knowingly exposes to the public on a regular basis, the taking of which does not violate the Fourth Amendment when taken during a *Terry* stop. In this case, consistent with federal caselaw and binding decisions of the Court of Appeals—in particular, *Nuriel v Young Women's Christian Ass'n*, 186 Mich App 141 (1990)—the P&P policy did not violate the Fourth Amendment protection against unreasonable searches. The Court's holding in *Nuriel*, which

stated that the taking of fingerprints in that case could not violate the Fourth Amendment because a person does not have a reasonable expectation of privacy in his or her fingerprints, was binding precedent. Even if the constitutional analysis in *Nuriel* were dicta, the analysis was persuasive and applied to the P&P policy. For that reason, the fingerprint portion of the P&P procedure employed by defendants in both cases did not violate the Fourth Amendment; the procedure was a tool used by police during an investigation into potential criminal activity when the individual's identity could not be confirmed by other means. Safeguards existed in that the police only employed the P&P procedure without an individual's consent when the individual was searched during a valid *Terry* stop prompted by a reasonable suspicion of criminal activity. For the same reason, a search did not occur when plaintiffs' photographs were taken. Therefore, plaintiffs failed to demonstrate that the P&P policy was unconstitutional, and the trial court did not err by granting summary disposition in favor of the city.

3. Plaintiffs' supplemental authority was factually and legally distinguishable and was not binding on the Court.

Affirmed.

LETICA, J., concurring, reluctantly agreed with the majority's conclusion that under the federal and state caselaw cited by the majority photographing and fingerprinting were not searches under the Fourth Amendment. Judge LETICA would have reached a different result had she not been constrained by that caselaw, prior decisions of the Court of Appeals, and the plaintiffs' earlier framing of the case as solely a facial challenge to the P&P policy.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — INVESTIGATORY STOPS BASED ON REASONABLE SUSPICION OF CRIMINAL ACTIVITY — FINGERPRINTING AND PHOTOGRAPHING.

What a person knowingly exposes to the public, even in his or her home or office, is not subject to Fourth Amendment protections; the police action of obtaining both photographs and fingerprints when performing an investigatory stop based on a reasonable suspicion of criminal activity does not constitute a search under the Fourth Amendment of the United States Constitution.

The American Civil Liberties Union Fund of Michigan (by *Edward R. Becker*, *Margaret Curtiss Hannon*, *Miriam J. Aukerman*, *Michael J. Steinberg*, and *Daniel S. Korobkin*) for Denishio Johnson and Keyon Harris.

Kristen Rewa and *Elliot J. Gruszka* for Curtis VanaderKooi, Elliott Bargas, and the city of Grand Rapids.

ON REMAND

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

BOONSTRA, P.J. These consolidated appeals[1] are back before this Court on remand from our Supreme Court. The Supreme Court directed that we determine "whether [the challenged policies] violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Johnson v VanderKooi*, 502 Mich 751, 781; 918 NW2d 785 (2018). We conclude, under current caselaw, that they did not and that plaintiffs' Fourth Amendment rights were not violated by the on-site taking of photographs and fingerprints based on reasonable suspicion (i.e., during valid *Terry*[2] stops). We therefore affirm the trial court's orders granting summary disposition in favor of defendant city of Grand Rapids (the City) in these matters.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The facts underlying these appeals are set forth in detail in our previous opinions.[3] Our Supreme Court summarized the relevant underlying facts as follows:

> These consolidated cases arise from two separate incidents where plaintiffs were individually stopped and

[1] See *Johnson v VanderKooi*, unpublished order of the Court of Appeals, entered November 30, 2018 (Docket Nos. 330536 and 330537).

[2] *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[3] See *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017), rev'd in part 502 Mich 751 (2018); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537), rev'd in part 502 Mich 751 (2018).

questioned by Grand Rapids Police Department (GRPD) officers. During these stops, plaintiffs' photographs and fingerprints were taken in accordance with the GRPD's "photograph and print" (P&P) procedures. . . .

* * *

The P&Ps giving rise to these lawsuits took place during two separate incidents. At the time of the incidents, each GRPD patrol officer was assigned as a part of their standard equipment a camera, a fingerprinting kit, and GRPD "print cards" for storing an individual's copied fingerprints. Generally speaking, a P&P involved an officer's use of this equipment to take a person's photograph and fingerprints whenever an officer deemed the P&P necessary given the facts and circumstances. After a P&P was completed, the photographs were uploaded to a digital log. Completed print cards were collected and submitted to the Latent Print Unit. Latent print examiners then checked all the submitted fingerprints against the Kent County Correctional Facility database and the Automated Fingerprint Identification System. After being processed, the cards were filed and stored in a box according to their respective year.

The first incident giving rise to these lawsuits involved the field interrogation of plaintiff Denishio Johnson. On August 15, 2011, the GRPD received a tip that a young black male, later identified as Johnson, had been observed walking through an athletic club's parking lot and peering into vehicles. Officer Elliott Bargas responded to the tip and initiated contact with Johnson. Johnson, who had no identification, told Bargas that he was 15 years old, that he lived nearby, and that he used the parking lot as a shortcut. Bargas was skeptical of Johnson's story, and being aware of several prior thefts in and near the parking lot, he decided to perform a P&P to see if any witnesses or evidence would tie Johnson to those crimes. After Johnson's mother arrived and verified his name and age, Johnson was released. At some point during this process, Captain Curtis VanderKooi arrived and approved Bargas's actions. Johnson was never charged with a crime.

> The second event occurred on May 31, 2012, after VanderKooi observed Keyon Harrison, a young black male, walk up to another boy and hand him what VanderKooi believed was a large model train engine. Suspicious of the hand-off, VanderKooi followed Harrison to a park. After initiating contact, VanderKooi identified himself and questioned Harrison. Harrison, who had no identification, told VanderKooi that he had been returning the train engine, which he had used for a school project. VanderKooi, still suspicious, radioed in a request for another officer to come take Harrison's photograph. Sergeant Stephen LaBrecque arrived a short time later and performed a P&P on Harrison, despite being asked to take only a photograph. Harrison was released after his story was confirmed, and he was never charged with a crime.
>
> Johnson and Harrison subsequently filed separate lawsuits in the Kent Circuit Court, and the cases were assigned to the same judge. Plaintiffs argued, in part, that the officers and the City were liable pursuant to 42 USC 1983 for violating plaintiffs' Fourth and Fifth Amendment rights when the officers performed P&Ps without probable cause, lawful authority, or lawful consent. Both plaintiffs also initially claimed that race was a factor in the officers' decisions to perform P&Ps, though Johnson later dropped that claim.
>
> In two separate opinions, the trial court granted summary disposition in favor of the City pursuant to MCR 2.116(C)(10) [no genuine issue of material fact] and in favor of the officers pursuant to MCR 2.116(C)(7) [governmental immunity], (C)(10), and (I)(2) [opposing party entitled to judgment]. Plaintiffs individually appealed by right in the Court of Appeals. [*Johnson*, 502 Mich at 757-759.]

In our previous opinions, we affirmed the trial court's orders granting summary disposition in favor of the individual defendants and the City. *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537). Relevant to the issue now before

us on remand, as the Supreme Court stated, we concluded in Part III of each opinion that "plaintiffs did not demonstrate that any of the alleged constitutional violations resulted from a municipal policy or a custom so persistent and widespread as to practically have the force of law," *Johnson*, 502 Mich at 760, and we therefore affirmed the trial court's orders granting summary disposition in favor of the City. See, e.g., *Johnson*, 319 Mich App at 626-627 (holding that "plaintiff did not establish a genuine issue of material fact that his alleged deprivation was caused by an unwritten custom or policy 'so persistent and widespread as to practically have the force of law' "), quoting *Connick v Thompson*, 563 US 51, 61; 131 S Ct 1350; 179 L Ed 2d 417 (2011). Plaintiffs thereafter filed a joint application for leave to appeal in our Supreme Court.[4]

Our Supreme Court directed that oral argument be scheduled on whether to grant the application or take other action and ordered that the parties file supplemental briefs addressing "whether any alleged violation of the plaintiffs' constitutional rights were [sic] the result of a policy or custom instituted or executed by [the City]." *Johnson v VanderKooi*, 501 Mich 954, 954-955 (2018). Subsequently, after supplemental briefing and oral argument, the Supreme Court reversed Part III of this Court's opinions, stating:

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[4] Plaintiffs did not challenge our holdings that the individual police officers were entitled to qualified immunity, that the P&Ps did not violate plaintiffs' rights under the Fifth Amendment, that the trial court properly struck each plaintiff's proposed expert witness and, in *Harrison*, that the record did not support the equal-protection claim. See *Johnson*, 502 Mich at 760 n 3. Additionally, plaintiffs did not challenge our holding in *Harrison* that the *Terry* stop in that case was itself valid, or our holding in *Johnson* that the trial court did not abuse its discretion by declining to read Johnson's general Fourth Amendment allegation as providing sufficient notice to defendants that he was asserting a challenge to the *Terry* stop in that case. These holdings stand as the law of the case. See *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992).

> In summary, we hold that it has been conclusively established by the City's concession that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. We further hold that, even without the City's concession as to the existence of a custom, the City's admissions, the officers' testimony, the GRPD manual, and the training materials, when viewed in the light most favorable to plaintiffs, are sufficient to create a genuine issue of material fact as to whether the City's custom has become an official policy. Genuine issues of material fact also remain concerning causation. Therefore, the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. Therefore, we reverse Part III of the Court of Appeals' opinion in both cases. [*Johnson*, 502 Mich at 781.]

Because this Court, in its earlier opinions, had not reached the issue of whether plaintiffs' Fourth Amendment rights were violated by the P&P procedure, the Supreme Court remanded these cases to this Court "to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Id*. We subsequently issued an order granting plaintiffs' motion to file supplemental briefs "limited to issues in the scope of the remand from the Michigan Supreme Court[.]"[5] The parties filed supplemental briefs in accordance with that order, and we have considered the arguments presented in those briefs.

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[5] See *Johnson v VanderKooi*, unpublished order of the Court of Appeals, entered September 11, 2018 (Docket Nos. 330536 and 330537).

II. STANDARD OF REVIEW

We review de novo preserved questions of constitutional law. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 685; 819 NW2d 28 (2011) (opinion by MARKEY, J.).

III. ANALYSIS

A. FRAMING THE ISSUE BEFORE US

Our Supreme Court directed us to determine on remand "whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Johnson*, 502 Mich at 781. The question before us, therefore, is whether the P&Ps were constitutionally permissible. In answering that question, it is necessary first to precisely identify the nature of plaintiffs' claim relating to the P&Ps. Indeed, our Supreme Court has already done so, describing plaintiffs as arguing "that the record demonstrated that the City had a policy or custom of performing P&Ps without probable cause during investigatory stops . . . , which may be based on reasonable suspicion of criminal conduct, and that execution of that policy or custom violated their Fourth Amendment rights." *Johnson*, 502 Mich at 760. In other words, the linchpin of plaintiffs' claim was, is, and remains that the City's policy or custom was unconstitutional because it allowed P&Ps to be conducted on the basis of reasonable suspicion alone, rather than on the more stringent requirement of probable cause. And in their supplemental briefs in this Court, plaintiffs similarly encapsulated their constitutional argument as follows: "Taking fingerprints without consent is a Fourth Amendment search, and

thus unconstitutional when performed as part of a *Terry* stop without probable cause."[6]

We note, parenthetically, that Justice WILDER, joined by then Chief Justice MARKMAN and Justice ZAHRA, stated in a concurring opinion that he would have "specifically direct[ed] the Court of Appeals to decide on remand whether the complained-of 'policy or custom' was facially unconstitutional." *Johnson*, 502 Mich at 792 (WILDER, J., concurring in the judgment).

> A local government entity violates § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. A city's custom or policy can be unconstitutional in two ways: 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. [*Gregory v Louisville*, 444 F3d 725, 752 (CA 6, 2000), citing *Monell v New York City Dep't of Social Servs*, 436 US 658, 692-94; 98 S Ct 2018; 56 L Ed 2d 611 (1978) (citation omitted).]

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[6] It is worth noting that the policy or custom at issue, i.e., conducting P&Ps based on reasonable suspicion alone, does not even come into play when probable cause to arrest a suspect exists. Probable cause to arrest (and to therefore conduct searches incident to arrest) provides both constitutional and statutory bases for the taking of photographs and fingerprints independent of any municipal policy or custom. See *Maryland v King*, 569 US 435, 461; 133 S Ct 1958; 186 L Ed 2d 1 (2013) ("[T]he Fourth Amendment allows police to take certain routine 'administrative steps incident to arrest—*i.e.*, . . . book[ing], photograph[ing], and fingerprint[ing].' ") (citation omitted); see also MCL 28.243(1) ("[U]pon the arrest of a person for a felony or for a misdemeanor . . . the arresting law enforcement agency in this state shall collect the person's biometric data . . . ."); MCL 28.241a(b)(*i*) and (*iii*) (defining "biometric data" as including "[f]ingerprint images" and "[d]igital images recorded during the arrest or booking process"); *People v Gill*, 31 Mich App 395, 399; 187 NW2d 707 (1971) ("Since the arrest was constitutionally permissible the subsequent fingerprinting was valid. . . . Given a valid arrest and providing the police conduct does not 'shock the conscience' of the court, it is entirely proper to fingerprint the accused.") (citations omitted). Consequently, the P&P policy or custom at issue in this case is *only* relevant in the absence of probable cause.

While the majority did not frame the issue in the fashion suggested by the concurring justices, it stated, in response to the concurrence, that its opinion "should not be read as implying that whether the policy or custom identified by plaintiffs is facially constitutional or facially unconstitutional is irrelevant to this case as a whole," noting that this Court "has yet to determine whether a constitutional violation occurred, much less whether the City's policy or custom is facially unconstitutional[.]" *Johnson*, 502 Mich at 780 n 14 (opinion of the Court). The Court also noted that it was "express[ing] no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated." *Id*. at 781.

We interpret our Supreme Court's direction to mean that we should determine whether the specific conduct authorized by the City's policy or custom, i.e., the conducting of P&Ps on the basis of reasonable suspicion (rather than probable cause), resulted in a constitutional violation. However, in addressing that question, we note that in his concurring opinion, Justice WILDER observed that plaintiffs had disavowed the "deliberate indifference standard" necessary to prove their claim if the custom or policy at issue is facially lawful. *Johnson*, 502 Mich at 790 (WILDER, J., concurring in the judgment); see also *Bd of Co Comm'rs v Brown*, 520 US 397, 407; 117 S Ct 1382; 137 L Ed 2d 626 (1997) ("[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences.") (citation omitted).[7] Specifically, Justice WILDER noted:

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[7] The Supreme Court majority found it "unnecessary to adopt or reject that interpretation of the controlling Supreme Court cases." *Johnson*, 502 Mich at 777 (opinion of the Court).

> Plaintiffs stated in their appellate brief that the municipality's failure to act was not at issue in this case. Plaintiffs' reply brief stated that the deliberate-indifference standard was inapplicable. And in oral argument, plaintiffs explicitly disavowed the need to demonstrate deliberate indifference. [*Johnson*, 502 Mich at 790 n 5 (WILDER, J., concurring in the judgment).]

Our review of the record confirms this. Moreover, the arguments presented by plaintiffs in their supplemental briefs on remand in this Court are, in our judgment, consistent with a purely "facial" (not an "as applied") constitutional challenge to the P&Ps.[8] That is because plaintiffs' challenge is not that a municipal policy or custom, though constitutional, was improperly applied in their particular cases in an unconstitutional manner. Rather, plaintiffs' position is that because the policy or custom authorized the conducting of P&Ps without probable cause, the policy or custom was itself necessarily and inherently, i.e., facially, unconstitutional. In other words, plaintiffs' claim is expressly that the policy or custom was itself unconstitutional *because* it authorized P&Ps on less than probable cause. That, in our judgment, is by its very nature a facial challenge.[9] While the Supreme Court majority

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[8] We therefore agree with plaintiffs that the deliberate-indifference standard does not apply here. And because plaintiffs' constitutional challenge is purely a facial one (not an as-applied one), we need not decide the question that appears to have divided our Supreme Court, i.e., whether the deliberate-indifference standard necessarily applies to every as-applied constitutional challenge.

[9] We appreciate that our Supreme Court held that "a policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability" and that "when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions." *Johnson*, 502 Mich at 757 (opinion of the Court). However, the mere fact that individual officers have discre-

did not take a position on that characterization,[10] our judgment is that by framing the alleged constitutional infirmity as the authorization of P&Ps in the absence of probable cause, the constitutional challenge is necessarily a facial one. A facially unconstitutional custom or policy is one that may not be applied constitutionally in any circumstance. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). Consequently, and because plaintiffs' framing of the issue requires us to determine whether employment of the P&Ps without probable cause constitutes a "search" under the Fourth Amendment, we conclude that our resolution of these cases on remand requires us to determine whether the P&Ps were facially constitutional.

B. NO CONSTITUTIONAL VIOLATION

We conclude that the P&Ps were constitutionally permissible because, under current caselaw, no constitutionally protected interest was violated.

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tion over whether and when to implement an allegedly constitutionally infirm policy or custom (here, to conduct a P&P without probable cause) does not transform the constitutional challenge from a facial one into an as-applied one. To the contrary, the challenge remains to the policy or custom itself, not to the manner in which it was applied in a particular circumstance. To conclude otherwise would effectively hold a municipality liable whenever an individual officer decides to implement a challenged policy or custom. As our Supreme Court has recognized, however, that is not and cannot be the law. *Id*. at 763 (stating that "[municipal] liability may not be based on a respondeat superior theory").

[10] The Supreme Court majority concluded that "whether plaintiffs specifically claim that the P&P policy is itself facially unconstitutional is beside the point for the purposes of determining whether the . . . alleged violation of the plaintiffs' constitutional rights was the result of a policy or custom instituted or executed by the City." *Id*. at 779-780. It did not, however, make any judgment about whether plaintiffs' constitutional challenge was in fact a facial one. We conclude that it is.

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." US Const, Am IV; see also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011).

When the police obtain physical evidence from a person, the Fourth Amendment is implicated both in the initial " 'seizure' of the 'person' necessary to bring him into contact with government agents," and in "the subsequent search for and seizure of the evidence." *United States v Dionisio*, 410 US 1, 8; 93 S Ct 764; 35 L Ed 2d 67 (1973). Generally, seizure requires probable cause; however, a "*Terry* stop," in which police stop and briefly detain a person based on a "reasonable suspicion" that criminal activity may have occurred, is permissible without probable cause. *Terry*, 392 US at 30-31. Therefore, " '[t]he brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a 'reasonably articulable suspicion' that the person is engaging in criminal activity.' " *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996).

A person detained during a valid *Terry* stop does not lose the Fourth Amendment's protection against unreasonable searches, which "applies to all seizures of a person, including seizures that involve only a brief detention, short of traditional arrest." *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985) (citation omitted). A search is unreasonable if it is not supported by a warrant or an exception to the warrant requirement; in either case, probable cause is still required. See *In re Forfeiture of $176,598*, 443 Mich 261, 265-266; 505

NW2d 201 (1993).[11] Plaintiffs do not dispute that they were detained in the course of a valid *Terry* stop. Therefore, the issue before us is whether either the fingerprinting portion or the photographing portion of the P&P procedure was a "search" under the Fourth Amendment. We conclude under current caselaw that they were not.

The United States Supreme Court has never explicitly decided whether the act of taking a person's fingerprints or photograph by police is "a search" under the Fourth Amendment. See *Maryland v King*, 569 US 435, 477; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (Scalia, J., dissenting) ("The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question.").[12] We nonetheless must take heed of what the Supreme Court has said on the subject, even if in dicta. See *FEB Corp v United States*, 818 F3d 681, 690 n 10 (CA 11, 2016) (stating that "dicta from the Supreme Court is not something to be lightly cast aside, but rather is of considerable persuasive value") (quotation marks and citations omitted); *Surefoot LC v Sure Foot Corp*, 531 F3d 1236, 1243 (CA 10, 2008) (noting that lower federal courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings") (quotation marks and citation omitted).

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[11] An officer may, in the course of a *Terry* stop, conduct a "limited pat-down" for weapons based on a reasonable suspicion that the person is armed and dangerous. *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). No party argues that we should analyze the P&Ps under our jurisprudence related to this "stop-and-frisk" exception.

[12] The Supreme Court in *King* held that the taking of a DNA sample by buccal swab incident to a lawful arrest was, "like fingerprinting and photographing," a reasonable procedure that was permissible under the Fourth Amendment. *King*, 569 US at 465-466 (opinion of the Court).

The Supreme Court has stated, for example, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States v Katz*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967).[13] And, while the Court has stopped short of deciding the issue, it has on more than one occasion suggested that obtaining fingerprints during *Terry* stops may be permissible, at least in certain circumstances.

In *Davis v Mississippi*, 394 US 721, 727; 89 S Ct 1394; 22 L Ed 2d 676 (1969), the Court suggested, albeit in dicta, that "[d]etentions for the sole purpose of obtaining fingerprints" could, "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[14] Later, in *Dionisio*, 410 US at 14, the Court stated, in the context of a compelled voice exemplar:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably

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[13] In *Katz*, 389 US at 348, 353-359, the defendant successfully challenged the prosecution's introduction of "evidence of [the defendant's] end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls."

[14] The *Davis* Court ultimately concluded that the transport of the defendant unwillingly from his home to the police station for the purposes of fingerprinting and interrogation was a "seizure" requiring probable cause. *Davis*, 394 US at 726-727. The Court explicitly did not determine whether, during a criminal investigation, fingerprints could be obtained in the absence of probable cause. *Id*. at 728.

> expect that his face will be a mystery to the world. [*Id*., citing *Katz*, 389 US at 351.][15]

The *Dionisio* Court also likened a voice exemplar to a fingerprint, thereby again suggesting that the taking of fingerprints is not a search under the Fourth Amendment. *Id*. at 15 ("[T]his is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' "), quoting *Davis*, 394 US at 727.

Still later, in *Hayes v Florida*, 470 US 811, 817; 105 S Ct 1643; 84 L Ed 2d 705 (1985), the Court again suggested, but did not decide,[16] that the Fourth Amendment could permit the taking of fingerprints in the field based on reasonable suspicion:

> There is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish

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[15] In *Dionisio*, the voice exemplars were compelled by court orders issued under 18 USC 2518. *Dionisio*, 410 US at 2 & n 1. The judge issuing such an order is required to determine that probable cause exists to believe that the individual affected by the order has committed, is committing, or is about to commit a particular offense. 18 USC 2518(3). The Court in *Dionisio* therefore did not face the issue of lack of probable cause that is present here. Nonetheless, the Court did make clear its conclusion that a grand jury's "directive to make a voice recording" did not "infringe[] upon any interest protected by the Fourth Amendment[.]" *Dionisio*, 410 US at 15.

[16] The *Hayes* Court held that detention and transport to the police station for the purpose of fingerprinting was the functional equivalent of an arrest; it therefore did not resolve the issue of whether on-site fingerprinting during an investigatory stop was permissible under the Fourth Amendment. *Hayes*, 470 US at 817.

> or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.

Several federal courts have declared that the taking of photographs and fingerprints by the police is not a search. See, e.g., *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009) ("The police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment."); *United States v Fagan*, 28 MJ 64, 66 (1989) ("[P]eople ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints."); *In re Grand Jury Proceedings*, 686 F2d 135, 139 (CA 3, 1982) ("[F]ingerprints can be subject to compelled disclosure by the grand jury without implicating the Fourth Amendment . . . ."); *United States v Sechrist*, 640 F2d 81, 86 (CA 7, 1981) ("The taking of a person's fingerprints simply does not entail a significant invasion of one's privacy.").[17] However, federal courts have also disapproved of the mass fingerprinting of citizens without *any* individual suspicion of criminal activity. See *United States v Mitchell*, 652 F3d 387, 411 (CA 3, 2011); *United States v $124,570 US Currency*, 873 F2d 1240, 1247 (CA 9, 1989).

This Court also has stated that "[t]he taking of fingerprints is not violative of the prohibition against unreasonable searches and seizures," in part, because "[t]here is no reasonable expectation of privacy in one's

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[17] Decisions of lower federal courts are not binding upon this Court but may be persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Although plaintiffs dismiss these cases with the cursory claim that they either "overstate the Supreme Court's dicta or did not actually decide whether fingerprinting was a search," they offer no contrary authority.

fingerprints." *Nuriel v Young Women's Christian Ass'n*, 186 Mich App 141, 146; 463 NW2d 206 (1990). The *Nuriel* Court elaborated that "[t]he taking and furnishing of fingerprints does not represent an invasion of an individual's solitude or private affairs."

As we noted in *Johnson*, 319 Mich App at 617, the issues before the *Nuriel* Court "did not involve police contact[.]" Nonetheless, this statement from *Nuriel* is unambiguous and unqualified. *Nuriel* is binding on this Court. MCR 7.215(J)(1). Consequently, unless the above statements in *Nuriel* were dicta, *Nuriel* compels the conclusion that the taking of fingerprints as part of the P&Ps did not violate the Fourth Amendment. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008).

We hold that the referenced determinations in *Nuriel* were not dicta. " '[O]biter dictum' is defined as '1. an incidental remark or opinion. 2. a judicial opinion in a matter related but not essential to a case.' " *Id.*, quoting *Random House Webster's College Dictionary* (1997).

In *Nuriel*, this Court considered whether the trial court had abused its discretion by denying the plaintiff's motion to compel fingerprint samples from nonparties to a civil lawsuit. The rationale of the trial court in denying that motion was as follows:

> "Right now, you can take this on appeal. I do not think you are entitled to take fingerprints or blood samples of third parties or parties who are not part of a lawsuit. I am concerned about those parties who might be a part of the lawsuit—but go out and take fingerprints of other parties, no. I think it is an invasion of privacy and constitutionally impermissible." [*Nuriel*, 186 Mich App at 145.]

It was in that context that this Court granted the plaintiff's application for leave to appeal to consider

whether the trial court had abused its discretion. And because the only rationale given by the trial court for its ruling was a constitutional one, it was necessary for this Court to assess the trial court's constitutional reasoning to determine whether it reflected an abuse of discretion.

Only after determining that the trial court's stated reasoning was erroneous as a matter of constitutional law, *id*. at 146, did the *Nuriel* Court ultimately uphold the trial court's denial of the plaintiff's motion on the basis of a stipulated order between the parties, *id*. at 148. We cannot conclude under the circumstances presented that this Court's ultimate reliance on an alternative basis for its ruling converted the Court's constitutional analysis into mere dicta. To hold otherwise would essentially mean that a reviewing Court's rejection of a trial court's reasoning in a "right result, wrong reason" case is always dicta, and we decline to so hold. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Moreover, because this Court is an error-correcting court that is "principally charged with the duty of correcting errors that occurred below," *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002) (citation omitted), mod in part on other grounds 468 Mich 881 (2003), the *Nuriel* Court was required to correct the trial court's constitutional error, at least when allowing it to stand could have affected the plaintiff's rights in the proceedings below.[18] Consequently, although it ultimately may have

[18] We note that had the *Nuriel* Court decided the constitutional issue differently and affirmed the trial court on the basis of its constitutional ruling, the plaintiff would have been prohibited from seeking to compel any fingerprint samples from any nonparties; in the words of the trial court, such a compulsion would have been " 'an invasion of privacy and constitutionally impermissible.' " *Nuriel*, 186 Mich App at 145. By affirming the trial court on the alternative ground that a stipulated

made no difference to the plaintiff's case, the *Nuriel* Court's correction of the trial court's error on the constitutional issue presented was not "incidental" or superfluous to the adjudication of the plaintiff's appeal, and we therefore reject plaintiffs' characterization of it as mere dicta.

Moreover, even if the *Nuriel* Court's rejection of the trial court's constitutional holding was dicta, we find the analysis persuasive. The *Nuriel* Court's analysis comports with the statements to date from the United States Supreme Court and from the other cited federal cases, as well as other statements from this Court. See *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989) (stating that "[a] defendant has no reasonable expectation of privacy in physical characteristics such as a fingerprint or a voice print, both of which are constantly exposed to the public"); *People v Davis*, 17 Mich App 615; 170 NW2d 274 (1969) (stating that "[f]ingerprints, like a man's name, height, color of his eyes, and physiognomy, are subject to non-custodial police inquiry, report, and preservation when reasonable investigation requires, even though probable cause for arrest may not exist at the moment"). We therefore conclude that the fingerprint portion of the P&P procedure employed by the officers in these appeals did not violate the Fourth Amendment.[19]

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order barred the particular motion before the trial court, the plaintiff was not subject to such a broad prohibition. *Id*. at 148. The *Nuriel* case, therefore, does not implicate this Court's general rule that we will not "unnecessarily" decide constitutional issues, see *J&J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003), because had the *Nuriel* Court left intact the trial court's ruling, the plaintiff's rights on remand would, at least potentially, have been affected.

[19] Plaintiffs seem to acknowledge that under current caselaw, a "search" generally involves an intrusion into a constitutionally protected area, such as a person's body or home. See, e.g., *Kyllo v United*

Although plaintiffs suggest that this holding would not be consistent with *Davis*'s statement that "detentions for the sole purpose of obtaining fingerprints . . . might, under narrowly defined circumstances, be found to comply with the Fourth Amendment" despite a lack of probable cause, see *Davis*, 394 US at 727, we find that argument unconvincing. First, the P&P procedure is not a "detention[] for the sole purpose of obtaining fingerprints"; rather, it is a tool used by police during an investigation into potential criminal activity, specifically when an individual's identity cannot be confirmed through other means. Moreover, in order to employ the P&P procedure without the consent of an individual, the officers must seize the individual in circumstances involving, at least, a valid *Terry* stop prompted by a reasonable suspicion; this opinion does not afford, and should not be read as

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States, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (concluding that the use of a thermal imager to obtain information about the inside of a home constituted a search). They therefore primarily confine their argument to what they term "biometric data," such as fingerprints, which they assert are constitutionally protected because their collection relies on technology other than the naked eye. However, the fact that the use of some forms of "sense-enhancing" technology has been deemed to constitute a search, *id*., does not mean that *all* information that cannot be gleaned using only a human being's natural senses constitutes a search, especially when the existing caselaw points in the other direction. Moreover, the definition of "biometric data" in MCL 28.241a includes such things as scars and tattoos, which are visible to the naked eye. We conclude that the mere fact that the collection of the information at issue involves the use of technology does not, itself, convert that collection into a search under the Fourth Amendment. Plaintiffs have provided no authority to the contrary. And although plaintiffs argue that the "ever-increasing developmental pace of identification technology magnifies the civil liberties impact of concluding that using such identification technologies is not a search," we must also be cognizant of the United States Supreme Court's caution that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear," *City of Ontario, California v Quon*, 560 US 746, 759; 130 S Ct 2619; 177 L Ed 2d 216 (2010).

granting, police officers carte blanche to perform suspicionless P&Ps on any individual in public who catches their eye. We believe that these protections are sufficient to satisfy *Davis*'s "narrowly defined circumstances" requirement. Moreover, they comport with the Supreme Court's statement in *Hayes* that "[t]here is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act," provided that the fingerprinting is reasonably necessary to the investigation and the procedure is done "with dispatch." *Hayes*, 470 US at 186-187.

The rationale of *Nuriel* and the other cited cases applies at least equally to the taking of photographs. A person's physical appearance is certainly something "a person knowingly exposes to the public[.]" *Katz*, 389 US at 351. Although a person does possess certain property rights to his or her likeness, at least in a commercial sense, see *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995); see also *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003), we cannot reasonably declare that the taking of a photograph of plaintiffs that merely depicts them as they appeared in public to be a search under the Fourth Amendment. We therefore conclude that the photograph portion of the P&Ps employed by the officers in these appeals also did not violate the Fourth Amendment.[20]

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[20] In their supplemental brief on remand, plaintiffs briefly argue that the City's alleged *retention* of the photographs and fingerprints "causes an ongoing intrusion that is beyond the permissible scope of the stop." We conclude that this issue is beyond the scope of our Supreme Court's remand, and we therefore decline to address it. Moreover, we are cautious of the principle that we should "neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise

Because we conclude that the P&Ps did not infringe plaintiffs' Fourth Amendment protections (given that, as plaintiffs concede, they were validly detained) we further conclude that plaintiffs have failed to satisfy their burden of demonstrating that the custom or policy at issue here, i.e., the photographing and printing of individuals during an investigatory stop based on reasonable suspicion but without probable cause, was unconstitutional.

IV. RESPONSE TO SUPPLEMENTAL AUTHORITY

While this case was pending on remand, plaintiffs filed supplemental authority calling to our attention the recent decision of the United States Court of Appeals for the Sixth Circuit in *Taylor v Saginaw*, 922 F3d 328 (CA 6, 2019). In *Taylor*, the Sixth Circuit held that the defendant's practice of making chalk marks on parked vehicles' tires to determine whether the vehicles had been parked longer than the posted time limit was a search under the Fourth Amendment. *Id*. at 322. The Sixth Circuit applied the "seldom used

facts to which it is to be applied." See *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 570 n 3; 892 NW2d 388 (2016) (quotation marks and citations omitted). Whether or for how long the City may have retained plaintiffs' photographs or fingerprints is undetermined. We will not engage in fact-finding, see *Wolf v Detroit*, 489 Mich 923, 923 (2011), nor will we remand for additional fact-finding in the current context, see MCR 7.216(A)(5). Not only are plaintiffs' arguments conclusory and beyond the scope of the Supreme Court's remand, but plaintiffs' assertions regarding the alleged retention of the photographs and fingerprints have always been ancillary to and hinged upon plaintiffs' challenge to the photographs and fingerprints as having been obtained as a result of an unlawful search. Because we have concluded that under our current caselaw the P&Ps were not "searches" under the Fourth Amendment, we need not address the issue further. Any challenge to the alleged retention of the photographs and fingerprints separate and apart from whether they were unconstitutionally obtained in the first instance is an issue for another day.

'property-based' approach to the Fourth Amendment search inquiry in *United States v Jones*, 565 US 400[;] 132 S Ct 945[;] 181 L Ed 2d 911 (2012)," noting that "[u]nder *Jones*, when governmental invasions *are* accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information." *Taylor*, 922 F3d at 322.

Plaintiffs argue that fingerprinting is a physical intrusion on a constitutionally protected area and that it is, therefore, a search under *Jones*. This Court has not found, and plaintiffs have not provided, cases in which the "trespass" theory has been applied to the collection of fingerprints or the taking of pictures; rather, *Jones* and its progeny typically have involved the government's warrantless placement of electronic monitoring devices that collect location data for persons or property, see, e.g., *United States v Powell*, 847 F3d 760 (CA 6, 2017), although the rationale of *Jones* has been applied by our Supreme Court in the context of a police intrusion onto a homeowner's property for the purpose of gathering information (i.e., "knock and talk"), see *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017). Indeed, Justice Scalia, who authored *Jones* in 2012, observed the very next year that the Supreme Court had never explicitly decided the issue of whether the taking of fingerprints constituted a search under the Fourth Amendment. See *King*, 569 US at 477 (Scalia, J., dissenting). In the absence of any compelling authority to the contrary, we see no reason to alter our conclusions in light of *Taylor*, which is not only not binding on this Court, *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), but is significantly distinguishable, both factually and legally.

V. CONCLUSION

We conclude that the P&Ps at issue did not violate plaintiffs' Fourth Amendment rights under current caselaw, and we accordingly affirm the trial court's orders granting summary disposition in favor of the City.

Affirmed.

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

LETICA, J. (*concurring*). I reluctantly concur. Reviewing the federal and state caselaw relied upon by the majority, I cannot disagree with the majority's conclusion that photographing and fingerprinting are not searches under the Fourth Amendment. I am likewise constrained by this Court's prior decisions and by the plaintiffs' earlier framing of the issues to address their current claim as solely a facial challenge.[1] Were I not bound by these limitations, I would reach a different conclusion.[2]

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[1] I was not a member of the panel that decided these cases in the original appeals.

[2] The city has since modified its P&P policy to require a *Terry* detainee's consent before fingerprinting him or her and to recognize the protections afforded under the Child Identification and Protection Act, MCL 722.771 *et seq*. See *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). The act prohibits a governmental unit from fingerprinting a child with limited exceptions. MCL 722.773; MCL 722.774. A governmental unit includes "any political subdivision of the state" as well as "an authorized representative of . . . any political subdivision of the state[.]" MCL 722.772(e). A child is "any person under 17 years of age." MCL 722.772(a). The act permits a governmental unit to "fingerprint a child if fingerprints are voluntarily given with the written permission of the child and parent or guardian, upon the request of a law enforcement officer, to aid in a specific criminal investigation." MCL 722.774(1)(d). "Only 1 set of prints shall be taken and, upon completion of the investigation, the law enforcement agency shall return the fingerprint cards to the parent or guardian of the child." *Id*.

RPF OIL COMPANY v GENESEE COUNTY

Docket No. 344735. Submitted November 5, 2019, at Lansing. Decided December 3, 2019, at 9:00 a.m.

Plaintiff, RPF Oil Company, owned and operated convenience stores in Genesee County. After Genesee County passed a regulation that prohibited the sale of tobacco products and paraphernalia to people under 21 years of age (the Tobacco 21 Regulation), plaintiff filed an action for declaratory judgment in the Genesee Circuit Court against defendants, Genesee County and the Genesee County Health Department, asking the trial court to rule that the regulation was preempted by the Age of Majority Act, MCL 722.51 *et seq*., and the Youth Tobacco Act, MCL 722.641 *et seq*. Plaintiff moved for summary disposition under MCR 2.116(C)(10), and the trial court denied its motion. Defendants also moved for summary disposition pursuant to MCR 2.116(C)(10), and plaintiff responded by moving for judgment under MCR 2.116(I)(2). The trial court, Judith A. Fullerton, J., ruled that there was a conflict between the Tobacco 21 Regulation and the two statutes and denied defendants' motion and granted summary disposition for plaintiff pursuant to MCR 2.116(I)(2). The trial court also entered a stipulated order in which defendants agreed not to enforce the Tobacco 21 Regulation unless the court's previous order ruling that a conflict existed between the Tobacco 21 Regulation and the statutes was overturned on appeal. Defendants appealed the stipulated order by right.

The Court of Appeals *held*:

The county's Tobacco 21 Regulation is preempted by statute because it prohibits the sale of tobacco products to all persons under the age of 21 and thus plainly prohibits what Michigan law permits. A municipality's power to adopt resolutions and ordinances relating to municipal concerns is derived from and subject to the state Constitution. Under *People v Llewellyn*, 401 Mich 314 (1977), state law may preempt a local government's law either through a direct conflict or by occupying the field of regulation that the municipality seeks to enter. A direct conflict exists if a regulation permits what a statute prohibits or a regulation prohibits what a statute permits. The plain language

of MCL 722.52(1) of the Age of Majority Act affords to persons 18 years of age or older all the rights previously conferred on individuals aged 21 and older, beginning on January 1, 1972. The Age of Majority Act also expressly provides that it supersedes all provisions of law that prescribe the rights of persons between the ages of 18 and 21 years old, MCL 722.53, as well as the Youth Tobacco Act. Moreover, the Legislature amended the Youth Tobacco Act in 1972 so that individuals at least 18 years old were no longer prohibited from purchasing and using tobacco products. No other laws may infringe the rights of persons 18 years old and older who are legally recognized as adults by the Age of Majority Act. Defendants' argument that the Age of Majority Act only applies to laws in existence at the time it was enacted lacked merit because the plain language of MCL 722.52 precludes the imposition of legal impediments to persons aged 18 and older enjoying the rights afforded to adults for all purposes.

Affirmed.

MUNICIPALITIES — LOCAL LAWS AND ORDINANCES — PREEMPTION — AGE OF MAJORITY ACT — RESTRICTIONS ON TOBACCO SALES AND USE.

Local governments derive their authority from the Legislature and the Constitution, Const 1963, art 7, § 22; state law may preempt a local government's law either through direct conflict or through occupying the field of regulation that the municipality seeks to enter; a local government may not enact an ordinance or regulation that restricts the right of persons 18 years old or older to purchase tobacco products because such a regulation directly conflicts with the Age of Majority Act, MCL 722.51 *et seq*.

Knaggs Brake, PC (by *Clifford A. Knaggs*) for RPF Oil Company.

Plunkett Cooney (by *Mary Massaron* and *Hilary A. Ballentine*) and *Gupta Wessler, PLLC* (by *Rachel Bloomekatz* and *Matthew W. H. Wessler*) for Genesee County and Genesee County Health Department.

Amici Curiae:

Anne Argiroff PLC (by *Anne Argiroff*) and *Dennis A. Henigan* for the Campaign for Tobacco-Free Kids.

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

REDFORD, J. Defendants, Genesee County and Genesee County Health Department, appeal by right the trial court's entry of a stipulated order in which defendants agreed not to enforce the county's Regulation to Prohibit the Sale of Tobacco Products to Individuals Under 21 Years of Age (Tobacco 21 Regulation), prohibiting the sale of tobacco to persons under the age of 21, unless the trial court's earlier summary-disposition order in favor of plaintiff RPF Oil Company was overturned on appeal. We affirm the trial court's conclusion that the county's Tobacco 21 Regulation is preempted by the Age of Majority Act, MCL 722.51 *et seq*.

I. BACKGROUND

The county's Tobacco 21 Regulation became effective on May 15, 2017. It prohibits the sale of any tobacco product or paraphernalia to persons under 21 years of age and requires that a retailer of tobacco or tobacco paraphernalia place a sign stating that the county prohibits the sale of tobacco products to any person under the age of 21.[1] The ordinance does not restrict persons 18 to 21 years old from using tobacco products in the county.

[1] Plaintiff points out that the city of Ann Arbor passed a similar ordinance regulating the use of tobacco and raising the age of tobacco sales to 21; Michigan's Attorney General opined that the ordinance directly conflicted with, and was preempted by, the Age of Majority Act. See OAG, 2017, No. 7294 (February 2, 2017). We do not rely upon the Attorney General's opinion for our decision, but we conclude that the Attorney General correctly analyzed the issue under applicable law. Defendant argues that the trial court exclusively and improperly relied on the Attorney General's opinion. The record, however, does not support defendant's contention. The trial court appropriately based its decision on applicable caselaw.

Plaintiff owns and operates convenience stores in Genesee County. On May 12, 2017, plaintiff filed a declaratory-judgment action seeking the trial court's determination that the Age of Majority Act and the Youth Tobacco Act, MCL 722.641 *et seq*., preempted the county's Tobacco 21 Regulation because it conflicted with the state statutes. On July 24, 2017, following briefing by the parties and amicus, the trial court issued an order granting a preliminary injunction enjoining the county from enforcing the Tobacco 21 Regulation. On the same day, the trial court issued an order denying plaintiff's motion for summary disposition and a permanent injunction. On August 18, 2017, defendants sought leave to appeal the July 24, 2017 preliminary-injunction order. This Court denied leave on October 6, 2017.[2]

Plaintiff later filed a motion for summary disposition under MCR 2.116(C)(10), which the trial court denied on February 26, 2018. On March 26, 2018, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff responded on May 14, 2018, seeking judgment under MCR 2.116(I)(2). On May 31, 2018, following a hearing, the trial court ruled that a conflict existed between state law and the county's regulation because the Tobacco 21 Regulation prohibited what the statute permitted by not allowing adults between 18 and 21 years of age to purchase tobacco products within the county. The trial court entered an order denying defendants' motion for summary disposition and granted plaintiff summary disposition under MCR 2.116(I)(2) on plaintiff's claim for declaratory judgment. On July 2, 2018, the trial court entered a final stipulated order under which

[2] *RFP Oil Co v Genesee Co*, unpublished order of the Court of Appeals, entered October 6, 2017 (Docket No. 339674).

defendants agreed not to enforce the Tobacco 21 Regulation unless the trial court's May 31, 2018 summary-disposition order was overturned on appeal.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 583; 794 NW2d 76 (2010) (citation omitted). Summary disposition is appropriate under MCR 2.116(C)(10) when "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). We also review de novo a motion for summary disposition granted under MCR 2.116(I)(2). *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). "If, after careful review of the evidence, it appears to the trial court that there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law, then summary disposition is properly granted under MCR 2.116(I)(2)." *Lockwood v Ellington Twp*, 323 Mich App 392, 401; 917 NW2d 413 (2018) (citations omitted). We also review de novo a trial court's ruling on a question of statutory interpretation. *Thompson-McCully Quarry Co v Berlin Charter Twp*, 259 Mich App 483, 488; 674 NW2d 720 (2003). "We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). "A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning." *Sau-Tuk Indus, Inc v Allegan Co*, 316

Mich App 122, 136; 892 NW2d 33 (2016) (quotation marks and citation omitted). "Whether a state statute preempts a local ordinance is a question of statutory interpretation and, therefore, a question of law that we review de novo." *Ter Beek v City of Wyoming (Ter Beek I)*, 297 Mich App 446, 452; 823 NW2d 864 (2012).

III. ANALYSIS

Defendants argue that the trial court erred by ruling that the Age of Majority Act preempts the Tobacco 21 Regulation. We disagree.

"Subject to authority specifically granted in the Constitution, local governments derive their authority from the Legislature." *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006) (citations omitted). "Under Const 1963, art 7, § 22, a Michigan municipality's power to adopt resolutions and ordinances relating to municipal concerns is 'subject to the constitution and law'." *People v Llewellyn*, 401 Mich 314, 321; 257 NW2d 902 (1977). State law may preempt a local government's law either through a direct conflict or through "occupying the field of regulation which the municipality seeks to enter." *Id*. at 322. Thus, an ordinance is preempted if it is "in direct conflict with the state statutory scheme . . . ." *Id*. "Michigan is strongly committed to the concept of home rule, and constitutional and statutory provisions which grant power to municipalities are to be liberally construed." *Bivens v Grand Rapids*, 443 Mich 391, 400; 505 NW2d 239 (1993) (citation omitted). Nevertheless, local governments may regulate matters of local concern only in a manner and to the degree that their regulations do not conflict with state law. *Taylor*, 475 Mich at 117-118. A local regulation directly conflicts with a state statute if the regulation "permits what the

statute prohibits or prohibits what the statute permits." *Ter Beek v City of Wyoming (Ter Beek II)*, 495 Mich 1, 20; 846 NW2d 531 (2014) (quotation marks and citation omitted). Our Supreme Court has explained that an ordinance may add prohibitions to the prohibitions set forth in a statute. *Miller v Fabius Twp Bd*, 366 Mich 250, 256; 114 NW2d 205 (1962). When an ordinance and a statute are both prohibitory and "the only difference between them is that the ordinance goes further in its prohibition," there is no conflict. *Id*. (quotation marks and citations omitted). However, a local government may "not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has *expressly* licensed, authorized, or required . . . ." *Id*. (quotation marks and citations omitted). Preemption applies to counties as well as cities. See *Saginaw Co v John Sexton Corp of Mich*, 232 Mich App 202, 214; 591 NW2d 52 (1998) (applying conflict preemption to a county ordinance). A county—like a city—may not enact an ordinance that conflicts with state law. See *id*.; *Ter Beek II*, 495 Mich at 19-20.

This appeal requires this Court to determine whether the county's Tobacco 21 Regulation is preempted by state law. Section 2 of the Age of Majority Act, MCL 722.52(1), provides:

> Except as otherwise provided in the state constitution of 1963 and subsection (2), notwithstanding any other provision of law to the contrary, a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age.[3]

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[3] MCL 722.52(2) pertains to the authority of courts to order support payments for persons 18 years old or older pursuant to statutory

The Legislature specified in the unambiguous plain language of this subsection that persons 18 to 21 years of age as of January 1, 1972, shall be entitled to enjoy all the rights and privileges and bear the responsibilities and duties previously afforded by law to persons in this state aged 21 years and older. The Legislature expressly provided that the only exceptions to that broad grant of rights and privileges are as stated in the state constitution or the statutes enumerated in MCL 722.52(2). No other laws may infringe the rights of persons 18 years old and older who henceforth were legally recognized as adults. All existing laws to the contrary were changed by enactment of the Age of Majority Act.

In MCL 722.53, the Legislature clarified further that the Age of Majority Act "supersedes all provisions of law prescribing duties, liabilities, responsibilities, rights and legal capacity of persons 18 years of age through 20 years of age different from persons 21 years of age[.]" In MCL 722.53, the Legislature listed statutory provisions covering 20 areas regulated by laws of this state that the Age of Majority Act superseded, including laws that governed, among other things, firearms, motor vehicles, legal settlements, workers' compensation, marriage, dower estates, the Revised Judicature Act, the probate code, status of minors and child support, alcohol, and the exclusion of minors during examination of witnesses in criminal cases. The Legislature also specified that the Age of Majority Act superseded MCL 722.641 to MCL 722.643 of the Youth Tobacco Act, which regulates tobacco sales to minors, and prohibits the purchase, possession, and use of tobacco products by minors. The Legislature amended

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provisions related to divorce, child custody, family support, paternity, the status of minors and child support, none of which apply in this case.

the Youth Tobacco Act so that it substituted the term "18 years" for the use of the term "21 years." See 1972 PA 29, § 1, effective February 19, 1972. Following the enactment of MCL 722.53 and the amendment of the Youth Tobacco Act, persons at least 18 years old were no longer prohibited from purchasing and using tobacco products, and retailers were not prohibited from selling tobacco products to persons 18 years old and older.

The county's Tobacco 21 Regulation prohibits the sale of tobacco to all persons under the age of 21. In so doing, the Tobacco 21 Regulation plainly prohibits what Michigan law permits by diminishing the rights and privileges granted by state law to persons who have reached the age of majority. The Age of Majority Act expressly provides that persons at least 18 years old in Michigan are adults of legal age for all purposes whatsoever. This means that they may enjoy all the rights and privileges of adulthood unless the Legislature acts to limit such rights and privileges. The Legislature has not done so respecting the purchase and use of tobacco products by adults.

Defendants' arguments to the contrary lack merit because the Age of Majority Act precludes age-based distinctions of the kind the Tobacco 21 Regulation makes. This Court has previously ruled—and our Supreme Court affirmed the principle—that, where a state statute permits the exercise of rights and privileges within this state, local regulation may not prohibit such conduct. *Ter Beek I*, 297 Mich App at 453; *Ter Beek II*, 495 Mich at 19-20. In *Ter Beek II*, our Supreme Court analyzed whether the defendant city could adopt an ordinance prohibiting the plaintiff, a qualified medical marijuana patient, from using his land as permitted by the Michigan Medical Marijuana Act

(MMMA), MCL 333.26421 *et seq*., to grow and use medical marijuana in his home and imposing penalties for doing so. *Ter Beek II*, 495 Mich at 5-7. Our Supreme Court considered whether the MMMA preempted the local ordinance. The Court stated that its precedent established that local governments are "precluded from enacting an ordinance if . . . the ordinance is in direct conflict with the state statutory scheme" and explained that "[a] direct conflict exists when the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *Id*. at 19-20 (quotation marks and citations omitted). Because the Legislature granted rights and privileges to citizens in the MMMA, the city could not prohibit what the MMMA permitted or impose a penalty upon anyone for doing what the statute permitted. *Id*. at 20. Our Supreme Court, therefore, held that the MMMA preempted the city ordinance. *Id*. at 20, 24-25.

In this case, through the Tobacco 21 Regulation, by restricting the sale of tobacco products by retailers within the county, the county created an impermissible age distinction that effectively raised the minimum legal age to purchase tobacco products within the county to age 21. In so doing, the county attempts within its territory to improperly limit the scope of rights granted by the Legislature to adults. Consequently, the Age of Majority Act preempts the county's Tobacco 21 Regulation and it is unenforceable as a matter of law.

Defendants argue that the Age of Majority Act does not permit anything that the Tobacco 21 Regulation prohibits because, by its language, the Age of Majority Act applies only to laws in existence at the time of its enactment. Defendants focus on the use of the word "heretofore" in MCL 722.52(1) and the word "super-

sede[]" in MCL 722.53. This argument lacks merit because the plain language of MCL 722.52 precludes age-based distinctions and the imposition of legal impediments to persons aged 18 years and older from enjoying the rights afforded to adults for all purposes whatsoever. Significantly, the Age of Majority Act expressly superseded the provisions of the Youth Tobacco Act, which before the enactment of the Age of Majority Act prohibited tobacco purchases, possession, and use by persons under age 21. The Legislature, shortly after enacting the Age of Majority Act, also amended the Youth Tobacco Act to remove the previous prohibitions that applied to persons 18 to 21 years old. The action taken by the Legislature afforded persons 18 to 21 years of age rights heretofore unavailable to them. Neither the plain language of the Age of Majority Act nor the amended Youth Tobacco Act intimate that local governments may restrict or prohibit what state law permits. The county's Tobacco 21 Regulation, therefore, directly conflicts with the Age of Majority Act's directive that an 18-year-old is an adult "for all purposes whatsoever."[4] MCL 722.52(1).

Defendants argue that the plain language of the Age of Majority Act does not expressly prohibit raising the age at which a person may purchase tobacco and that the Age of Majority Act merely sets the "floor" of permissible regulation and does not set a "ceiling." Therefore, the county was permitted, through the Tobacco 21 Regulation, to raise the ceiling on the age at

[4] Moreover, we note that the people of Michigan amended the state Constitution in 1978 by passing Proposal D, which returned the legal age to purchase, possess, and consume alcohol to 21 years old, see Const 1963, art 4, § 40. By contrast, the people of this state have not amended the Constitution to restrict the age of persons to whom tobacco products may be sold or restrict possession and use of tobacco products by persons 18 to 21 years old.

which a person may purchase tobacco. Defendants, however, fail to explain how the fact that the statute does not include a "ceiling" age renders the county regulation permissible. MCL 722.52(1) confers legal-adult status on any individual who is "at least 18 years of age," and with that status the Legislature granted such persons all the rights and privileges of adulthood. Nothing in the Age of Majority Act provides or implies that local governments may infringe or place barriers in the way of exercise of the rights and privileges under law afforded to adults in this state. We are unpersuaded that the Legislature intended by enacting the Age of Majority Act or amending the Youth Tobacco Act that local governments could raise the age at which adults may purchase tobacco products. Therefore, the trial court did not err by ruling that, because the county's Tobacco 21 Regulation directly conflicts with the Age of Majority Act, it is preempted.

Affirmed.

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

BAUSERMAN v UNEMPLOYMENT INSURANCE AGENCY
(ON REMAND)

Docket No. 333181. Submitted May 1, 2019, at Lansing. Decided December 5, 2019, at 9:00 a.m. Leave to appeal sought.

Grant Bauserman, Karl Williams, and Teddy Broe, on behalf of themselves and all others similarly situated, brought an action in the Court of Claims against the Unemployment Insurance Agency, alleging that defendant had violated their due-process rights by depriving them of property without providing adequate notice and an opportunity to be heard as required by Const 1963, art 1, § 17 and that defendant had also engaged in unlawful collection practices. Plaintiffs were all recipients of unemployment compensation benefits who alleged that defendant unlawfully seized their property without affording due process of law; specifically, that defendant had employed an automated fraud-detection system—the Michigan Integrated Data Automated System (MiDAS)—to determine that plaintiffs had received unemployment benefits for which they were not eligible and to then garnish plaintiffs' wages, benefits, and tax refunds to recover the amount of alleged overpayments, interest, and penalties that defendant had assessed. Plaintiffs each challenged the determinations. In turn, defendant moved for summary disposition on multiple grounds, including that (1) plaintiffs had failed to comply with the notice provision of MCL 600.6431(3) and (2) plaintiffs could not pursue a constitutional-tort claim against defendant because plaintiffs had alternative administrative remedies they could pursue under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*.; in response, plaintiffs argued that the administrative remedies were inadequate. The Court of Claims, CYNTHIA D. STEVENS, J., denied defendant's motion, reasoning, in part, that plaintiffs' constitutional claims were viable because the administrative penalties were not a sufficient remedy for the alleged violations. On appeal, the Court of Appeals, GADOLA, P.J., and METER and FORT HOOD, JJ., reversed, concluding that plaintiffs' claims were not timely filed. *Bauserman v Unemployment Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued July 18, 2017 (Docket No. 333181). Plaintiffs applied for leave to appeal in the Supreme Court, which

ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1047 (2018). In lieu of granting leave to appeal, the Supreme Court held that plaintiffs did not incur an actionable harm in their due-process claims until they were deprived of their property; thus, plaintiffs were deprived of their property when their tax refunds were seized or their wages garnished. As a result, plaintiffs Bauserman and Broe timely filed their claims within six months following the deprivation of their property, but plaintiff Williams did not. Therefore, the Court of Appeals judgment was affirmed in part and reversed in part, and the case was remanded to the Court of Appeals to consider defendant's argument that it was entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional-tort claims. 503 Mich 169 (2019).

On remand, the Court of Appeals *held*:

1. In *Bivens v Six Unknown Agents of Fed Bureau of Narcotics*, 403 US 388 (1971), the United States Supreme Court recognized that a petitioner could pursue a cause of action against the respondents for injuries suffered during a search and seizure that violated the Fourth Amendment; although the Court has stated that caution must be employed before extending that remedy into new contexts, a *Bivens* action has been permitted in the context of an age-discrimination case alleging a violation of the Due Process Clause of the Fifth Amendment of the United States Constitution. When Congress has not taken action by enacting legislation to provide a complete remedy for individuals asserting constitutional claims, the inaction weighs against imposing a judicially inferred damages remedy; that is, when the design of a government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, a damages remedy will not be judicially inferred. The Michigan Supreme Court has also recognized that a claim for damages against the state arising from a violation of the state Constitution may be appropriate in certain cases. The ability to recover monetary damages for such a claim is not provided by any general state statute; instead, the damage remedy is inferred directly from the violation of the state Constitution. A claim for damages resulting from an alleged violation of the state Constitution is recognized when the execution of an official policy or custom caused a person to be deprived of state constitutional rights. An official policy does not have to be memorialized in writing as a prerequisite to a claim; it often refers to formal rules or understandings that are

intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. Once a governmental policy or custom has been identified, a plaintiff must then establish that the policy or custom was also the moving force behind the action that gave rise to the alleged constitutional violation. Courts apply a multifactor balancing test, set forth by Justice BOYLE in her partial concurring opinion in *Smith v Dep't of Pub Health*, 428 Mich 540 (1987), to determine whether it is appropriate to infer a damage remedy for an alleged violation of the state Constitution. When applying the test, courts consider the weight of 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 damage remedy in any text, history, and previous interpretations of the specific constitutional provision, (4) the availability of another remedy for obtaining monetary relief, and (5) various other factors militating for or against a judicially inferred damage remedy. There is no judicially inferred damages remedy for a violation of the state's Equal Protection Clause because that clause specifically provides that the Legislature shall implement the section by appropriate legislation. However, the state's Due Process Clause, which provides that no person shall be deprived of life, liberty, or property without due process of law, does not contain similar language granting the Legislature authority to implement private causes of action for a violation of the clause.

2. Defendant's use of the MiDAS to disqualify plaintiffs from receiving unemployment benefits, to accuse them of fraud, to engage in a concerted system of unlawfully imposing penalties and interest, and to intercept their tax refunds and garnish wages constituted a custom supported by the force of law. If plaintiffs' allegations were established to be true, they had a viable constitutional claim under the state's Due Process Clause; in other words, plaintiffs alleged sufficient facts to establish that, if proved true, defendant violated plaintiffs' due-process rights by employing its policy or custom in administering the unemployment benefit system. Applying the *Smith* multifactor test, each factor weighed in favor of judicially inferring a remedy for monetary damages for the alleged constitutional claims: (1) plaintiffs clearly alleged a constitutional violation of their due-process rights, (2) the due-process protections at issue in the case were clear and definitive, (3) the Due Process Clause does not leave implementation of a private cause of action for the violation of the clause to the Legislature, and (4) while MESA allows defendant's decisions to be reviewed administratively and in the

circuit courts with respect to the award or disqualification of unemployment benefits, or pertaining to its imposition of penalty and interest, the act did not provide plaintiffs with an avenue through which they could seek redress in the form of money damages for the alleged due-process violations. The United States Supreme Court's holding in *Schweiker v Chilicky*, 487 US 412 (1988), in which the Court declined to infer a damages remedy for alleged federal due-process violations involving the receipt of Social Security benefits, was factually and legally distinguishable because the respondents in that case could seek judicial review of constitutional claims after exhausting their administrative remedies and Congress had provided an elaborate remedial scheme that did not include money damages; in addition, the facts were not as egregious. Although MESA's remedial scheme did not expressly allow individuals to recover monetary damages for alleged state constitutional violations, MESA's administrative procedures and judicial-review provisions did not provide a remedy so extensive as to prevent a remedy from being judicially inferred; moreover, defendant's conduct was outrageous, particularly in light of its mandate to safeguard the general welfare of individuals who are involuntarily unemployed. Because plaintiffs asserted a cognizable constitutional-tort claim and monetary damages for that violation may be judicially inferred, the Court of Claims correctly denied defendant's motion for summary disposition.

Affirmed.

Judge GADOLA, concurring, agreed with the majority's legal analysis given the controlling legal precedent but wrote separately to urge the Supreme Court to revisit its confusingly fractured opinion in *Smith*. Courts have applied the multifactor balancing test set forth in Justice BOYLE's partial concurring opinion in *Smith* since 1987, even though that test was only supported by two justices. The United States Supreme Court has steadily retreated from *Bivens*, suggesting greater deference to Congress on whether to create damage remedies for violations of the federal Constitution. While Judge GADOLA recognized that under existing Michigan precedent, plaintiffs set forth a cognizable constitutional claim and damages could appropriately be imposed because plaintiffs were unable to recover money damages for the claimed due-process violations in the administrative proceedings, he urged the Michigan Supreme Court to address the continuing validity of *Smith* in light of the United States Supreme Court's retrenchment of *Bivens*.

Pitt, McGehee, Palmer, & Rivers, PC (by *Jennifer L. Lord*, *Michael L. Pitt*, and *Rachael E. Kohl*), *Kevin M. Carlson PLLC* (by *Kevin M. Carlson*), and *Neal A. Young* for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Debbie K. Taylor* and *Jason Hawkins*, Assistant Attorneys General, for defendant.

ON REMAND

Before: GADOLA, P.J., and METER and FORT HOOD, JJ.

FORT HOOD, J. This putative class action returns to us on remand from the Michigan Supreme Court. In our first opinion in this case, in which plaintiffs alleged a deprivation of their due-process rights under Const 1963, art 1, § 17, we concluded that plaintiffs had not given timely notice of their due-process claims to defendant, the Michigan Unemployment Insurance Agency (the Agency), in compliance with MCL 600.6431(3). In an opinion issued April 5, 2019, the Michigan Supreme Court disagreed with our conclusion, reasoning that plaintiffs did not incur an " 'actionable harm' " in their due-process claims until they were deprived of their property when their income tax refunds were seized or their wages were garnished. *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 190, 192-193; 931 NW2d 539 (2019).[1] Because

[1] Chief Justice MCCORMACK filed a concurring opinion, questioning whether the "strict-compliance rule from [*McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012)] and [*Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007)] for notice of statutorily created claims applies to a due-process claim in particular, or to constitutional tort claims at all." *Bauserman*, 503 Mich at 194 (MCCORMACK, C.J., concurring).

plaintiffs Grant Bauserman and Teddy Broe filed their claims in a timely manner in compliance with MCL 600.6431(3) but plaintiff Karl Williams did not, our Supreme Court affirmed in part and reversed in part our judgment and remanded the case to this Court with the directive that we "consider the Agency's argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional tort claims." *Bauserman*, 503 Mich at 193 n 20.

I. BACKGROUND

We adopt the pertinent facts of this case from our Supreme Court's opinion:

> Plaintiffs are former recipients of unemployment compensation benefits who allege that the Agency unlawfully seized their property without affording due process of law. Plaintiff Bauserman received unemployment compensation from October 2013 through March 2014. In October 2014, the Agency sent Bauserman and his former employer, Eaton Aeroquip (Eaton), a questionnaire regarding suspected unreported earnings that Bauserman received while he was receiving unemployment compensation. Both Bauserman and Eaton responded that Bauserman had not worked for Eaton at the time. On December 3, 2014, the Agency sent Bauserman two notices of redetermination, one claiming that he had received unemployment compensation for which he was ineligible and the other claiming that he had intentionally misled the Agency or concealed information from it to obtain compensation for which he was not eligible. As a result, the Agency informed Bauserman that he owed $19,910 in overpayments, penalties, and interest. The next day, Bauserman submitted an online appeal through the Agency's website regarding its assertion that he had committed fraud, but did not submit a separate appeal regarding the Agency's determination that he had received compensation for which he was not eligible.

From January 2015 through June 2015, the Agency sent Bauserman multiple notices stating the amount he owed to the Agency, informing him of missed payments on his debt, and raising the possibility that his wages would be garnished or his tax refunds seized. One of these communications consisted of a "notice of intent to reduce/withhold federal income tax refund," which warned Bauserman that "if you do not pay the amount shown or take other action described below within 60 days of the mail date on this form, the [Agency] will submit this benefit overpayment balance (restitution) to . . . the United States Department of Treasury . . . [which] will reduce or withhold any federal income tax refund you may be due and will instead forward that amount to the [Agency]." Around this same time, Bauserman sent multiple letters to the Agency attempting to explain the situation, two of which included an attached letter from Eaton explaining that Bauserman received one payment in 2014 for work performed in 2013 but was not employed by Eaton during the time he was receiving unemployment compensation. Finally, on June 16, 2015, the Agency intercepted Bauserman's state and federal income tax refunds.

On September 9, 2015, Bauserman filed a putative class action against the Agency in the Court of Claims, alleging that the Agency had deprived him of his property without providing due process of law. More specifically, he alleged that "Michigan's unemployment fraud detection, collection, and seizure practices fail to comply with minimum due process requirements." On September 30, 2015, the Agency issued two new notices of redetermination, rendering its December 3, 2014 redeterminations "null and void," and the Agency has since returned all monies seized from Bauserman.

On October 19, 2015, Bauserman filed an amended complaint, which added Teddy Broe and Karl Williams as named plaintiffs to the class action. Broe had received unemployment compensation from April 2013 to August 2013, and he had initially been determined eligible on the basis that he had been laid off by his employer, Fifth Third Bank (Fifth Third). However, Fifth Third challenged

that determination, alleging that Broe voluntarily terminated his employment to attend school. The Agency then sent requests for information to Broe regarding his eligibility for compensation, and on July 15, 2014, it sent two notices of redetermination to Broe, the first claiming that he had received compensation for which he was ineligible because his termination of employment at Fifth Third "was voluntary and not attributable to the employer," and the second claiming that he had intentionally misled the Agency or concealed information from it to obtain compensation that he was not eligible to receive. As a result, the Agency informed Broe that he owed $8,302 in overpayments, penalties, and interest.

From August 2014 through April 2015, the Agency sent Broe multiple notices stating the amount owed to the Agency, informing him of missed payments on the debt and raising the possibility that his wages would be garnished or his tax refunds seized. Specifically, on September 2, 2014, the Agency sent Broe a "notice of intent to reduce/withhold federal income tax refund" that was materially identical to the notice provided to Bauserman. In April 2015, Broe sent the Agency a letter appealing its redeterminations and claiming that he had not received the Agency's previous communications because they had been sent to him through his online account with the Agency, which he no longer accessed because he was reemployed and no longer seeking unemployment compensation. The Agency denied the appeal as untimely and, in May 2015, intercepted Broe's state and federal tax refunds. On November 4, 2015, the Agency issued two notices of redetermination, reversing its July 15, 2014 redeterminations that Broe was ineligible for compensation and had committed fraud. The Agency has since returned all monies seized from Broe.

Williams started working at Wingfoot Commercial Tire System in May 2011. When his employment with Wingfoot began, Williams was receiving unemployment compensation from a previous employer. Williams alleges that he advised the Agency that he was now receiving wages from Wingfoot, yet his unemployment compensation had not

been altered; Williams believed that he was still entitled to unemployment compensation because his wages from Wingfoot were less than 1½ times his weekly compensation. See MCL 421.48(1). The Agency sent Williams a request to provide information regarding his employment with Wingfoot. On June 22, 2012, the Agency issued redeterminations that (1) terminated Williams's receipt of future unemployment compensation, (2) asserted that he had already received compensation for which he was ineligible due to his employment with Wingfoot, and (3) alleged that he had intentionally misled the Agency or concealed information from it to obtain compensation for which he was not eligible.

On October 29, 2013, the Agency sent Williams a "notice of garnishment" stating that, if the amount owed was not provided to the Agency within 30 days, his "employer [would] be required to deduct and send to [the Agency] up to 25% of [his] disposable earnings each pay period until the debt is paid in full." Williams's wages were first garnished, at the latest, on May 16, 2014, and on May 27, 2014, the Agency sent Williams a "notice of intent to reduce/withhold federal income tax refund" that was materially identical to the notices provided to Bauserman and Broe. Williams sent a letter appealing the Agency's redeterminations on May 22, 2014. The Agency denied Williams's appeal as untimely, as did an administrative law judge. Finally, on February 19, 2015, the Agency seized Williams's federal income tax refund and continues to collect his debt by this means. [*Bauserman*, 503 Mich at 173-177 (alterations in original).]

In our first opinion in this case, this Court was presented with the following question:

[W]e are asked to determine whether the six months within which plaintiffs were required to file a notice of intention to file a claim, or the claim itself [in compliance with MCL 600.6431(3)], began to run (1) when defendant issued notices informing plaintiffs that they were disqualified from receiving unemployment benefits, or (2) when defendant actually seized plaintiffs' property. [*Bauserman v*

> *Unemployment Ins Agency*, unpublished per curiam opinion of the Court of Appeals, issued July 18, 2017 (Docket No. 333181), p 5.]

We answered this question by stating "that plaintiffs' cause of action accrued when the wrong on which they base their claims was done." *Id*. at 7. Disagreeing with plaintiffs' argument that their cause of action arose when their federal and state income tax refunds were seized or their wages garnished, we held that because plaintiffs alleged a constitutional claim alleging a deprivation of due process, plaintiffs' cause of action accrued when the Agency first notified "plaintiffs of its determination that plaintiffs had engaged in fraudulent conduct, and they were not given the requisite notice and opportunity to be heard." *Id*. at 9. We reversed the order of the Court of Claims denying the Agency's motion for summary disposition and remanded the case to the Court of Claims for entry of an order granting summary disposition in favor of the Agency. *Id*. at 11.

Plaintiffs subsequently filed an application for leave to appeal in the Michigan Supreme Court, which scheduled oral argument on the application, directing the parties to address the following issues:

> whether "the happening of the event giving rise to [appellants'] cause of action" for the deprivation of property without due process occurred when the appellee issued its allegedly wrongful notice of redetermination, or when the appellee actually seized the appellants' property. MCL 600.6431(3); MCL 600.5827; cf. *Frank v Linkner*, 500 Mich 133, 149-153; 894 NW2d 574 (2017). [*Bauserman v Unemployment Ins Agency*, 501 Mich 1047 (2018) (alteration in original).]

In its subsequent decision, the Michigan Supreme Court considered whether plaintiffs had complied with MCL 600.6431, which provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

Our Supreme Court concluded that the dispositive question "is at what point plaintiffs first incurred or suffered the 'actionable harm' for a claim alleging a violation of predeprivation due process." *Bauserman*, 503 Mich at 185. Our Supreme Court went on to recognize that "the 'actionable harm' in a predeprivation due-process claim occurs when a plaintiff has been deprived of property, and therefore such a claim 'accrues' when a plaintiff has first incurred the deprivation of property." *Id*. at 186. The Court concluded:

> Accordingly, the Court of Appeals erred by holding that plaintiffs' due-process claims seeking monetary relief accrued when plaintiffs were deprived of process. Rather, these claims accrued only when they were deprived of property, as they incurred no harm before that deprivation. Because the accrual under MCL 600.5827 of a due-process claim seeking monetary relief "giv[es] rise to [a] cause of action" for purposes of MCL 600.6431(3), the six-month period from MCL 600.6431(3) was trig-

> gered when plaintiffs were deprived of property. [*Id*. at 190 (alterations in original).]

Applying its holding to the facts of this case, our Supreme Court rejected the Agency's argument that plaintiffs were first deprived of property when initial redetermination notices were sent to plaintiffs informing them of their financial liability, or when plaintiffs received the Agency's notice of its intention to intercept their tax returns or wages. Instead, our Supreme Court concluded that plaintiff Bauserman first incurred a deprivation of property when the Agency actually intercepted his federal and state income tax refunds and that his September 9, 2015 complaint was, therefore, filed in compliance with MCL 600.6431(3). *Id*. at 192-193. Our Supreme Court reached a similar conclusion with regard to plaintiff Broe, holding that he first incurred a deprivation of property when the Agency seized his tax refunds in May 2015 and that his claims were, therefore, also timely filed in accordance with MCL 600.6431(3). *Id*. at 193. In contrast, plaintiff Williams incurred a deprivation of his property on May 16, 2014, when his wages were first garnished, and he did not comply with MCL 600.6431(3) because his claims were not filed within six months of that initial deprivation. *Id*. Observing that "[i]t is yet to be determined whether plaintiffs will succeed on their claims against the Agency," our Supreme Court stated the following instructions for this Court:

> On remand, the Court of Appeals should consider the Agency's argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional tort claims. [*Id*. at 193 n 20.]

A. PROCEDURE IN THE COURT OF CLAIMS AS PERTINENT TO PLAINTIFFS' CONSTITUTIONAL-TORT CLAIMS

Given that our Supreme Court has expressly directed that we consider the Agency's assertion that plaintiffs[2] did not allege cognizable constitutional-tort claims, a brief background regarding the proceedings in the Court of Claims as pertinent to this issue is helpful in our analysis. In the Court of Claims, the Agency argued that it should not be held liable for plaintiffs' claims on the basis of governmental immunity. In this vein, the Agency asserted that plaintiffs could not pursue a constitutional-tort claim against the Agency because other alternative remedies were available if plaintiffs pursued their appellate rights under the Michigan Employment Security Act (the MES Act), MCL 421.1 *et seq*. In response, plaintiffs countered that governmental immunity would not insulate the Agency from liability in this case given that plaintiffs alleged a constitutional tort against the Agency, a department of the state of Michigan. Because the Agency acted under what plaintiffs characterized as an "unconstitutional custom or policy," plaintiffs could pursue a claim for damages against it in state court, particularly given that plaintiffs could not pursue redress under 42 USC 1983. Plaintiffs also claimed that their administrative remedies were "inadequate" because appeals to the Agency were not handled in a competent, timely, and responsive fashion. Observing that they were challenging "the entire [Agency] fraud-determination procedure," plaintiffs also questioned whether the Agency "is . . . empowered at any level to decide the constitutionality of its own customs and policies."

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[2] Our references to "plaintiffs" in this opinion are limited to Bauserman and Broe.

On March 8, 2016, the Court of Claims held a hearing on the Agency's motion, and the parties advanced legal arguments consistent with their briefing in the Court of Claims. Specifically, during oral argument, counsel for plaintiffs stated: "This case is not a super appeal of [an] individual fraud determination. Rather, this is a structural challenge to the constitutionality of [the] fraud determination and seizure process." Plaintiffs' counsel stated: "[Plaintiffs are] not challenging the administration of [the MES Act]. We're challenging the constitutionality of the seizure that flows from a fraud finding that's made without due process of law." On May 10, 2016, the Court of Claims issued a lengthy written opinion and order denying the Agency's motion to dismiss. In addressing whether plaintiffs could maintain a cause of action seeking damages for an alleged violation of the Michigan Constitution, the Court of Claims ruled, in pertinent part, as follows:

> [D]efendant further argues that plaintiffs cannot establish an additional prerequisite for maintaining a constitutional tort claim. Following its decision in *Smith* [*v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987)], the [Michigan] Supreme Court in *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000), further explained that "*Smith* only recognized a narrow remedy against the state on the basis of the unavailability of any other remedy." *Id*. at 337 (emphasis added) [sic]. Relying upon the language in *Smith*, defendant argues that because plaintiffs could pursue the administrative process, they had "other remedies available," and therefore, they cannot maintain a constitutional tort claim. This Court finds defendant's argument unavailing. Simply put, the administrative process fails to afford sufficient relief to plaintiff's [sic] challenging an entire statutory and policy scheme. Therefore, a constitutional claim continues to be viable.

On remand, as instructed by our Supreme Court, we now review the Court of Claims' decision regarding plaintiffs' claims alleging constitutional torts. *Bauserman*, 503 Mich at 193 n 20.

II. STANDARD OF REVIEW

While the Court of Claims did not specify under which subrule of MCR 2.116(C) it was denying the Agency's summary-disposition motion, the Court of Claims did not consider material outside of the pleadings and, instead, focused on whether plaintiffs had alleged valid constitutional claims as a matter of law. Accordingly, we review the Court of Claims' decision denying the Agency's motion for summary disposition as having been granted under MCR 2.116(C)(8) (failure to state a claim). As this Court recently observed in *Kazor v Dep't of Licensing & Regulatory Affairs*, 327 Mich App 420, 422; 934 NW2d 54 (2019):

> A motion under MCR 2.116(C)(8) tests the [legal] sufficiency of the complaint based on the pleadings alone, and we review a decision made pursuant to this subrule de novo. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing a motion brought under MCR 2.116(C)(8), "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. Judgment is properly granted under this subrule "when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Long v Liquor Control Comm*, 322 Mich App 60, 67; 910 NW2d 674 (2017). [Second alteration in original.]

III. ANALYSIS

A. CONSTITUTIONAL TORTS

At issue here is whether plaintiffs alleged cognizable constitutional-tort claims allowing them to recover

monetary damages arising from the alleged state due-process violations that resulted from the Agency's actions. Constitutional-tort claims originated in *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388, 389, 397; 91 S Ct 1999; 29 L Ed 2d 619 (1971), a case in which the United States Supreme Court recognized that the petitioner could pursue a cause of action for monetary damages against the respondents arising from injuries he had suffered during an unlawful search and seizure in violation of the Fourth Amendment. Following *Bivens*, in the Michigan Supreme Court's memorandum opinion in *Smith*, 428 Mich at 544, the Court recognized that a majority of the justices agreed 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, the *Smith* Court did not provide further guidance regarding the circumstances under which a claim for damages may be judicially inferred. Accordingly, appellate courts have looked to Justice BOYLE's partial concurring opinion in *Smith* for guidance concerning when a claim for damages arising from an alleged constitutional violation may be judicially inferred. See *Reid v Michigan*, 239 Mich App 621, 628; 609 NW2d 215 (2000) (recognizing that "[a]lthough an appropriate analysis for determining whether a constitutional tort had been established did not garner a majority opinion, Justice BOYLE's extensive analysis of this issue has generally been utilized by this Court"); *Marlin v Detroit (After Remand)*, 205 Mich App 335, 337-338; 517 NW2d 305 (1994).

In Justice BOYLE's partial concurrence in *Smith*, she recognized that the ability to recover monetary damages arising from the violation of rights protected by Michigan's 1963 Constitution is not provided by any general statute in Michigan. *Smith*, 428 Mich at 644

(BOYLE, J., concurring in part). Therefore, the inquiry that the *Smith* Court was presented with was whether that remedy could be "inferred directly from protections found in the Michigan Constitution[.]" *Id*. In her analysis, Justice BOYLE looked to *Bivens* as instructive:

> We would recognize the propriety of an inferred damage remedy arising directly from violations of the Michigan Constitution in certain cases. *As the* Bivens *Court recognized, there are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy*. On the other hand, there are circumstances in which a damage remedy would not be appropriate. *The absence of any other remedy would, as in* Bivens*, heighten the urgency of the question. Justice Harlan, concurring in* Bivens*, states that "*[*t*]*he question then, is, as I see it, whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted."* [*Bivens*, 403 US at 407 (Harlan, J., concurring)]. *In answering this question in the positive, Justice Harlan commented, "[f]or people in Bivens' shoes, it is damages or nothing*." [*Id*. at 410]. [*Smith*, 428 Mich at 647 (BOYLE, J., concurring in part) (most alterations in original; emphasis added).]

Since *Smith* was decided, this Court has recognized that a claim for damages resulting from an alleged violation of the state Constitution will be recognized when "the execution of an official policy or custom caused a person to be deprived of [state] constitutional rights." *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996). More recently, this Court looked to the multifactor balancing test set forth in Justice BOYLE's opinion in *Smith* to determine whether in a case in which the plaintiffs alleged a claim for injury to their bodily integrity arising from their exposure to contaminated water, it was appropriate to infer a damage remedy for an alleged violation of Const 1963, art 1, § 17:

> To apply the test, we consider the weight of various factors, including, as relevant here, (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 damage 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 damage remedy. See *Smith*, 428 Mich at 648-652; 612 NW2d 423 (BOYLE, J., concurring in part). [*Mays v Governor*, 323 Mich App 1, 65-66; 916 NW2d 227 (2018), lv gtd 503 Mich 1030 (2019).][3]

On appeal, the Agency initially contends that plaintiffs have not established that the Agency acted in accordance with a state policy or custom that mandated the alleged unlawful actions.[3] The Agency further argues that plaintiffs are precluded from recovering damages for the alleged constitutional violations because the administrative review process for issues with unemployment benefits set forth in the MES Act provides an adequate remedy for plaintiffs to address these alleged constitutional violations. More specifically, the Agency asserts that the administrative process provides an adequate procedure for reviewing plaintiffs' constitutional claims because administrative decisions pertaining to unemployment benefits are subject to review by the Michigan Compensation Appellate Commission (MCAC), the circuit courts, and the appellate courts of this state. In response, plaintiffs assert that the present case is an appropriate one for this Court to infer a remedy for monetary damages

[3] The parties do not dispute that Const 1963, art 1, § 17 protects plaintiffs' right not to be "deprived of . . . property . . . without due process of law." For example, in its reply brief on appeal, the Agency, citing *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008), acknowledges that before the state may take property from its owner, the state's actions must comply with due process.

arising from the violations of the state Constitution that plaintiffs incurred. Plaintiffs counter the Agency's assertion that the MES Act provides an adequate remedy to adjudicate their constitutional claims by arguing that the administrative process is procedurally flawed, resulting in claimants being denied rudimentary due process. Plaintiffs further claim that the administrative process is not the appropriate forum to address the substance of the constitutional claims at issue here. Addressing other potential alternative avenues for redress, plaintiffs also point out that they cannot sue the Agency in federal or state court under 42 USC 1983.

B. OFFICIAL POLICY OR CUSTOM

As this Court recently observed in *Mays*, the state may only be held responsible for an alleged violation of the state Constitution "where the state's liability would, but for the Eleventh Amendment, render it liable under the standard for local governments as set forth in 42 USC 1983 and articulated in [*Monell v New York City Dep't of Social Servs*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978)]." *Mays*, 323 Mich App at 62 (quotation marks and citation omitted). In *Johnson v VanderKooi*, 502 Mich 751, 762; 918 NW2d 785 (2018), our Supreme Court clarified that for liability to be imposed under 42 USC 1983, a showing must be made that "(1) a plaintiff's federal constitutional or statutory rights were violated and (2) *the violation was caused by a policy or custom of the municipality*."[4] (Emphasis added.) See also *Holeton v Livonia*, 328 Mich App 88, 106; 935 NW2d 601 (2019) (holding "that

[4] In this case, given that plaintiffs allege state constitutional violations against the Agency, a department of the state of Michigan, we must discern whether plaintiffs' allegations, if demonstrated to be correct, establish that the alleged constitutional violations were caused by a policy or custom of the state of Michigan.

the plaintiff must plead and be able to prove that the municipality's policy or custom directly led to the deprivation of the federal constitutional or statutory right at issue" in a suit brought under 42 USC 1983).

In *Johnson*, our Supreme Court noted that an official policy need not be memorialized in writing as a prerequisite for liability. *Johnson*, 502 Mich at 763-764. Moreover, a governmental custom may provide a foundation for liability if it is a "permanent and well settled" practice that governmental officials and employees act in accordance with. *Id*. at 764 (quotation marks and citation omitted). "Thus, accepted, though unwritten, practices of executing governmental policy may give rise to liability for the purposes of *Monell*." *Id*. Additionally, if governmental resources are used to "develop and implement practices and procedures," this, too, can establish that an official governmental policy exists. *Id*. The *Johnson* Court also stated that "a municipality may be held liable for unlawful actions that it sanctioned or authorized, as well as for those that it specifically ordered" and that liability will flow from concerted choices " 'to follow a course of action [that] is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " *Id*. at 765-766, quoting *Pembaur v Cincinnati*, 475 US 469, 483-484; 106 S Ct 1292; 89 L Ed 2d 452 (1986). Similarly, in *Mays*, this Court, also guided by *Pembaur*, held that "[a] 'single decision' by a policymaker or governing body 'unquestionably constitutes an act of official government policy,' regardless of whether 'that body had taken similar action in the past or intended to do so in the future[.]' " *Mays*, 323 Mich App at 63 (second alteration in original), quoting *Pembaur*, 475 US at 480. The *Mays* Court quoted with approval the following passage from *Pembaur*:

> "To be sure, 'official policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. That was the case in *Monell* itself, which involved a written rule requiring pregnant employees to take unpaid leaves of absence before such leaves were medically necessary. However . . . a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood. More importantly, where action is directed by those who establish governmental policy, the [government] is equally responsible whether that action is to be taken only once or to be taken repeatedly." [*Mays*, 323 Mich App at 63-64 (alterations in *Mays*), quoting *Pembaur*, 475 US at 480-481.]

With regard to causation, the *Johnson* Court also instructed, in pertinent part:

> Once a municipal policy or custom has been identified, a plaintiff must then show that the policy or custom was also the "moving force" behind the action that gave rise to the alleged constitutional violation. *Monell*, 436 US at 694. In other words, the policy or custom must be the cause of the violation. [*Johnson*, 502 Mich at 767.]

In this case, plaintiffs have alleged that the Agency systemically, and by way of concerted and coordinated actions, unlawfully intercepted their state and federal tax refunds, garnished their wages, and forced them to repay unemployment benefits that they had lawfully received. The first amended complaint further alleges that the Agency, in violation of state law, imposes penalties on individuals in receipt of unemployment benefits and collects interest also not authorized by state law. Plaintiffs claim that the Agency has taken

these actions under the following circumstances: (1) without providing "required notice of the bases asserted for disqualification [of unemployment benefits,]" or a hearing, (2) by not allowing plaintiffs to present evidence in their own defense, and (3) by using an automated computerized system "for the detection and determination of [alleged] fraud cases," which does not comport with due process. Plaintiffs specifically allege that the Agency uses the Michigan Integrated Data Automated System (MiDAS), "an automated decision-making system" to spot suspected fraud in the receipt of unemployment benefits, and that MiDAS "initiates an automated process" that can result in an individual being disqualified from receiving benefits, having penalties imposed, and being subjected to criminal prosecution. All of this, plaintiffs allege, occurs without plaintiffs being provided with notice, an opportunity to be heard, or an opportunity to present evidence in their defense.

These allegations, if established to be true, would demonstrate that plaintiffs' rights to due process as guarded by Const 1963, art 1, § 17 were violated and that the alleged violations "arose from actions taken by state actors pursuant to governmental policy." *Mays*, 323 Mich App at 64. In our opinion, the Agency's use of MiDAS to allegedly disqualify plaintiffs from receipt of unemployment benefits, to accuse them of fraudulent receipt of unemployment benefits, and to engage in a concerted system of unlawfully imposing penalties and interest and intercepting the financial resources of the plaintiffs can be aptly characterized as an established practice of state governmental officials such that it amounts to a custom supported by the force of law. *Johnson*, 502 Mich at 764. Accordingly, we reject the Agency's assertion that plaintiffs' claims are legally deficient because the allegations plaintiffs advance, if

proven to be correct, amply demonstrate that plaintiffs' constitutional rights were violated as a result of the Agency's policy or custom in administering the unemployment benefit system. *Id*. at 762.

C. SHOULD A DAMAGE REMEDY BE INFERRED IN THIS CASE?

We now turn our attention to the multifactor analysis that Justice BOYLE first stated in *Smith* and that this Court more recently highlighted in its decision in *Mays*. In its brief on appeal, the Agency focuses its argument on the fact that the Agency's administrative process, mandated by the MES Act, provides a sufficient remedy to redress plaintiffs' alleged injuries. However, we will nonetheless weigh all the factors articulated by Justice BOYLE in *Smith*. The first factor requires that we weigh the "existence and clarity of the constitutional violation itself[.]" *Mays*, 323 Mich App at 65, citing *Smith*, 428 Mich at 648-650 (BOYLE, J., concurring in part). Const 1963, art 1, § 17 provides, in pertinent part:

> No person shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*. [Emphasis added.][5]

As our Supreme Court recognized in its opinion in this case, the thrust of plaintiffs' allegations against the Agency are as follows:

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[5] Notably, in *Smith*, Justice BRICKLEY, joined by Justice RILEY, opined that the courts of this state "should defer to the Legislature the question whether to create a damages remedy for violations of a plaintiff's right to due process or equal protection." *Smith*, 428 Mich at 632 (opinion by BRICKLEY, J.). See also *Lewis v Michigan*, 464 Mich 781, 787; 629 NW2d 868 (2001) (quoting same). However, as recognized by the *Lewis* Court, the Michigan Supreme Court has not yet addressed whether a judicially inferred remedy for monetary damages is "ever appropriate" under the Due Process Clause of the state Constitution, Const 1963, art 1, § 17. *Lewis*, 464 Mich at 787 n 3.

> Plaintiffs allege that the Agency violated their due-process rights under the Michigan Constitution when it (1) seized their property without reasonable notice and an opportunity to be heard and (2) engaged in unlawful collection practices. [*Bauserman*, 503 Mich at 185.]

Citing its earlier decision in *Bonner v City of Brighton*, 495 Mich 209, 225-226; 848 NW2d 380 (2014), our Supreme Court also recounted the protections that the Due Process Clause provides:

> The Due Process Clause precludes the state from (1) depriving one of life, liberty, or property (2) without due process of law. Clearly, the clause is violated only if there has been a deprivation of life, liberty, or property. [*Bauserman*, 503 Mich at 186.]

Because plaintiffs allege that the Agency violated Const 1963, art 1, § 17 by seizing their property without providing them with adequate notice and an opportunity to be heard, given the "existence and clarity of the [alleged] constitutional violation itself," *Mays*, 323 Mich App at 65, we conclude that the first factor weighs in favor of judicially inferring a remedy for monetary damages. See also *Sidun v Wayne Co Treasurer*, 481 Mich 503, 509; 751 NW2d 453 (2008) (recognizing that a citizen has the "constitutional right to due process of law before the government takes . . . property").

The second and third factors consider "the degree of specificity of the constitutional protection" and whether there is support for the propriety of a judicially inferred damage remedy in the " 'text, history and previous interpretations' " of Const 1963, art 1, § 17. *Mays*, 323 Mich App at 65-66, quoting *Smith*, 482 Mich at 650, 651 (BOYLE, J., concurring in part). While we acknowledge Justice BOYLE's general concerns in *Smith* that the protections inherent in due process may

not be as well defined as the search-and-seizure protections embedded in the Fourth Amendment that were at issue in *Bivens*, *Smith*, 428 Mich at 651 (BOYLE, J., concurring in part), we nonetheless are satisfied that the due-process protections at issue in this case are clear and definitive enough that the second factor weighs in favor of inferring a judicial remedy. Plaintiffs allege that they were deprived of their property in violation of Const 1963, art 1, § 17, and even though due process is flexible and the procedural protections that it offers may vary depending on the circumstances, "the Due Process Clause secures an absolute right to an opportunity for a meaningful hearing" and an opportunity to be heard before individuals are deprived of their property. *Dow v Michigan*, 396 Mich 192, 205; 240 NW2d 450 (1976). Additionally, with regard to the third factor, concerning whether support for a judicially inferred remedy exists in the text of Const 1963, art 1, § 17, we observe that unlike Const 1963, art 1, § 2, the plain language of Const 1963, art 1, § 17 does not leave the implementation of a private cause of action to the Legislature. Specifically, in *Lewis v Michigan*, 464 Mich 781, 782; 629 NW2d 868 (2001), our Supreme Court held that it would be "inappropriate to infer . . . a damages remedy" with respect to Const 1963, art 1, § 2, because the plain language of that constitutional provision, which states that "[n]o person shall be denied the equal protection of the laws," also expressly states that "[t]he legislature shall implement this section by appropriate legislation."

> On its face, the implementation power of Const 1963, art 1, § 2 is given to the Legislature. Because of this, for this Court to implement Const 1963, art 1, § 2 by allowing, for example, money damages, would be to arrogate this power given expressly to the Legislature to this Court.

> Under no recognizable theory of disciplined jurisprudence do we have such power.
>
> * * *
>
> Given the language of the Michigan Constitution, we hold in this case that we are without proper authority to recognize a cause of action for money damages or other compensatory relief for past violations of Const 1963, art 1, § 2. [*Lewis*, 464 Mich at 787, 789.]

Moreover, while the United States Supreme Court, in its most recent pronouncement on the validity of the *Bivens* remedy, reiterated that caution must be employed before extending the *Bivens* remedy into new contexts, it also acknowledged that in a prior case alleging gender discrimination, the United States Supreme Court had permitted a *Bivens* action in the context of the Fifth Amendment's Due Process Clause. See *Ziglar v Abbasi*, 582 US ___, ___; 137 S Ct 1843, 1854, 1857; 198 L Ed 2d 290 (2017), citing *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979).[6] Accordingly, we likewise conclude that the third factor weighs in favor of a judicially inferred remedy for damages.

As noted earlier in this opinion, the Agency focuses its argument on the fourth factor at issue, that is, whether plaintiffs have another remedy available to them. *Smith*, 428 Mich at 651 (BOYLE, J., concurring in part); *Mays*, 323 Mich App at 66. Specifically, the Agency contends that plaintiffs have an alternative remedy available to them because they can seek re-

[6] In *Bauserman*, our Supreme Court noted that because of the "textual similarities between the state and federal Due Process Clauses," this Court may look to United States Supreme Court cases as persuasive authority even though plaintiffs only allege a violation of their state constitutional due-process rights. *Bauserman*, 503 Mich at 186 n 12.

dress through the administrative system established by the MES Act. The MES Act provides for the payment of unemployment benefits, MCL 421.27; a person's eligibility to receive unemployment benefits, MCL 421.28; criteria for disqualification from benefits, MCL 421.29; and the procedures governing determinations of unemployment benefits, MCL 421.32; as well as review of determinations leading to a redetermination of benefits, MCL 421.32a. Challenges to unemployment benefit redeterminations are "referred to the Michigan administrative hearing system for assignment to an administrative law judge." MCL 421.33(1). If a case is transferred to an administrative law judge, "all matters pertinent to the claimant's benefit rights . . . under this act shall be referred to the administrative law judge." *Id*. A party may also proceed with an appeal from a decision of an administrative law judge to the MCAC. MCL 421.33(2). The MCAC "has full authority to handle, process, and decide appeals filed under [MCL 421.33(2)]." MCL 421.34(1). Additionally, MCL 421.38(1) provides that a claimant may file an appeal in the circuit court, and the circuit court may "review questions of fact and law on the record made before the administrative law judge and the [MCAC]," but the circuit court may also "make further orders in respect to that order or decision as justice may require[.]" MCL 421.38(2) provides for a direct appeal to the circuit court from an order of an administrative law judge "if the claimant and the employer or their authorized agents or attorneys agree to do so by written stipulation filed with the administrative law judge." Additionally, "[t]he decision of the circuit court may be appealed in the manner provided by the laws of this state for appeals from the circuit court." MCL 421.38(4).

Our review of this legislative scheme leads to the conclusion that while the administrative process established by the MES Act allows for a review of the Agency's decisions with respect to the award or disqualification of unemployment benefits, or pertaining to its imposition of penalty and interest, it does not provide an avenue for plaintiffs to seek redress in the form of monetary relief for the alleged violation of their due-process rights protected by the state Constitution. See *Mays*, 323 Mich App at 67 (observing that the proper inquiry is whether "a judicially imposed damage remedy for the alleged constitutional violation is the only available avenue for obtaining *monetary* relief"). Further, while the procedure set forth in the MES Act establishes a way for claimants to challenge the Agency's decision regarding their unemployment benefits, we agree with the Court of Claims that it does not provide a suitable avenue for plaintiffs to challenge the Agency's alleged systemic and concerted deprivation of their due-process rights caused by the Agency's implementation of the MiDAS system. Put another way, we disagree with the Agency that the administrative process set forth in the MES Act provides a remedy for plaintiffs to seek redress for the due-process violations that they claim to have suffered as result of the Agency's allegedly unlawful actions. See *id*. at 70 (concluding that the federal Safe Drinking Water Act, 42 USC 300f *et seq*., and the Michigan Safe Drinking Water Act, MCL 325.1001 *et seq*., "do not provide an alternative remedy for plaintiffs' claim of injury to bodily integrity" as a result of the alleged contamination of their water supply). While we are aware that this Court has addressed a First Amendment claim in the context of reviewing an unemployment-benefits determination, *Shirvell v Dep't of Attorney General*, 308 Mich App 702, 732-749; 866 NW2d 478 (2015), the

present case is not one in which the plaintiffs are merely disputing the determination of their individual employment benefits. Instead, plaintiffs are mounting a direct and large-scale challenge to an administrative process of the Agency that resulted in the seizure of their property without their consent, which plaintiffs assert was done in violation of their right to due process protected by Const 1963, art 1, § 17. In sum, because of the factual and procedural backdrop of this case, we disagree with the Agency that the existing administrative process set forth in the MES Act, including the judicial review provided by the courts of this state, provides plaintiffs with a remedy to pursue their constitutional claims in this case.

Moreover, while the Agency cites *Jones*, 462 Mich 329, in support of its argument, because the state of Michigan enjoys the protection of immunity under the Eleventh Amendment in a lawsuit seeking monetary damages filed in any court under 42 USC 1983 for an alleged violation of rights protected by the federal Constitution or a federal statute, plaintiffs do not have the same access to a remedy that the plaintiffs in *Jones* did. Unlike the instant case, in *Jones*, 462 Mich at 337, our Supreme Court observed that the plaintiff had an alternative remedy available because she could pursue an action in federal or state court under 42 USC 1983 against a municipality or an individual defendant without implicating immunity under the Eleventh Amendment.

Additionally, the present case is factually and legally distinguishable from the persuasive authority of the United States Supreme Court's decision in *Schweiker v Chilicky*, 487 US 412, 414; 108 S Ct 2460; 101 L Ed 2d 370 (1988). In *Schweiker*, the Court declined to extend *Bivens* to a situation in which the

respondents, who had been improperly denied Social Security disability benefits, alleged federal due-process violations against the government officials administering the federal Social Security program. The Court looked to its earlier decision in *Bush v Lucas*, 462 US 367, 380-388; 103 S Ct 2404; 76 L Ed 2d 648 (1983), noting that in circumstances in which Congress had not taken action by enacting legislation to provide a complete remedy for individuals asserting constitutional claims, the inaction would weigh against the imposition of a *Bivens* remedy. *Schweiker*, 487 US at 423. The Court stated:

> In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" [as first articulated in *Bivens*] has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies. [*Id*., quoting *Bivens*, 403 US at 396.]

Specifically, the *Schweiker* Court observed that the respondents, after exhausting their administrative remedies within the Social Security system, could seek judicial review, "including review of constitutional claims." *Schweiker*, 487 US at 424, citing *Heckler v Ringer*, 466 US 602, 615; 104 S Ct 2013; 80 L Ed 2d 622 (1984), and *Weinberger v Salfi*, 422 US 749, 762; 95 S Ct 2457; 45 L Ed 2d 522 (1975) (recognizing that "the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions"). The *Schweiker* Court also concluded that because Congress did not make any "provision for remedies in money damages against officials responsible for unconstitutional conduct that leads to the wrongful denial of benefits," when

that remedy was not included in "the elaborate remedial scheme devised by Congress," it was not available to the respondents. *Schweiker*, 487 US at 414, 424. Notably, *Schweiker* did not involve highly egregious facts such as those alleged in the instant case. Specifically, in *Schweiker*, the respondents' Social Security disability benefits were wrongfully withheld as a result of a new review procedure, *id*. at 416-418, whereas plaintiffs in this case claim that their own monetary funds were wrongfully taken by the Agency after they faced unsubstantiated allegations of fraud and were not given the opportunity to defend against such accusations. Under these circumstances, we are not persuaded that the administrative procedures and the judicial-review provisions set forth in the MES Act, which admittedly do not expressly allow individuals to recover monetary damages as a result of alleged state constitutional violations, provide a remedy to plaintiffs in this case to the extent that a judicial remedy cannot be inferred.

Finally, as this Court did in *Mays*, we afford "significant weight" to the " 'outrageousness' " of the misconduct by the Agency that plaintiffs allege in this case, and we conclude that it weighs in favor of a judicially inferred damage remedy. *Mays*, 323 Mich App at 72 (citation omitted). Specifically, plaintiffs allege that the Agency, relying on an automated system, systematically engaged in a series of concerted actions that wrongfully accused thousands of innocent citizens of this state of fraud and the unlawful receipt of unemployment benefits without grounds for doing so.[7] The MES Act is intended to "safeguard the general welfare through the dispensation of benefits intended to ame-

[7] While the Court of Claims has not yet ruled on plaintiffs' motion seeking class certification, we observe that plaintiffs assert that the number of claimants affected by the Agency's allegedly unlawful actions is in the range of 26,000.

liorate the disastrous effects of involuntary unemployment." *Korzowski v Pollack Indus*, 213 Mich App 223, 228-229; 539 NW2d 741 (1995) (quotation marks and citation omitted). Instead, the procedure at issue allegedly deprived plaintiffs and the others affected by the Agency's actions of their due-process rights because they were saddled with undeserved and unnecessary penalties and interest and were forced to endure the garnishment of wages and state and federal income tax refunds that people in this state rely on to survive. Indeed, the absolutely "egregious nature," *Mays*, 323 Mich App at 72, of the Agency's alleged actions in this case may have led to the undermining of the due-process rights of thousands of innocent citizens across this state at a particularly vulnerable time in their lives, having lost their gainful employment for one reason or another. Consequently, if plaintiffs' allegations are borne out in the course of this litigation, this would be a case in which a judicially inferred damage remedy is appropriate to safeguard the constitutional protections that we as a citizenry in a democracy hold inviolate. In simple terms, the disturbing facts alleged in this lawsuit would call out for that remedy.

Considering the factors set forth in Justice BOYLE's partial concurring opinion in *Smith* and as clarified by this Court recently in *Mays*, we conclude that this multifactor approach weighs in favor of recognizing a judicially inferred damage remedy in this case for the due-process deprivations that plaintiffs allege they suffered as a result of the Agency's unlawful actions. We therefore agree with the Court of Claims' determination that summary disposition was not warranted.[8]

[8] Given our conclusion that plaintiffs have alleged a valid constitutional claim against the Agency, governmental immunity does not shield the Agency from liability. *LM v Michigan*, 307 Mich App 685, 694; 862 NW2d 246 (2014).

IV. CONCLUSION

The May 10, 2016 opinion and order of the Court of Claims denying the Agency's motion to dismiss is affirmed. Plaintiffs, as the prevailing parties, may tax costs under MCR 7.219.

METER, J. concurred with FORT HOOD, J.

GADOLA, P.J. (*concurring*). I concur with the analysis and reasoning of the majority opinion given the controlling legal precedent cited in that opinion, as applied to the facts alleged in plaintiffs' complaint. I write separately to urge that our Supreme Court revisit the fractured decision in *Smith v Dep't of Pub Health*, 428 Mich 540; 410 NW2d 749 (1987), which recognized the existence of a constitutional-tort claim arising under Michigan's 1963 Constitution. In particular, the Supreme Court should address more clearly under what circumstances, if any, a judicially inferred damages remedy is appropriate for violations of the Due Process Clause of the Michigan Constitution. *Id*. at 647 (BOYLE, J., concurring in part).[1]

As an initial matter, I think it somewhat debatable whether the damages issue is even before us on remand. In remanding this case to us, the Supreme Court directed that we "consider the [Unemployment Insurance Agency's] argument that it is entitled to summary disposition on the ground that plaintiffs failed to raise cognizable constitutional tort claims." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 193 n 20; 931 NW2d 539 (2019). Whether plain-

[1] The Supreme Court has granted leave to appeal in *Mays v Governor*, 323 Mich App 1; 916 NW2d 227 (2018), lv gtd 503 Mich 1030 (2019). It is hoped that *Mays* will ultimately provide needed clarity with respect to these questions.

tiffs have a cognizable claim is arguably a more narrow question than whether, if a cognizable claim exists, plaintiffs may recover damages under a judicially inferred remedy. In other words, this Court must first determine whether plaintiffs have made out a constitutional claim before moving on to determine whether they may recover damages for a violation of their constitutional due-process rights. In asking us to determine whether plaintiffs raised "cognizable constitutional tort claims," *id*., the Supreme Court arguably asked us to examine the first question but not necessarily the second question, which touches exclusively upon what an appropriate remedy might be for a "cognizable" claim.

The majority opinion concludes that plaintiffs have (1) raised a cognizable constitutional claim and (2) that they may recover damages for the alleged due-process violations. Given the imprecise nature of the instructions on remand, I cannot conclude that we are beyond our scope in addressing both questions. Because a tort claim would not generally have much value in the absence of a financial recovery, it is reasonable to conclude that the question of damages is part and parcel of determining whether a constitutional-tort claim is "cognizable."

Under existing precedent, as first laid out in *Smith*, and as more recently articulated in *Mays v Governor*, 323 Mich App 1; 916 NW2d 227 (2018), lv gtd 503 Mich 1030 (2019), plaintiffs appear to have made out a cognizable constitutional claim such that the Agency is not entitled to summary disposition. In particular, with respect to the key question in determining whether plaintiffs have made out a cognizable due-process claim, it seems clear that the harms plaintiffs allege result from a "custom or policy" of the defendant

Agency. *Smith*, 428 Mich at 648-652 (BOYLE, J., concurring in part). The harms plaintiffs allege resulted from a series of policy decisions and practices the Agency consciously and intentionally adopted over a considerable period of time. Specifically, the Agency instituted the Michigan Integrated Data Automated System at issue in this case and essentially ceded fraud determinations to that system. One would be hard-pressed to conclude that these decisions and practices were not the result of government policy or custom, and I am unable to do so.

Most unfortunate for our resolution of this case, however, is that the controlling legal precedent, *Smith*, is hopelessly fractured and confused. *Smith* began with a two-page memorandum opinion, signed by all six participating justices, but with an indication that each of its "holdings" was concurred in by "at least" four (unnamed) justices. *Smith*, 428 Mich at 545 (opinion of the Court). Justice BRICKLEY was joined in his separate opinion by Chief Justice RILEY. Justice BOYLE authored an opinion, concurring in part and dissenting in part, which Justice CAVANAGH joined. Justice LEVIN authored a separate opinion concurring in part, and Justice ARCHER dissented, joined by Justice LEVIN. Of the seven enumerated holdings of the *Smith* memorandum opinion, holdings five and six have specific bearing on the resolution of this case, providing as follows:

> 5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> 6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases. [*Id.* at 544.]

As the majority opinion here articulates, the test long employed for determining whether damages may be recognized in a particular (i.e., "appropriate") case, *id*., is set forth in Justice BOYLE's partial concurrence in *Smith*. This balancing test has become the standard since it was first expounded in 1987, despite the fact it had the support of only two justices.

Justice BRICKLEY, on the other hand, joined by Chief Justice RILEY, urged caution with respect to whether the judiciary may infer a damages remedy in constitutional-tort cases. *Smith*, 428 Mich at 629-630 (opinion by BRICKLEY, J.). I concur in their view that the constitutional separation of powers dictates that the judiciary lacks the power to create that remedy when the Legislature has failed to act.

Toward the end of his lengthy opinion, Justice BRICKLEY analyzed whether the plaintiffs in *Smith* could recover damages for their constitutional-tort claims. Justice BRICKLEY began this analysis with a review of the history of the United States Supreme Court's decision in *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971). In *Bivens*, he noted, the Supreme Court, "for the first time, found an implied right to sue federal officials in federal court for damages on the basis of violations of the federal constitution." *Smith*, 428 Mich at 613 (opinion by BRICKLEY, J.). *Bivens* was a Fourth Amendment case, and Justice BRICKLEY called attention to Justice Harlan's concurring opinion, in which he "noted that the appropriateness of money damages for other constitutionally protected interests might 'well vary with the nature of the personal interest asserted.' " *Id*. at 614, quoting *Bivens*, 403 US at 408-409 n 9 (Harlan, J., concurring). Justice BRICKLEY then noted that three justices dissented in *Bivens*, all on the basis

that "the Court should leave to Congress the creation of private causes of action under the constitution." *Smith*, 428 Mich at 614 (opinion by BRICKLEY, J.).

Justice BRICKLEY then recounted that in two subsequent decisions, *Davis v Passman*, 442 US 228; 99 S Ct 2264; 60 L Ed 2d 846 (1979), and *Carlson v Green*, 446 US 14; 100 S Ct 1468; 64 L Ed 2d 15 (1980), the United States Supreme Court extended the scope of the *Bivens* remedy from the search-and-seizure context of the Fourth Amendment to cases arising under the Fifth and Eighth Amendments, respectively. *Smith*, 428 Mich at 615-621 (opinion by BRICKLEY, J.). He noted, however, that Justice Rehnquist, "[i]n a lengthy critique of the *Bivens* decision, . . . dissented from the Court's opinion in *Carlson*. He argued that the constitution did not confer on the judiciary the power to create private damage remedies under specific constitutional provisions and prohibitions; only the legislature possessed that authority." *Id*. at 621.

Since its decision in *Carlson*, the United States Supreme Court has steadily retreated from the *Bivens*, *Davis*, and *Carlson* line of cases. Justice BRICKLEY's *Smith* opinion noted that in *Chappell v Wallace*, 462 US 296; 103 S Ct 2362; 76 L Ed 2d 586 (1983), and *Bush v Lucas*, 462 US 367; 103 S Ct 2404; 76 L Ed 2d 648 (1983), "the Supreme Court apparently curtailed the scope of its earlier opinions in *Bivens*, *Davis*, and *Carlson*," *Smith*, 428 Mich at 622 (opinion by BRICKLEY, J.), and concluded that "[b]oth *Chappell* and *Bush* suggest greater caution and increased willingness on the part of the Court to defer to Congress on the question whether to create damages remedies for violations of the federal constitution," *id*. at 626.

This cabining of *Bivens* continued with the United States Supreme Court's more recent decision in *Ziglar v*

Abbasi, 582 US ___; 137 S Ct 1843, 1857; 198 L Ed 2d 290 (2017), in which the Court refused to recognize a lawsuit for damages brought by a putative class of immigration detainees suing over the conditions of their confinement following the September 11, 2001 terrorist attacks. In *Ziglar*, the Court detailed a long litany of cases, beginning with *Chappell* and *Bush*, in which it had declined to create an implied-damages remedy. *Id*. The Court framed the issue[2] as follows:

> When a party seeks to assert an implied cause of action under the Constitution itself, just as when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis. The question is "who should decide" whether to provide for a damages remedy, Congress or the courts? *Bush*, [462 US at 380].
>
> The answer most often will be Congress. . . . In most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if " 'the public interest would be served' " by imposing a " 'new substantive legal liability.' " *Schweiker* [*v Chilicky*, 487 US 412, 426-427; 108 S Ct 2460; 101 L Ed 2d 370 (1988), quoting *Bush*, 462 US at 390]. . . . The Court's precedents now make clear that a *Bivens* remedy will not be available if there are " 'special factors counselling hesitation in the absence of affirmative action by Congress.' " [*Ziglar*, 582 US at ___; 137 S Ct at 1857 (citation omitted).]

I am constrained to conclude under the existing precedents of *Smith* and *Mays* that plaintiffs have made out a "cognizable claim" and that this is an "appropriate case" for the imposition of damages given plaintiffs'

[2] In November 2019, the United States Supreme Court again considered the scope of *Bivens* when it heard oral argument in *Hernandez v Mesa*, 885 F3d 811 (CA 5, 2018), cert gtd in part 587 US ___; 139 S Ct 2636 (2019); in resolving the case, the Court will have occasion to further define the scope of *Bivens*.

inability to gain monetary redress of a claimed constitutional violation of this scope in the context of an administrative proceeding.[3] And yet I agree with Justice BRICKLEY and Chief Justice RILEY that the scope of the remedy for a violation of the state Constitution is fundamentally a policy decision best left to the policy-making branches of our government. I urge our Supreme Court to address the continued vitality of *Smith* in light of the United States Supreme Court's 35-year retrenchment of *Bivens* and its recognition that the judiciary may not be properly suited to infer a damages remedy in the face of constitutional and legislative silence.[4] Important considerations such as this should not rest upon a multifactor balancing test devised by just two justices of our Supreme Court some 32 years ago.

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[3] Caution should be exercised, however, when the remedy for an alleged constitutional violation is sought against a state agency, as it is in this case, as opposed to individual state officials. As Justice BRICKLEY noted in *Smith*, "allowing suits for damages against state agencies for violations of the state constitution does not further the goal of deterrence underlying a *Bivens*-style action." *Smith*, 428 Mich at 630 (opinion by BRICKLEY, J.).

[4] Unlike the majority opinion, I would not conclude that the failure of the state Constitution to invite legislative action to enforce its due-process provision is actually an invitation to the judiciary to infer such a remedy when none previously existed. To the contrary, one might instead argue that the requirement that the Legislature implement the state Constitution's equal-protection provision suggests that this is the only provision for which the drafters envisioned the creation of a damages remedy given that this would have been thought strictly to be a legislative policy decision. I would further note that just as *Bivens* has been limited and somewhat disfavored since it was issued in 1971, the United States Supreme Court has also retreated from recognizing implied causes of action for damages when Congress has failed to include them in a statutory remedial scheme. *See Ziglar*, 582 US at ___; 137 S Ct at 1857. Out of respect for the policy considerations inherent in creating a damages remedy and lacking explicit authority to do so, the judiciary is well advised to exercise similar caution in cases arising under the state Constitution and to consider leaving those policy considerations to the policy-making branches of government.

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY v MICHIGAN ASSIGNED CLAIMS PLAN

Docket No. 344715. Submitted October 9, 2019, at Detroit. Decided October 17, 2019. Approved for publication December 10, 2019, at 9:00 a.m. Reversed and remanded 507 Mich 498 (2021).

Plaintiff, Esurance Property & Casualty Insurance Company, sued defendants, the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility (MAIPF), in the Wayne Circuit Court for reimbursement of personal protection insurance (PIP) benefits it paid to Roshaun Edwards under a theory of equitable subrogation. Edwards was seriously injured in an automobile accident while driving a vehicle owned and registered by an individual in Michigan and insured by plaintiff under a Colorado policy issued to Luana Edwards-White. When Edwards-White obtained the policy, she falsely represented that she was the owner of the vehicle and that it would be garaged in Colorado. Following the accident, Edwards sought PIP benefits from plaintiff, who paid about $571,000 for Edwards's medical bills. Edwards also applied for benefits from the MAIPF, but the MAIPF did not assign an insurer to Edwards's claim because plaintiff had already paid benefits. Plaintiff subsequently learned that Edwards-White had lied in her insurance application and obtained an order rescinding the policy and declaring it void *ab initio*. Defendants were not parties to this action. Plaintiff then filed a claim for reimbursement against defendants. Defendants moved for summary disposition under MCR 2.116(C)(8), arguing that there was no legal basis for an equitable-subrogation claim against them because no such claim was contemplated by the no-fault act, MCL 500.3101 *et seq*. In response, plaintiff argued that Edwards could seek recovery from defendants because he had timely applied for benefits from the MAIPF and was not covered by a no-fault policy. According to plaintiff, it was entitled to stand in Edwards's place and pursue a claim against defendants through the doctrine of equitable subrogation. The circuit court, David J. Allen, J., granted summary disposition for defendants, ruling that equitable subrogation was not available to plaintiff because the no-fault act did not contain any provisions allowing for reimbursement and indemnification in the circumstances at issue, citing the maxim of *expressio unius est*

exclusio alterius (the expression of one thing is the exclusion of another). Plaintiff appealed.

The Court of Appeals *held*:

1. Equitable subrogation was not available to plaintiff, but the trial court wrongly relied on the *expressio unius* maxim in reaching this conclusion. Relying on that maxim requires the presumption that the Legislature deliberately chose not to include a right to equitable subrogation by a no-fault insurer against defendants, which is not warranted by the text of the no-fault act. However, equitable subrogation is nonetheless unavailable to plaintiff because, contrary to plaintiff's argument that it may stand in Edwards's place and seek to enforce the claim he would have had for PIP benefits against defendants, Edwards does not have a claim against defendants because he had already been paid PIP benefits by plaintiff. MCL 500.3172(1), as enacted by 2012 PA 204, provided that claimants could only obtain PIP benefits through the MAIPF under certain enumerated circumstances, including if no personal protection insurance was applicable to the injury. In this case, when Edwards was injured, plaintiff was the applicable no-fault insurer. Therefore, Edwards did not have a right to seek benefits through the MAIPF on the basis of this or any of the other circumstances set forth in the statute. Because plaintiff could not claim rights that were greater than those of the subrogor under the doctrine of equitable subrogation, and because Edwards had no claim against defendants, plaintiff also had no claim to pursue under the doctrine.

2. Plaintiff could not subject defendants to its equitable-subrogation claim by asserting that the policy had been declared void *ab initio* and should therefore be treated as though it never existed. Equitable subrogation is available only to those who are compelled to pay a debt, not to mere volunteers. Without a policy in place, plaintiff had no relationship to Edwards and was thus in the position of a "volunteer" who paid PIP benefits to Edwards without any legal obligation to do so. Accordingly, plaintiff's claim that it was entitled to seek reimbursement on Edwards's behalf under a theory of equitable subrogation was at odds with its contention that the policy never existed, and this argument failed as a matter of law.

Affirmed.

1. INSURANCE — NO-FAULT ACT — MOTOR VEHICLES — UNINSURED OPERATORS — PERSONAL PROTECTION INSURANCE BENEFITS — EQUITABLE SUBROGATION.

Equitable subrogation is a flexible doctrine of equity whose application is to be determined on a case-by-case basis; although the

no-fault act, MCL 500.3101 *et seq*., does not expressly provide that the doctrine may be used by an insurer to recoup its costs when it has paid personal protection insurance benefits to an uninsured driver under a policy that was later rescinded, and although other provisions throughout the act address reimbursement and similar concepts, this does not mean that the Legislature meant to exclude this type of action on the basis of the maxim *expressio unius est exclusio alterius*.

2. INSURANCE — NO-FAULT ACT — MOTOR VEHICLES — UNINSURED OPERATORS — PERSONAL PROTECTION INSURANCE BENEFITS — EQUITABLE SUBROGATION — "VOLUNTEERS."

A claim for equitable subrogation rests on the principle that a person who is compelled to pay the debt for which another is primarily liable, in order to protect the person's own security interest, is entitled to be substituted in the place of and vested with the rights of the person to whom such payment is made; in order to avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty; where no legal or equitable relationship exists, an insurer who pays the claim of an injured person is a mere volunteer who is not entitled to recover benefits under an equitable-subrogation theory.

3. INSURANCE — NO-FAULT ACT — MOTOR VEHICLES — UNINSURED OPERATORS — PERSONAL PROTECTION INSURANCE BENEFITS — EQUITABLE SUBROGATION – VOIDED POLICIES.

Equitable subrogation is only available to those who are compelled to pay a debt, not to mere volunteers; when an insurance policy has been declared void *ab initio*, the policy is considered to have never existed; an insurer who has had a policy declared void *ab initio* may not rely on the doctrine of equitable subrogation to recover personal protection insurance benefits it has paid before the policy was declared void, because without an insurance policy the insurer has not paid benefits under a policy but rather to an individual with whom the insurer had no relationship.

Secrest Wardle (by *Nathan J. Edmonds* and *Drew W. Broaddus*) for Esurance Property & Casualty Insurance Company.

Anselmi Mierzejewski Ruth & Sowle, PC (by *Michael D. Phillips* and *Zachary P. Krzyzaniak*) for the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility.

Before: METER, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM. After Roshaun Edwards was seriously injured in an automobile accident, plaintiff, Esurance Property & Casualty Insurance Company, paid approximately $571,000 in personal protection insurance (PIP) benefits for Edwards's medical bills. Esurance then discovered that the insurance policy covering the vehicle had been procured through fraud, and it obtained an order voiding the policy *ab initio*. Plaintiff sued defendants, the Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility (MAIPF), seeking reimbursement under a theory of equitable subrogation for the benefits plaintiff mistakenly paid. The circuit court granted summary disposition to defendants under MCR 2.116(C)(8), ruling that equitable subrogation was not available to plaintiff. Plaintiff appeals as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Edwards was seriously injured on January 10, 2016, while driving a vehicle that was titled to and registered by Anthony Robert White II in Michigan. The vehicle was covered by a Colorado insurance policy issued by plaintiff to Luana Edwards-White. Edwards-White obtained the policy by representing to plaintiff that she owned the vehicle and that it would be garaged in Colorado. Edwards did not have his own vehicle or insurance policy. After the accident, Edwards sought PIP benefits from plaintiff under the Colorado policy, and he also applied for benefits from the MAIPF. Because plaintiff paid PIP benefits to Edwards, the MAIPF did not assign an insurer to handle Edwards's claim.

After it paid about $571,000 in PIP benefits, plaintiff discovered that Edwards-White had lied in her applica-

tion for insurance. Plaintiff obtained an order rescinding the policy and declaring it void *ab initio* in a suit to which defendants were not parties. Plaintiff then filed the instant suit, in which it asserts a claim of equitable subrogation and asks for an order requiring defendants to reimburse plaintiff for the PIP benefits it paid to Edwards. Defendants moved for summary disposition under MCR 2.116(C)(8), arguing that there was no legal basis for an equitable-subrogation claim against them. Defendants explained that the no-fault act, MCL 500.3101 *et seq*., contemplates rights of reimbursement and indemnification in a variety of situations, but not in this one. In response, plaintiff argued that the lack of statutory authority for its claim was not dispositive. According to plaintiff, Edwards could seek recovery from defendants because he had timely applied for benefits through the MAIPF and had no applicable no-fault policy. Plaintiff contended that because it paid Edwards's medical bills, it could use the doctrine of equitable subrogation to step into Edwards's shoes and pursue a claim against defendants.

The circuit court ruled that because the no-fault act contains some provisions contemplating reimbursement and indemnification, but nothing covering the circumstances here, the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), see *Detroit City Council v Mayor of Detroit*, 283 Mich App 442, 456; 770 NW2d 117 (2009), required the conclusion that equitable subrogation was not available to plaintiff. The instant appeal followed.

II. DISCUSSION

Plaintiff argues that the trial court was wrong to conclude that equitable subrogation is unavailable and claims that it may pursue equitable subrogation against

defendants because Edwards could have sued defendants under MCL 500.3172. While we do not necessarily agree with the trial court's reasoning, we agree with its ultimate conclusion that equitable subrogation is not available to plaintiff.[1]

The trial court granted defendants summary disposition under MCR 2.118(C)(8). This Court reviews de novo a trial court's decision to grant summary disposition. *Kendzierski v Macomb Co*, 503 Mich 296, 302; 931 NW2d 604 (2019). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. [Citations omitted.]

To the extent this Court is asked to interpret a statute, questions of statutory interpretation are reviewed de novo. *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). This Court also reviews de novo a trial court's decision to apply an equitable doctrine. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013). See also *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 57; 658 NW2d 460 (2003).

As this Court explained in *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 573-574; 683 NW2d 242 (2004):

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[1] This Court will not reverse when the trial court reaches the correct result for an incorrect reason. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 216; 888 NW2d 916 (2016).

> "Equitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). Its application is to be determined on a case-by-case basis. *Id*. It has been applied to allow a no-fault insurance company to collect worker's compensation benefits from a self-insured employer, *Auto-Owners Ins Co*, [468 Mich] at 55, to allow a surety to assert a contractor's right to payment, *Old Kent Bank–Southeast v Detroit*, 178 Mich App 416, 418, 420-421; 444 NW2d 162 (1989), to allow a security company's insurance carrier to assert a legal malpractice claim against the security company's attorney, *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521-524; 475 NW2d 294 (1991), and in other situations. Although caution is indicated, " 'the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability.' " *Hartford Accident & Indemnity Co*, [461 Mich] at 216 (citation omitted).
>
> To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty. *Id*. at 216. Thus, "[w]hen an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer." *Auto-Owners Ins Co*, [468 Mich] at 59. This is true even if the insurer's obligation was only secondary to another carrier's, so that it would not have been liable to pay benefits until the policy limits of the primary carrier were exhausted. See *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 128-129, 132-133; 485 NW2d 695 (1992). The rationale is that an insurance company that pays a claim that another insurer may be liable for is "protecting its own interests and not acting as a volunteer . . . [and] [i]s entitled to invoke the doctrine of equitable subrogation." *Auto-Owners Ins Co*, [468 Mich] at 60; see also *Auto Club Ins Ass'n*, [440 Mich] at 132-133. [Alterations in original.]

The trial court concluded that the doctrine could not be invoked by plaintiff because the no-fault act does not explicitly contemplate its being used in circumstances such as those present here. The trial court relied on the maxim *expressio unius est exclusio alte-*

rius to reach that conclusion. It is true that there are a number of provisions of the no-fault act that address reimbursement or similar concepts under several distinct factual scenarios, none of which apply here.[2] But it is a misapplication of the *expressio unius* maxim to conclude that the Legislature must have intended to exclude the type of suit brought by plaintiff because such action is not specified in the no-fault act. The maxim "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." *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003) (quotation marks omitted). Given that the various reimbursement provisions contained in the no-fault act are scattered throughout the act and involve distinct factual scenarios, we cannot presume that those statutes are necessarily exclusive of any and all other similar remedies in all factual scenarios. Doing so would presume that the Legislature deliberately chose not to include a right to equitable subrogation by a no-fault insurer against defendants, which is unwarranted from the text of the no-fault act.

But even if equitable subrogation is not prohibited by the no-fault act under the circumstances here, it is nonetheless unavailable to plaintiff. Plaintiff argues that because it has paid benefits to Edwards, it may

[2] MCL 500.3114(8) allows a no-fault insurer to receive partial recoupment from other no-fault insurers standing in equal priority. MCL 500.3116 provides rights of reimbursement and indemnity to no-fault insurers where a claimant recovers on a tort claim. MCL 500.3146 sets a statute of limitations on claims for reimbursement or indemnity brought under MCL 500.3116. MCL 500.3175(2) allows insurers to whom a claim is assigned by the MAIPF to seek reimbursement and indemnity from third parties. Finally, MCL 500.3177(1) allows no-fault insurers to seek reimbursement from owners of uninsured vehicles.

step into Edwards's shoes and seek to enforce a claim that Edwards would have for PIP benefits against defendants. The problem is that Edwards has no claim against defendants to pursue the benefits plaintiff has already paid. When Edwards was injured, MCL 500.3172(1) allowed a claimant to obtain PIP benefits through the MAIPF in one of four circumstances: (1) "if no personal protection insurance is applicable to the injury," (2) if "no personal protection insurance applicable to the injury can be identified," (3) if "the personal protection insurance applicable to the injury 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," or (4) if "the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed." MCL 500.3172(1), as enacted by 2012 PA 204.[3] Plaintiff seems to contend that Edwards could have claimed benefits through the MAIPF under the first scenario (no applicable no-fault insurance). See MCL 500.3172(1). Yet, when Edwards applied for benefits from the MAIPF, there *was* an applicable no-fault insurer: plaintiff. Thus, Edwards had no right to benefits through the MAIPF because none of the four avenues for making a claim through the MAIPF under MCL 500.3172 was open to him.[4]

[3] The no-fault act was substantially revised by 2019 PA 21. Following this revision, the same four circumstances are stated in MCL 500.3172(1)(a) through (d).

[4] Much of plaintiff's brief focuses on whether MCL 500.3174 allows a claimant to sue the MAIPF, or whether that provision contemplates only suit being brought against an insurer to whom a claim is assigned. In other words, plaintiff focuses on whether a suit could ever be brought against defendants, not whether any such suit would be meritorious.

Because a plaintiff seeking equitable subrogation cannot claim rights any greater than are possessed by the subrogor, *Eller*, 261 Mich App at 573, and Edwards had no claim against defendants, there is no claim for plaintiff to enforce against defendants through equitable subrogation.

In response to this problem, plaintiff points out that the policy under which it paid benefits to Edwards has been rescinded *ab initio*, and when a policy is declared void *ab initio*, "the insurance policy is considered never to have existed." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 408-409; 919 NW2d 20 (2018). "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Id*. at 409. Thus, were this a matter of rescission as between Edwards and plaintiff, we would have little difficulty agreeing that the matter should be viewed, at least legally speaking, as if no policy ever existed.

But the matter is made complicated because plaintiff wants to use this legal fiction to subject defendants to its equitable-subrogation claim. That is, plaintiff wants to proceed with its equitable-subrogation claim against defendants as if the policy never existed.[5] But if plaintiff wishes to proceed against defendants under the premise that there never was an applicable insur-

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Whether defendants can be sued under MCL 500.3174 is not relevant if there is no possible claim to bring against them in the first place. Thus, MCL 500.3174 is ultimately not relevant, and there is no need for this Court to address the question of who, exactly, may be sued under that statute.

[5] Because defendants were not parties to the rescission action and had no opportunity to defend in that suit, we have doubts whether it would be proper to hold defendants to the outcome of that action. The propriety of doing so, however, does not affect the outcome of this case, so we assume that it is proper for purposes of this opinion.

ance policy, as is pleaded in the complaint, then plaintiff must also be held to that state of affairs. And if that state of affairs applies to plaintiff, then, as will be explained, its claim for equitable subrogation fails as a matter of law.

The heart of a claim of equitable subrogation "rests upon the equitable principle that one who, *in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable*, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect." *French v Grand Beach Co*, 239 Mich 575, 580; 215 NW 13 (1927) (emphasis added). In other words, equitable subrogation is available only to those who are compelled to pay a debt, not to mere volunteers. *Id*. at 580-581. "To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty." *Eller*, 261 Mich App at 574. Accordingly, an insurer who pays expenses *on behalf of its insured* is not a mere volunteer. *Id*. "The rationale is that an insurance company that pays a claim that another insurer may be liable for is protecting its own interests and not acting as a volunteer . . . ." *Id*. (quotation marks and citation omitted).

Plaintiff, somewhat understandably, argues that it could not possibly be deemed a mere volunteer. Plaintiff paid nearly $600,000 in benefits, which plaintiff explains was done out of fear that if it did not, it might become liable for interest and attorney fees down the road. See MCL 500.3142; MCL 500.3148. Plaintiff contends that, on these facts, it was not a mere volunteer because it believed that it was obligated to pay benefits under the policy.

This argument fails, however, because it is predicated on the very state of affairs that plaintiff seeks to

disavow in pursuing its equitable-subrogation claim. Plaintiff's claim for equitable subrogation is dependent on the view that *the insurance policy never existed*. But if the claim for equitable subrogation proceeds under the premise that the policy never existed, then plaintiff had no obligation to pay PIP benefits on Edwards's behalf. Without a policy, plaintiff would have paid benefits not to its insured, but to an individual with whom it had no relationship. Without any legal or equitable duty to pay PIP benefits, plaintiff is a mere volunteer—one who accidentally paid nearly $600,000 in PIP benefits. See *Eller*, 261 Mich App at 574. As a mere volunteer, plaintiff cannot seek equitable subrogation.

In the end, there are two ways to look at the problem. Either the equitable-subrogation claim must be analyzed under the circumstances that existed when benefits were paid, which was before the policy was rescinded, or it must be looked at through the lens that the policy never existed in the first place. If the policy exists, plaintiff's claim of equitable subrogation fails as a matter of law because Edwards could not have pursued benefits from defendants under MCL 500.3172(1). If the policy never existed, then plaintiff was a mere volunteer when it paid $571,000 in PIP benefits. In either case, plaintiff's equitable-subrogation claim fails as a matter of law.

Affirmed.

METER, P.J., and O'BRIEN and SWARTZLE, JJ., concurred.

TCF NATIONAL BANK v DEPARTMENT OF TREASURY
FLAGSTAR BANCORP, INC v DEPARTMENT OF TREASURY

Docket Nos. 344892 and 344906. Submitted December 4, 2019, at Lansing. Decided December 12, 2019, at 9:00 a.m.

TCF National Bank (TCF) filed an action in the Court of Claims against the Department of Treasury (the Department) alleging that the Department had imposed an unlawful assessment and violated its equal-protection rights when it determined that TCF owed a franchise-tax deficiency of $558,794 under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*. The Department imposed the deficiency after conducting a business-tax audit of TCF for the period between January 1, 2008 and December 31, 2009. For the tax years in dispute, TCF filed its Michigan Business Tax (MBT) as the designated member of a unitary-business group (UBG) and remitted taxes on behalf of the UBG. As a result of its audit, the Department determined that there was a discrepancy between the amount of franchise tax owed and the amount reported by TCF on its return. In computing TCF's franchise-tax liability, the Department determined the net capital for each individual UBG member by using the equity capital for each member as reported by TCF, subtracting member-to-member investments, and then averaging each member's net capital for the current tax year. The Department averaged the individual UBG members' net capital by adding each member's net capital for the previous four tax years and dividing the sum by five, pursuant to its interpretation of MCL 208.1265. TCF challenged the Department's calculation method and its averaging methodology at an informal conference, arguing that the Department had erred by calculating the UBG's net capital as to each member rather than calculating it for a "single person," i.e., the UBG. The parties filed cross-motions for summary disposition under MCR 2.116(C)(10) based on these positions. The court, COLLEEN A. O'BRIEN, J., ruled that MCL 208.1265(1) and (2) did not refer to a UBG's net capital, but rather to the net capital of the individual members of a UBG. The court ruled that a UBG is a creation of tax law and does not "exist," so its years of existence cannot be determined under MCL 208.1265.

Flagstar Bancorp, Inc. (Flagstar) filed an action in the Court of Claims alleging that the Department had unlawfully assessed franchise taxes for the tax years beginning January 1, 2008, and ending December 31, 2011, and consequently reducing the refund owed to Flagstar from approximately $10.2 million to $7,026,404. Flagstar had filed its MBT returns for the relevant tax years as the designated member of a 13-member UBG. In 2013, the Department initiated a business-tax audit of Flagstar to determine the difference, if any, between Flagstar's reported franchise-tax liability and the correct amount owed for that period. The Department computed Flagstar's net capital, or tax base for purposes of the franchise tax, by identifying the equity capital of each UBG member, averaging each member's capital, then adding those amounts together to determine the UBG's net capital. Following an informal conference, both parties moved for summary disposition under MCR 2.116(C)(10), arguing that they had correctly determined the UBG's franchise-tax liability under the MBTA. The court, COLLEEN A. O'BRIEN, J., concluded that the MBTA's definition of a "financial institution" referred to an individual UBG member, and thus that the Department had correctly figured the UBG's franchise-tax liability. TCF and Flagstar appealed the court's decisions, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. MCL 208.1261(f) defines a "financial institution" to include certain types of banks, an entity owned by this type of bank that is a member of a UBG, or a UBG made up of either or both types of entities. Under MCL 208.1263, a financial institution is subject to a franchise tax, imposed on the tax base of the financial institution, and MCL 208.1265 prescribes the method for computing the tax base. "Tax base" is defined under MCL 208.1265(1) as the financial institution's "net capital," and "net capital" is defined as the institution's "equity capital . . . less goodwill and the average daily book value of United States obligations and Michigan obligations." Under MCL 208.1265(2), net capital is to be determined by adding the financial institution's net capital for the current tax year with its net capital for the preceding four years and dividing the sum by five. If the financial institution has not been in existence for five years, then net capital is to be determined under the statute by adding its net capital for the number of tax years it has been in existence and dividing that sum by the number of years the financial institution has been in existence. For UBGs, the statute excludes from the calculation of net capital the invest-

ment of one member of a UBG in another member of the UBG. When read together, MCL 208.1261(f), MCL 208.1263, and MCL 208.1265 unambiguously indicate that the Legislature intended the term "financial institution" to refer to a UBG when a UBG taxpayer's franchise-tax liability is at issue. In particular, the Legislature stated in MCL 208.1263(1) that the franchise tax is imposed on "the tax base of the financial institution." The use of the singular article "the" signifies that the franchise tax applies to the singular tax base of a singular taxpayer, not to multiple individual members of a UBG. Thus, the method for determining net capital in MCL 208.1265 also applies to a single UBG taxpayer and not to multiple individual UBG members. Additionally, because MCL 208.1511 provides that UBG members are one taxpayer for filing purposes, the UBG's net capital is an aggregate of its members' net capital for any given tax year.

2. The Department misinterpreted the statutory scheme and erred by applying the averaging formula in MCL 208.1265 to the individual members of TCF and Flagstar and then adding the respective sums together to derive the UBGs' net capital. The Department's argument that its interpretation of the statute was correct because a UBG has no independent existence was not persuasive, because a UBG does exist for tax purposes. The Court of Claims also erroneously interpreted the statute's definition of "financial institution" as referring to individual UBG members because the statute plainly defines a UBG as a financial institution, which must be understood under MCL 208.1265(1) as "the financial institution" whose net capital must be derived in order to figure the amount of franchise tax it owes.

Reversed and remanded for further proceedings.

STATUTES — MICHIGAN BUSINESS TAX ACT — FINANCIAL INSTITUTIONS — UNITARY-BUSINESS GROUPS — FRANCHISE TAX — TAX BASE AND NET CAPITAL — AVERAGING METHOD APPLICABLE TO UNITARY-BUSINESS GROUPS.

The Michigan Business Tax Act (MBTA) defines a financial institution to include certain types of banks, a unitary-business group (UBG) owned by one of these types of banks, or a UBG; under the MBTA, a UBG's tax base may not be determined by applying the averaging method in MCL 208.1265(2) to each individual member of a UBG and then adding those amounts together; rather, MCL 208.1511 requires treating the individual members of a UBG as one taxpayer for filing purposes, so the UBG's net capital is the aggregate of its members' net capital for a given tax year; because the Legislature intended the franchise tax to be imposed on a singular taxpayer, the averaging method

> in MCL 208.1265(2) applies to a UBG taxpayer who files a return in the same manner as to an individual financial institution, and it does not apply to the individual members of a UBG.

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

Bursch Law PLLC (by *John J. Bursch*) for Flagstar Bancorp, Inc., and TCF National Bank.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Lynn A. Gandhi*) for the Michigan Chamber of Commerce.

Warner Norcross and Judd LLP (by *Gaëtan Gerville-Réache*, *Rodney D. Martin*, and *Sean H. Cook*) for the Michigan Bankers Association.

Before: SWARTZLE, P.J., and MARKEY and REDFORD, JJ.

PER CURIAM. In these consolidated appeals,[1] TCF National Bank (TCF) and Flagstar Bancorp, Inc. (Flagstar), appeal by right the decisions of the Court of Claims granting the Department of Treasury summary disposition under MCR 2.116(C)(10). The court also affirmed the Department's franchise-tax assessments, derived by the Department using its computation method for determining the amount of franchise tax applicable to financial institutions under the Michigan Business Tax Act (MBTA), MCL 208.1101 *et seq*. For the reasons stated herein, we reverse.

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[1] *TCF Nat'l Bank v Dep't of Treasury*, unpublished order of the Court of Appeals, entered August 16, 2018 (Docket Nos. 344892 and 344906).

I. BACKGROUND

A. TCF

TCF is a federally chartered national bank with branches in Michigan and a wholly owned subsidiary of TCF Financial Corporation, a Delaware holding company headquartered in Minnesota. TCF filed its Michigan Business Tax (MBT) return as the designated member of a unitary-business group (UBG)[2] comprised of TCF Financial Corporation and its subsidiaries as permitted under the MBTA. On its MBT returns for the tax years in dispute, TCF identified each member of the UBG and on Form 4580 identified "elimination" entities used to account for intramember investments and adjustments for negative capital before eliminations. Using this method, TCF reported the UBG's total and ending taxable net capital, and it remitted franchise taxes on behalf of the UBG.

The Department initiated a business-tax audit of TCF for the period between January 1, 2008 and December 31, 2009, to determine any difference between the correct franchise tax and TCF's reported tax liability. In computing the UBG's "net capital," which is

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[2] The MBTA defines UBG as follows:

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

the taxpayer's tax base for purposes of the franchise tax, the Department first determined each member's equity capital using the equity capital TCF reported on its federal return for each UBG member. If applicable, the Department then subtracted a member's investment in another member from the investing member's equity capital. "Goodwill" and "government obligations" were then subtracted from each member's remaining equity capital, resulting in each individual member's net capital.[3] Next, the Department averaged each member's net capital for the current tax year by adding together the entity's net capital for the current tax year with its net capital for the preceding four tax years and divided that sum by five. If the member existed for less than five years, the Department added the net capital for the number of years in existence and divided the sum by the number of years of its existence. The Department took the averaged net capital for each member and added the amounts together to derive the UBG's net capital. Using this method to determine TCF's tax base, the audit resulted in a franchise-tax deficiency of $558,794.

After the Department issued its final assessment for the deficiency, TCF requested an informal conference to contest the calculation of its net capital. TCF challenged the Department's averaging method on the ground that the Department "inappropriately diluted" the investment elimination. TCF argued that the eliminations were not subject to averaging. The hearing referee disagreed. The Department accepted the hearing referee's recommendation and upheld its determination that the tax due for the period ending December 31, 2008, amounted to $323,872.

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[3] See MCL 208.1265(1).

That prompted TCF to file its complaint alleging that the Department imposed an unlawful assessment and violated its equal-protection rights by calculating the UBG's net capital as to each member rather than calculating it for a "single person," i.e., the UBG, and by failing to wholly eliminate investments into subsidiaries, in contravention of MCL 208.1511 and MCL 208.1265(3). TCF alleged that this treatment discriminated between taxpayers with subsidiaries and taxpayers without subsidiaries. Eventually, the parties filed cross-motions for summary disposition under MCR 2.116(C)(10). The Department asserted that its calculation of TCF's tax base was consistent with the applicable statutes. TCF argued that the Department's calculation conflicted with the applicable statutes because it should have added TCF's net capital for the tax years 2004 through 2008 and divided that number by five, instead of averaging the net capital of each UBG member individually over the four-year period before 2008, depending on each member's years of existence, and then adding those averages together.

The Court of Claims ruled in favor of the Department. The court opined that a UBG is not a separate and distinct legal entity that keeps its own books and records. But because individual UBG members do keep their own books and records, the reference in MCL 208.1265(1) to "the financial institution's net capital . . . cannot refer to a UBG's net capital, despite that 'financial institution' may refer to a UBG." Therefore, the court concluded that when MCL 208.1265(1) and (2) are read together, the phrase "the financial institution's net capital" refers to an individual member's net capital. Accordingly, the court concluded that the Department correctly applied the averaging provision in MCL 208.1265(2) to the individual UBG members. The court stated that because

a UBG is the creation of tax law, a UBG "has never been 'in existence' on its own" and that interpreting the first sentence of MCL 208.1265(2) as referring to a UBG would render the second sentence nugatory. The court concluded that the Department correctly interpreted MCL 208.1265(2) by applying it to individual UBG members, which have a separate and distinct legal existence.

B. FLAGSTAR

Flagstar, headquartered in Troy, Michigan, is a holding company for Flagstar Bank and serves as the designated member of a 13-member UBG. In 2013, the Department initiated a business-tax audit of Flagstar's MBT returns to determine the difference, if any, between Flagstar's reported and correct franchise-tax liability for tax years covered by January 1, 2008 through December 31, 2011. To determine the UBG's "net capital," or tax base for purposes of the franchise tax, the Department identified each individual UBG member's equity capital, averaged each entity's net capital, then determined the UBG's net capital by adding each of the members' averaged net capital. Using this method, the Department computed and assessed additional MBT liability which reduced the refund owed to Flagstar from approximately $10.2 million to $7,026,404.

Flagstar disputed the calculation of net capital for the 2008 tax year and requested an informal conference on the ground that the amounts it had reported were consistent with the statute, whereas the Department's method derived incorrect amounts. Flagstar argued that one of its members, created wholly out of the equity of the parent, should not have been subject to a three-year average for its years in existence;

rather, it should have been subject to the UBG's five-year average. The hearing referee disagreed. The Department affirmed the referee's recommendation, which prompted Flagstar to file its complaint in the Court of Claims alleging that the Department unlawfully assessed a franchise tax to Flagstar for tax years 2008 through 2010 by averaging the net capital of each individual UBG member and adding those averages together to calculate the UBG's net capital without eliminating investments from one UBG member to another.

The parties filed cross-motions for summary disposition under MCR 2.116(C)(10), each arguing that their calculation of net capital comported with the MBTA's financial institution franchise-tax provisions. The Court of Claims ruled in the Department's favor. Similar to its ruling in TCF's case, the court based its decision on its conclusion that

> statutes are to be read as a whole and the Legislature clearly intended for "the financial institution's net capital" as used in MCL 208.1265(1) to not refer to a UBG's net capital; the fact that defining "financial institution" in MCL 208.1265(2) as a UBG renders the second sentence of that statute nugatory; nor, particularly, the fact that the Legislature's use of "financial institution" in MCL 208.1265(2) is inconclusive and can refer to either a UBG or a UBG's individual member, see MCL 208.1261(f)(ii) and (iii). Thus, in light of the evidence showing the Legislature's intent for "financial institution" in MCL 208.1265(2) to refer to a UBG's individual member, the Court is unpersuaded that the Legislature's use of "the" instead of "a" mandates a different conclusion.

II. STANDARD OF REVIEW

We review de novo a court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Gen*

Motors Corp v Dep't of Treasury, 290 Mich App 355, 369; 803 NW2d 698 (2010) (*GMC*). Summary disposition is proper if, after viewing all admissible evidence in a light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*. We also review de novo questions of statutory interpretation. *GMC*, 290 Mich App at 369.

III. ANALYSIS

TCF and Flagstar appeal on the ground that the Court of Claims erred by affirming the Department's method for determining a UBG's tax base for purposes of the franchise tax because that method conflicted with the applicable statutes, resulting in vastly overstating their respective UBGs' net capital. TCF and Flagstar contend that the Department erred by not fully eliminating member investments, by averaging each individual UBG member's net capital over its individual years in existence, and then by adding each member's averaged net capital to derive the UBG's net capital. TCF and Flagstar assert that this was contrary to MCL 208.1265(2), which requires that a UBG's net capital be averaged over its years of existence. We agree.

TCF and Flagstar are the designated members of UBGs subject to the franchise tax and they each filed a combined return for their respective UBGs for the tax years at issue. They dispute how the tax base of a financial institution is calculated when the taxpayer

financial institution is a UBG. The issue before us involves a legal question pertaining to statutory interpretation.

Proper statutory interpretation requires examination of the specific statutory language to determine the legislative intent. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id*. (quotation marks and citation omitted). In *Detroit Pub Sch v Conn*, 308 Mich App 234, 247-248; 863 NW2d 373 (2014), this Court explained:

> When interpreting a statute, our goal is to give effect to the intent of the Legislature. The language of the statute itself is the primary indication of the Legislature's intent. If the language of the statute is unambiguous, we must enforce the statute as written. This Court reads the provisions of statutes reasonably and in context, and reads subsections of cohesive statutory provisions together. . . .
>
> [N]othing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself. Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself. [Quotation marks and citations omitted.]

In *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009), our Supreme Court explained that correct interpretation of a statutory scheme requires (1) reading the statute as a whole, (2) reading the statute's words and phrases in the context of the entire legislative scheme, (3) considering both the plain meanings of the critical words and phrases along with their place-

ment and purpose within the statutory scheme, and (4) interpreting the statutory provisions "in harmony with the entire statutory scheme." "Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Id*.

Chapter 2B of the MBTA covers taxation of financial institutions. Through December 31, 2011, the MBTA defined a "taxpayer" as "a person or a unitary business group liable for a tax, interest, or penalty under this act." MCL 208.1117(5), as enacted by 2007 PA 36. MCL 208.1261(f) defines the term "financial institution" as any of the following:

> (*i*) A bank holding company, a national bank, a state chartered bank, an office of thrift supervision chartered bank or thrift institution, a savings and loan holding company other than a diversified savings and loan holding company as defined in 12 USC 1467a(a)(F), or a federally chartered farm credit system institution.
>
> (*ii*) Any person, other than a person subject to the tax imposed under chapter 2A [taxation of insurance companies], who is directly or indirectly owned by an entity described in subparagraph (*i*) and is a member of the unitary business group.
>
> (*iii*) A unitary business group of entities described in subparagraph (*i*) or (*ii*), or both.

The plain language of this definitional provision establishes that a "financial institution" may be a type of bank, or an entity owned by such a bank that is a member of the UBG, or a UBG made up of either or both of these two types of entities.

The MBTA imposes a "franchise tax" on a financial institution under MCL 208.1263, which provides:

(1) Every financial institution with nexus in this state as determined under [MCL 208.1200] is subject to a franchise tax. The franchise tax is imposed upon the tax base of the financial institution as determined under [MCL 208.1265] after allocation or apportionment to this state, at the rate of 0.235%.

(2) The tax under this chapter is in lieu of the tax levied and imposed [for business income tax and modified gross receipts tax].

MCL 208.1265 prescribes the method for computing the tax base of "a financial institution" as follows:

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

(2) Net capital shall be determined by adding the financial institution's net capital as of the close of the current tax year and preceding 4 tax years and dividing the resulting sum by 5. If a financial institution has not been in existence for a period of 5 tax years, net capital shall be determined by adding together the financial institution's net capital for the number of tax years the financial institution has been in existence and dividing the resulting sum by the number of years the financial institution has been in existence. For purposes of this section, a partial year shall be treated as a full year.

> (3) For a unitary business group of financial institutions, net capital calculated under this section does not include the investment of 1 member of the unitary business group in another member of that unitary business group.

Under MCL 208.1511, a UBG must file a return as follows:

> [A] unitary business group shall file a combined return that includes each United States person, other than a foreign operating entity, that is included in the unitary business group. Each United States person included in a unitary business group or included in a combined return shall be treated as a single person and all transactions between those persons included in the unitary business group shall be eliminated from the business income tax base, modified gross receipts tax base, and the apportionment formula under this act. If a United States person included in a unitary business group or included in a combined return is subject to the tax under chapter 2A or 2B, any business income attributable to that person shall be eliminated from the business income tax base, any modified gross receipts attributable to that person shall be eliminated from the modified gross receipts tax base, and any sales attributable to that person shall be eliminated from the apportionment formula under this act.

"It is well established that different provisions of a statute that relate to the same subject matter are *in pari materia* and must be read together as one law." *Ter Beek v City of Wyoming*, 297 Mich App 446, 462; 823 NW2d 864 (2012). Accordingly, we must read these provisions together in harmony. *Id*. Read together, MCL 208.1261(f), MCL 208.1263, and MCL 208.1265 unambiguously indicate that the Legislature intended the term "financial institution" to mean a UBG when a UBG taxpayer's franchise-tax liability is at issue. The Legislature specified in MCL 208.1263(1) that the franchise tax is imposed on "*the* tax base of *the* finan-

cial institution" (emphasis added). The Legislature's use of the singular article "the" plainly signifies that the tax applies to a singular tax base of a singular taxpayer. The Legislature's inclusion of a UBG in its definitions of "financial institution" in MCL 208.1261(f) informs the interpretation and understanding of the other statutory provisions. Particularly, regarding MCL 208.1265, the specified method applies to a single UBG taxpayer who files a return in the same manner as to a single individual-financial-institution taxpayer that files a return. To give full effect to the Legislature's intent as expressed by its definition of "financial institution," therefore, when a UBG is the taxpayer, the term "financial institution" as used in MCL 208.1265(2) must be read as referring to the UBG itself because no clear contrary legislative intent appears to exist.

MCL 208.1265 specifies how a UBG's net capital must be determined and how the averaging provision applies to a UBG. For UBGs (and other financial institutions), the statute defines "tax base" as the UBG's net capital, which is equity capital computed under generally accepted accounting principles. MCL 208.1265(1). The UBG's net capital is determined by adding the UBG's net capital as of the close of the current tax year and preceding four tax years and dividing the resulting sum by five.[4] MCL 208.1265(2). Because MCL 208.1511 requires treating UBG members as one taxpayer for filing purposes, the UBG's net capital is an aggregate of its members' net capital for any given tax year. To derive each year's correct

[4] If the UBG did not exist for a period of five years, then net capital is determined by adding the UBG's net capital for the number of tax years it existed and dividing the resulting sum by the number of years of the UBG's existence. MCL 208.1265(2).

aggregate amount, the net capital of individual UBG members must be determined and added together. However, to avoid double-counting individual members' net capital, MCL 208.1265(3) directs that for a UBG of financial institutions, the UBG's net capital calculation does not include any investment of one UBG member in another member of the UBG. Thus, all intramember investments must be determined and eliminated for the UBG's net capital calculation. The elimination process requires examination at the member level of all intramember investment transactions so that all investments by any member of the UBG in any other member of that UBG are not included in the net capital calculation for the UBG.

When properly read together, MCL 208.1261(f), MCL 208.1263, and MCL 208.1265 require that a UBG's tax base may not be derived from applying the MCL 208.1265 averaging formula to each individual member and then adding those calculations together. Rather, the sum of individual members' net capital determinations, after adjustments to eliminate intramember investments, equals the UBG's net capital, which is the UBG's tax base for franchise-taxation purposes. The averaging provision of MCL 208.1265(2) applies to the UBG. Had the Legislature intended this provision to apply to each individual UBG member, it could have expressly stated so, as it made clear with respect to net capital and a member's investment in another member of the UBG. The Legislature did not do so, and such a requirement may not be read into the statute.

The Department, therefore, misinterpreted the statutory scheme and erred by applying the MCL 208.1265 averaging formula to the individual members and then adding the results together to derive the

UBG's net capital. Also, we find unpersuasive the Department's argument that the averaging must occur at the member level on the ground that a UBG has no independent existence and, thus, its years in existence cannot be measured. UBGs exist for tax purposes, and the duration of a UBG's existence is capable of measurement. Under MCL 208.1265(2), the UBG's net capital must be averaged over a five-year period or a lesser period if the UBG has not existed for five years.

The Court of Claims erred by affirming the Department's decisions. We conclude that the court based its decision on an erroneous interpretation of the meaning of the statutory term "financial institution," because the statute plainly defines a UBG as a financial institution which, pursuant to the statutory scheme, under MCL 208.1265(1) must be understood as "*the* financial institution" whose net capital must be derived pursuant to MCL 208.1265 for franchise-taxation purposes. The court's analysis cannot be reconciled with the plain statutory language. Although UBGs are not separate and distinct legal entities like other business entities, they do exist for purposes of Michigan business-tax law. See *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 551; 912 NW2d 593 (2018). In *D'Agostini*, this Court explained:

> To qualify as a unitary business group, one member of the proposed group must own or control more than 50% of the other members and there must be a sufficient connection between the members to meet one of two relationship tests. If a group of businesses qualifies as a unitary business group in a particular tax year, then the group must file a unitary tax return for that year. Michigan, like several other states, has adopted the unitary-business-group concept in an effort to measure more accurately the related group's taxable activities in the state.

> Unitary business groups were not taxed as such under the [Single Business Tax Act, MCL 208.1 *et seq*., repealed by 2006 PA 325]. When it enacted the MBT, the Legislature added "unitary business group" to the list of persons who qualify as a "taxpayer" under state law. [*Id*. at 551-552 (citations omitted).]

The Court of Claims' declaration that UBGs do not exist and its conclusion that the MCL 208.1265(2) averaging provision must be applied at the member level run contrary to the Legislature's intent that UBGs must be recognized and treated as a single taxpayer, subject to taxation under the MBTA. Accordingly, the Department was not entitled to summary disposition in either case and TCF and Flagstar are entitled to reversal and recalculation of their franchise taxes for the disputed tax years.

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

SWARTZLE, P.J., and MARKEY and REDFORD, JJ., concurred.

MICHIGAN OPEN CARRY, INC v MICHIGAN STATE POLICE

Docket No. 348487. Submitted December 3, 2019, at Lansing. Decided December 17, 2019, at 9:00 a.m. Leave to appeal denied 505 Mich 1134 (2020).

Michigan Open Carry, Inc., filed an action in the Court of Claims against the Michigan Department of State Police, challenging as a denial defendant's response to plaintiff's request for records under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. In October 2017, plaintiff filed a FOIA request with defendant, seeking records created or maintained by defendant from peace officers or authorized system users compiled under MCL 28.421b(2)(f) and MCL 28.425e(4)—that is, plaintiff sought information regarding when public officials accessed confidential firearms records in accordance with their statutory duties—for a one-year period ending September 30, 2017. Defendant responded to the request, and plaintiff appealed the response to the head of defendant, arguing that the response was essentially a denial of the request. A FOIA appeals officer for the department issued a formal written notice or opinion, stating that the request had not been denied because the information provided to plaintiff summarized the information in the department's possession. Plaintiff appealed in the Court of Claims, asserting that defendant violated the FOIA because (1) its administrative appeal was not decided by the head of defendant, that is, the head of the "public body," and (2) the department acted arbitrarily and capriciously by failing to disclose the requested records; plaintiff argued in the alternative that the department failed to disclose that the information requested did not exist. Defendant denied the allegations and asserted for the first time that the information sought by plaintiff was exempt from disclosure under MCL 15.243. Plaintiff moved for summary disposition; defendant responded and requested that summary disposition instead be granted in its favor. The Court of Claims, CYNTHIA D. STEPHENS, J., granted summary disposition in favor of defendant, first concluding that defendant did not violate the FOIA when the head of the public body did not personally issue the administrative decision. The court further concluded that while defendant in its answer had misconstrued plaintiff's adequately described request for

information, that error was not relevant in light of the fact that the information sought was exempt from disclosure under MCL 15.243(1)(d) because the only way to access the stored records was through the Michigan Law Enforcement Information Network (LEIN), and disclosure of that information was prohibited under MCL 28.214(5) and MCL 28.425e(4). Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 15.233(3) provides that a public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. Under MCL 15.240(1)(a), when a public body denies a FOIA request, the person who made the request may submit a written appeal to the head of the public body. In turn, MCL 15.240(2) requires the head of the public body to take certain action within 10 business days affirming or reversing the denial or extending the time for the head of the public body to respond. MCL 15.240 does not require the head of a public body to personally address, respond to, and decide FOIA denial appeals; instead, because it is not prohibited by the language of MCL 15.240, the head of a public body may employ personnel to act on behalf of and under the authority of the head of the public body when it responds to appeals of FOIA request denials. In this case, defendant was not prohibited by the FOIA from delegating the handling of plaintiff's FOIA request to an appeals officer; and given the volume of FOIA requests defendant received each year and the director's need to discharge her functions, MCL 15.233(3) supported using FOIA hearing officers to act on behalf of defendant's director in FOIA request appeals. Accordingly, defendant correctly authorized a FOIA appeals officer—not the director and head of defendant—to reply to plaintiff's written appeal.

2. The Court of Appeals was bound to follow earlier precedent holding that a public body does not waive defenses by failing to raise them at the administrative level; therefore, defendant did not waive its exemption defense when it failed to raise the issue during plaintiff's administrative appeal. The Court of Appeals declined to convene a special panel to create a conflict with the existing precedent.

3. The FOIA is broadly interpreted to allow public access to the records held by public bodies; relatedly, the statutory exemptions are narrowly construed to serve the policy of open access to public records. MCL 15.243 lists reasons for which a public body may claim a partial or total exemption from disclosure. In particular, MCL 15.243(1)(d) exempts from disclosure records or information specifically described and exempted from disclosure

by statute. With regard to information the department compiles related to individuals who apply for a concealed pistol license (CPL), MCL 28.425e(4)(a) provides that the database containing that information may only be accessed through LEIN or another system that maintains a record of the requester's identity, time, and date that the request was made. In turn, MCL 28.425e(4)(b) requires the requesting person to attest that the firearms records —which under MCL 28.421b(1) are confidential and not subject to disclosure under the FOIA except for specific purposes listed in MCL 28.421b(2)—were sought for one of the lawful purposes set forth in MCL 28.421b(2). Relatedly, MCL 28.214(5) also prohibits the disclosure of information stored in the LEIN and other information systems, like the CPL program application, maintained by defendant except as authorized by law or rule. In this case, the information sought by plaintiff was exempt from disclosure under MCL 28.214(5) because MCL 15.243(1)(d) prohibited disclosure of information exempted from disclosure by statute and MCL 28.421b(1) expressly exempted from disclosure FOIA information related to firearms records and none of the lawful purposes for such disclosure that are set forth in MCL 28.421b(2) was present in this case; moreover, although the FOIA facilitates disclosure of public records, plaintiff failed to identify a specific FOIA provision that authorized the disclosure of LEIN information. Furthermore, the MCL 28.214(5) LEIN disclosure exemption encompasses the retrieval of information through other information systems, including the CPL program application through which the information sought by plaintiff would have been retrieved. Because the requested information was exempt from disclosure, the Court of Claims correctly granted summary disposition in favor of defendant.

Affirmed.

FREEDOM OF INFORMATION ACT — WRITTEN APPEALS TO HEAD OF PUBLIC BODY — PERSONAL RESPONSE BY HEAD OF PUBLIC BODY NOT REQUIRED.

Under MCL 15.240(1)(a), when a public body denies a request brought under the Freedom of Information Act (FOIA), the person who made the request may submit a written appeal to the head of the public body; MCL 15.240(2) requires the head of the public body to take certain action within 10 business days affirming or reversing the denial or extending the time for the head of the public body to respond; the statute does not require the head of the public body to personally address, respond to, and decide FOIA denial appeals; the head of a public body may employ

> personnel to act on behalf of and under the authority of the head of the public body when it responds to appeals of FOIA request denials (MCL 15.231 *et seq*.).

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

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Adam R. de Bear*, Assistant Attorney General, for defendant.

Before: SWARTZLE, P.J., and MARKEY and REDFORD, JJ.

PER CURIAM. In this action brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff, Michigan Open Carry Inc. (MOCI), appeals by right the opinion and order of the Court of Claims denying MOCI's motion for partial summary disposition under MCR 2.116(C)(10) and granting summary disposition in favor of defendant, the Michigan Department of State Police (the Department), under MCR 2.116(I)(2). We affirm.

I. PERTINENT FACTS

In October 2017, MOCI submitted a FOIA request to the Department, seeking "[r]ecords created by and/or maintained by the Michigan Department of State Police from peace officers and authorized system users compiled pursuant to MCL 28.421b(2)(f)[1]

[1] MCL 28.421b(2)(f) provides that firearm records may be accessed and disclosed by a peace officer or authorized system user if

> [a] peace officer or an authorized user has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.

and MCL 28.425e(4)[2] between October 1st, 2016 and September 30th, 2017." MOCI further clarified that it was seeking the "non-confidential separate public records associated with official acts of public officials and public employees in accessing said confidential records in compliance with their statutory duties."

Following a 10-day extension, the Department responded with a series of numbers and directed MOCI to visit the online website containing the Department's Concealed Pistol Licenses Reports for further elaboration. In response, MOCI filed an administrative appeal with the head of the Department, alleging that the information provided was not responsive to the submitted request and stating that no justification for what essentially amounted to a denial had been given. Thereafter, a FOIA Appeals Officer for the Department issued a letter indicating that the request had not been denied and that the information provided was a summary of the information that was in the Department's possession.

In May 2018, MOCI filed a complaint in the Court of Claims, challenging the appellate decision made by the Department on MOCI's FOIA request. Count I of the complaint alleged that the Department violated the

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[2] MCL 28.425e(4) provides:

> Information in the [computerized database of individuals who apply for a license to carry a concealed pistol] shall only be accessed and disclosed according to an access protocol that includes the following requirements:
>
> (a) That the requestor of the firearms records uses the law enforcement information network [LEIN] or another system that maintains a record of the requestor's identity, time, and date that the request was made.
>
> (b) Requires the requestor in an intentional query by name of the firearms records to attest that the firearms records were sought under 1 of the lawful purposes provided in section 1b(2).

FOIA because MOCI's appeal was not decided by "the head of the public body" and the FOIA does not permit the delegation of appellate decision-making. Count II of the complaint alleged that the Department wrongfully denied the FOIA request and acted arbitrarily and capriciously by failing to disclose records that were responsive to MOCI's FOIA request. Count III of the complaint, which was pleaded as an alternative to Count II, alleged that the Department violated the FOIA by failing to disclose that the information requested did not exist.

The Department denied any FOIA violations and indicated that if the information provided by the Department was not the information sought by MOCI, then MOCI had failed to sufficiently describe the requested information. The Department further asserted that the information MOCI requested, as described in the complaint, was exempt from disclosure under MCL 15.243; however, the Department did not raise the existence of an alleged exemption to disclosure during the administrative appeal.

Following discovery, MOCI moved for partial summary disposition under MCR 2.116(C)(10). The Department responded and requested that summary disposition be instead granted in its favor under MCR 2.116(I)(2). In a written opinion, the Court of Claims denied MOCI's motion for summary disposition and granted summary disposition in favor of the Department. More specifically, in regard to Count I, the Court of Claims concluded that the Department did not violate the FOIA simply because the head of the public body did not personally issue the Department's appellate decision; it was permissible for another employee to have drafted a decision "in which, by all accounts, the Director of the Department of State Police acqui-

esced." Further, the Court of Claims noted that MOCI, by filing a complaint, had already exercised the remedy allowed by statute when the head of the public body allegedly failed to respond to the appeal.

Additionally, the Court of Claims found that MOCI's description of the information sought in the FOIA request was sufficiently or adequately described and that the Department had misconstrued the request. The Court of Claims determined, however, that the information sought was exempt from disclosure under MCL 15.243(1)(d) because the only way to access the stored records revealing the sought-after information is through the Michigan Law Enforcement Information Network (LEIN) or a similar system. Consequently, MCL 28.214(5) and MCL 28.425e(4) prohibited the disclosure of the requested information. The Court of Claims ruled that the disclosure exemption was supported by *King v Mich State Police Dep't*, 303 Mich App 162; 841 NW2d 914 (2013). This appeal ensued.

II. REQUIREMENT THAT THE HEAD OF THE PUBLIC BODY ISSUE DECISIONS ON APPEALS

MOCI first argues on appeal that the Court of Claims erred by concluding that the Department had not violated the FOIA when it allowed someone other than Colonel Kriste Kibbey Etue, the then director and head of the public body,[3] to address and respond to its FOIA appeal. MOCI contends, as it did in the Court of Claims, that the Legislature's use of the word "shall" requires that the duty of responding to an administrative appeal belongs solely to the head of the public body. MOCI further maintains that there is no lan-

[3] Colonel Kibbey Etue retired from her position with the Department on December 31, 2018.

guage in the FOIA authorizing the head of a public body to delegate his or her duty to issue written decisions on an appeal.

This Court reviews de novo whether the trial court properly interpreted and applied the FOIA. See *ESPN, Inc v Mich State Univ*, 311 Mich App 662, 664; 876 NW2d 593 (2015). We review for clear error the trial court's factual findings underlying its application of the FOIA. *King*, 303 Mich App at 174. A finding is clearly erroneous if, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake was made. *Id*. at 174-175. In *Wayne Co v AFSME Local 3317*, 325 Mich App 614, 633-634; 928 NW2d 709 (2018), this Court recited the core principles 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.]

MCL 15.240(1)(a) directs those wishing to appeal a denial of a FOIA request to "[s]ubmit to the head of the public body a written appeal that specifically states the word 'appeal' and identifies the reason or reasons for reversal of the denial." MCL 15.240(2) sets forth the next step in the process:

> Within 10 business days after receiving a written appeal pursuant to subsection (1)(a), the head of a public body shall do 1 of the following:
>
> (a) Reverse the disclosure denial.
>
> (b) Issue a written notice to the requesting person upholding the disclosure denial.
>
> (c) Reverse the disclosure denial in part and issue a written notice to the requesting person upholding the disclosure denial in part.
>
> (d) Under unusual circumstances, issue a notice extending for not more than 10 business days the period during which the head of the public body shall respond to the written appeal. The head of a public body shall not issue more than 1 notice of extension for a particular written appeal.

"[I]f the head of the public body upholds all or a portion of the disclosure denial that is the subject of the written appeal, the requesting person may seek judicial review of the nondisclosure by commencing a civil action[.]" MCL 15.240(3).

In response to MOCI's appeal, Lori M. Hinkley, a FOIA Appeals Officer, issued a formal written notice or opinion on Department letterhead that listed Colonel Kibbey Etue at the top of the notice. At the time of MOCI's written appeal and the decision, Hinkley was not the head of the Department; Colonel Kibbey Etue was the director and head of the Department. Again, MCL 15.240(1) and (2) provide that the "head of a public body," upon receipt of a written appeal, "shall" reverse a disclosure denial, issue a notice upholding a disclosure denial, reverse in part and uphold in part a disclosure denial, or issue a notice extending the time for the head of the public body to respond. We reject MOCI's appellate argument that Colonel Kibbey Etue had to personally address and decide MOCI's appeal. Nothing in the plain language of MCL 15.240 prohibits

the head of a public body from employing personnel to act on behalf and under the authority of the head of the public body. An agent is an individual who has express or implied authority to represent or act on behalf of another person known as the principal. *Wigfall v Detroit*, 504 Mich 330, 340 n 16; 934 NW2d 760 (2019). There is no indication in the record that Hinkley lacked the authority to act on behalf of Colonel Kibbey Etue and the Department in responding to and deciding MOCI's appeal.

Moreover, MCL 15.233(3) provides that "[a] public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions." According to the Department, it receives approximately 20,000 record requests a year, 80% of which are submitted under the FOIA. Colonel Kibbey Etue could not discharge her functions as director of the Department if she had to personally address, respond to, and decide FOIA denial appeals; requiring her to do so would amount to excessive interference with the discharge of her functions. Thus, MCL 15.233(3) supports use of Department agents such as Hinkley to act on behalf of the head of the Department, Colonel Kibbey Etue.

III. ABILITY TO RAISE NEW EXEMPTIONS IN COURT OF CLAIMS

MOCI argues for the first time on appeal that the Department waived its right to assert an exemption to the FOIA request in the Court of Claims by failing to claim an exemption as part of its final decision on MOCI's appeal within the Department. Additionally, MOCI argues that the legal precedent allowing consideration of newly raised defenses and exemptions should be overturned. We disagree.

In *Residential Ratepayer Consortium v Pub Serv Comm #2*, 168 Mich App 476, 481; 425 NW2d 98 (1987), this Court concluded that the FOIA's "provision for de novo review in circuit court suggests that the [public body] does not waive defenses by failing to raise them at the administrative level." This proposition was later applied in *Stone St Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 n 2; 689 NW2d 541 (2004). Further, in *Bitterman v Village of Oakley*, 309 Mich App 53, 60; 868 NW2d 642 (2015), the FOIA requester argued that a public body should be "estopped from raising any new defenses in support of its decision to deny her FOIA requests after it made its 'final determination to deny the request[.]' " This Court determined, however, that the argument was "without merit" because the "exact issue" had already been addressed in *Stone St Capital* when this Court reaffirmed that a public body can assert defenses in the circuit court despite their not being raised at the administrative level. *Id*. at 61.

An opinion of the Court of Appeals issued on or after November 1, 1990, is binding precedent with respect to all future panels until it is reversed or modified (1) by a special panel of the Court of Appeals or (2) by the Michigan Supreme Court. MCR 7.215(J)(1). Because neither of these triggering events has occurred, *Bitterman* and *Stone St* remain binding precedent that a public body may assert defenses or exemptions for the first time in the circuit court or Court of Claims. We decline to request the convening of a special panel to create a conflict with the existing binding precedent.

IV. APPLICABILITY OF FOIA EXEMPTION UNDER MCL 15.243(1)(d)

MOCI argues that the Court of Claims erred by ruling that the information sought by MOCI was

exempt from disclosure. We disagree. This Court reviews de novo whether a public record is exempt from disclosure under the FOIA. *King*, 303 Mich App at 174. The lower court's factual findings associated with its FOIA decision are reviewed for clear error. *Id*.

"The Legislature codified the FOIA to facilitate disclosure to the public of public records held by public bodies." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006). To that end, the FOIA must be broadly interpreted to allow public access to the records held by public bodies. See *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 465; 789 NW2d 178 (2010). Relatedly, the statutory exemptions must be narrowly construed to serve the policy of open access to public records. See *Herald Co v Bay City*, 463 Mich 111, 119; 614 NW2d 873 (2000).

A public body may claim a partial or total exemption from disclosure for the reasons listed in MCL 15.243. *Federated Publications, Inc v Lansing*, 467 Mich 98, 102; 649 NW2d 383 (2002), mod on other grounds in *Herald Co*, 475 Mich 463 (2006). MCL 15.243(1)(d) provides an exemption from disclosure for "[r]ecords or information specifically described and exempted from disclosure by statute." The burden of proving that an exemption applies rests with the public body asserting the exemption. *Rataj v Romulus*, 306 Mich App 735, 749; 858 NW2d 116 (2014). When a public body specifically invokes MCL 15.243(1)(d), "it is necessary to examine the statute under which the public body claims disclosure is prohibited." *MLive Media Group v Grand Rapids*, 321 Mich App 263, 270; 909 NW2d 282 (2017).

Moving outside the FOIA, we note that MCL 28.425e(1) requires the Department to "create and

maintain a computerized database of individuals who apply . . . for a license to carry a concealed pistol." Under MCL 28.425e(4)(a), the concealed-pistol-license (CPL) database can only be accessed through or via the LEIN "or another system that maintains a record of the requester's identity, time, and date that the request was made."[4] Furthermore, to make a query of an individual listed in the CPL database, MCL 28.425e(4)(b) requires the requesting party to identify one of the lawful purposes for doing so set forth in MCL 28.421b(2). MCL 28.421b provides, in relevant part, as follows:

> (1) Firearms records are confidential, are not subject to disclosure under the freedom of information act, . . . and shall not be disclosed to any person, except as otherwise provided by this section.
>
> (2) Firearms records may only be accessed and disclosed by a peace officer or authorized system user for the following purposes:
>
> (a) The individual whose firearms records are the subject of disclosure poses a threat to himself or herself or other individuals, including a peace officer.
>
> (b) The individual whose firearms records are the subject of disclosure has committed an offense with a pistol that violates a law of this state, another state, or the United States.
>
> (c) The pistol that is the subject of the firearms records search may have been used during the commission of an offense that violates a law of this state, another state, or the United States.
>
> (d) To ensure the safety of a peace officer.
>
> (e) For purposes of this act.

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[4] As indicated in the record, one of the other pertinent systems, in addition to the LEIN, is the CPL program application.

> (f) A peace officer or an authorized user has reason to believe that access to the firearms records is necessary within the commission of his or her lawful duties. The peace officer or authorized system user shall enter and record the specific reason in the system in accordance with the procedures in section 5e.

According to an affidavit submitted by Michigan State Police Field Support Section Manager Kevin Collins, the information MOCI requested "can only be accessed by a peace officer or authorized system user through either the LEIN or the CPL program application in the [Michigan Criminal Justice Information Network] which is a web portal that provides secure access to a variety of law enforcement applications." MCL 28.214(5) governs the disclosure of information stored in the LEIN and other information systems maintained by the Michigan State Police, providing that "[a] person shall not disclose information . . . in a manner that is not authorized by law or rule." See also Mich Admin Code, R 28.5208(4) (stating that information from the LEIN or other information systems shall generally not be disseminated to an unauthorized agency, entity, or person). We hold that the statutory disclosure exemption in MCL 28.214(5) regarding the LEIN and other information systems as applied to the FOIA exemption in MCL 15.243(1)(d) ultimately prohibits dissemination of the information sought by MOCI.

MOCI acknowledges that MCL 15.243(1)(d), which is part of the FOIA, provides a disclosure exemption for "[r]ecords or information specifically described and exempted from disclosure by statute" and that MCL 28.214(5) bars a person from disclosing LEIN information "in a manner that is not authorized by law or rule." But MOCI argues that the FOIA itself constitutes an authorizing law for purposes of MCL 28.214(5); there-

fore, the requested information should have been disclosed or produced. We reject this circular reasoning. MCL 28.214(5) precludes a person from disclosing LEIN information unless authorized by law or rule, and MOCI fails to identify a specific FOIA provision that particularly authorizes disclosure of LEIN information. MOCI's general reference to the FOIA's being a pro-disclosure law is insufficient to qualify under MCL 28.214(5) as a law or rule that allows disclosure of LEIN information.

MOCI also argues that the FOIA exemption under MCL 15.243(1)(d) refers to information or records "specifically described" as exempted by a statute, but the provision in MCL 28.214(5) regarding a LEIN disclosure exemption is not a *specifically described* exemption and is instead a *broad* exemption covering all information in the LEIN. We find this argument unavailing. Simply put, LEIN information or records are specifically described as exempted from disclosure under MCL 28.214(5). The level of specificity in MCL 28.214(5) is adequate to fall within the FOIA exemption in MCL 15.243(1)(d). Subcategories of LEIN information did not have to be statutorily identified as being exempted before fitting the FOIA exemption in MCL 15.243(1)(d).

MOCI next contends that the information sought is not actually in the LEIN but is instead in "a non-LEIN database known as the CPL database." MOCI maintains that simply because the CPL database can be accessed by going through the LEIN does not somehow mean that the requested information is exempt under the LEIN exemption.[5] Our earlier discussion was

[5] In reviewing the record citation given by MOCI in support of its argument, we note the documentation discusses the CPL program application, not the CPL database.

couched in terms of the LEIN because of the manner in which MOCI framed its arguments, but our analysis is equally applicable to information systems aside from the LEIN. The Criminal Justice Information Policy Council (the Council) is governed by the CJIS Policy Council Act, MCL 28.211 *et seq*. See MCL 28.211a(a). The Council was "created in the department of state police." MCL 28.212(1). And the Council was mandated to "[e]stablish policy and promulgate rules governing access, use, and disclosure of information in criminal justice information systems, including the [LEIN] . . . *and other information systems* related to criminal justice or law enforcement." MCL 28.214(1)(a) (emphasis added). The LEIN disclosure exemption in MCL 28.214(5) discussed earlier also encompasses other information systems, including the CPL program application. Accordingly, in the face of MOCI's CPL-related argument, our position remains unchanged. Additionally, as noted earlier, MCL 28.421b(1) specifically provides that firearm records are not subject to disclosure, even under the FOIA.

Further, as noted by the Court of Claims, this Court upheld a similar statutory restriction on information in *King*, 303 Mich App at 177-178. In *King*, this Court concluded that because polygraph reports were exempt from disclosure under the Forensic Polygraph Examiners Act, MCL 338.1701 *et seq*., the reports were also exempt from disclosure under the FOIA. *Id*. This Court did not conclude that the FOIA was a law that authorized the information's disclosure; we instead concluded that the requested information was exempt from disclosure under MCL 15.243(1)(d). *Id*. at 178. In this case, similar to the circumstances in *King*, the Court of Claims properly determined that the information MOCI requested was exempt from disclosure

under the FOIA because of the statutory prohibition on disclosure of the information under MCL 28.214(5).

We affirm. Having fully prevailed on appeal, the Department may tax costs under MCR 7.219.

SWARTZLE, P.J., and MARKEY and REDFORD, JJ., concurred.

PEOPLE v DUMBACK

Docket No. 345467. Submitted December 11, 2019, at Detroit. Decided December 17, 2019, at 9:05 a.m.

Tiffany L. Dumback pleaded guilty in the Chippewa Circuit Court to failing to stop at the scene of an accident when at fault resulting in death, MCL 257.617(3), and careless or negligent driving, MCL 257.626b. Dumback was driving a pickup truck when she was involved in a single-vehicle rollover accident. Dumback's boyfriend, Benjamin Hilts, was in the passenger seat at the time of the accident and was killed. Dumback left the scene of the accident and did not report it. Before sentencing, Dumback was assessed 100 points for Offense Variable (OV) 3, MCL 777.33, which is appropriate when a victim was killed and the death resulted from the commission of a crime and homicide is not the sentencing offense. Dumback objected that homicide is an element of the offense of failure to stop at the scene of an accident when at fault resulting in death, so the statute precludes the assessment of 100 points for OV 3. The trial court, James P. Lambros, J., affirmed the 100-point score for OV 3. Dumback filed a delayed application for leave to appeal in the Court of Appeals, which was granted.

The Court of Appeals *held*:

MCL 257.617(1) criminalizes leaving the scene after being involved in an accident; MCL 257.617(2) criminalizes leaving the scene after being involved in an accident resulting in serious impairment of a body function or death; and MCL 257.617(3) criminalizes leaving the scene of an accident when at fault and the accident has resulted in the death of another individual. In *People v Conklin*, unpublished opinion per curiam of the Court of Appeals, issued October 28, 2004 (Docket No. 248542), the Court of Appeals held that homicide (i.e., the death of a human being) is not an element of the offense of failing to stop because a person can commit the offense of failing to stop without causing the death of another individual. Rather, the Court of Appeals held that MCL 257.617(3) is a penalty provision. In *People v Lacosse*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2014 (Docket No. 310987), the Court of Appeals

held that MCL 257.617(3) provided the punishment for failure to stop or report an accident caused by that individual and that 100 points were appropriately assessed for OV 3 in such cases because homicide was not the sentencing offense. *Conklin* and *Lacosse* were wrongly decided. The Michigan Supreme Court overruled *Conklin*'s reasoning in *People v McBurrows*, 504 Mich 308 (2019), holding that, in the context of the offense of delivery of a controlled substance, MCL 333.7401, and delivery of a controlled substance causing death, MCL 750.317a, the latter statute does not merely provide an additional punishment for MCL 333.7401. Although MCL 750.317a is predicated on a violation of MCL 333.7401, it adds elements that make it a distinct offense. Even though *McBurrows* involved two separate statutes, the Court's reasoning in that case is applicable here. MCL 257.317(1) and (3) establish crimes that are distinct from each other and that have separate elements. In order to establish a violation of Subsection (1), the prosecution must establish that the driver of a vehicle was involved in an accident, knew or had reason to know that the accident occurred, and did not stop or report it. In addition to establishing these elements, Subsection (3) also requires the prosecution to prove that the driver caused the accident and that another person died as a result of the accident. Subsection (3) is not a mere penalty provision because the additional requirements are elements of the offense in that they increase the prescribed range of penalties to which a defendant is exposed and must be presented to and found by the jury.

Convictions affirmed, but sentence vacated and case remanded for resentencing.

CRIMINAL LAW — SENTENCING GUIDELINES — FAILURE TO STOP AT THE SCENE OF AN ACCIDENT WHEN AT FAULT RESULTING IN DEATH — OFFENSE VARIABLE 3.

Failure to stop at the scene of an accident when at fault resulting in death, MCL 257.617(3), is a separate and distinct offense from the crime of failure to stop at the scene of an accident, MCL 257.617(1), because Subsection (3) contains additional elements not present in Subsection (1) that must be presented to and found by a jury; 100 points must be assessed under Offense Variable (OV) 3, MCL 777.33, when a victim was killed and homicide is *not* an element of the offense; under MCL 777.1(c), "homicide" means any crime in which the death of a human being is an element; 100 points may not be assessed for OV 3 for a violation of MCL 257.617(3) because homicide is an element of the offense.

Eaman & Gabbara PLLC (by *Jennifer J. Qonja* and *Suzan Gabbara*) for Tiffany Dumback.

Amicus Curiae:

Criminal Defense Attorneys of Michigan (by *Jacqueline J. McCann*).

Before: MURRAY, C.J., and SAWYER and GLEICHER, JJ.

PER CURIAM. The legislative sentencing guidelines counsel the assessment of 100 points for Offense Variable (OV) 3 when "[a] victim was killed" as a result of the commission of the sentencing offense, but only if "homicide is not the sentencing offense." MCL 777.33(1)(a) and (2)(b). For purposes of scoring the guidelines, "homicide" includes "any crime in which the death of a human being is an element." MCL 777.1(c). Unpublished cases from this Court indicate that "the death of a human being" is not an element of the offense of failure to stop at the scene of an accident when at fault and resulting in death, MCL 257.617(3); rather, this Court has described MCL 257.617(3) as a "penalty provision." Those cases were wrongly decided, and we now clarify that a violation of MCL 257.617(3) is a "homicide" for purposes of scoring OV 3 under MCL 777.33. Therefore, a 100-point score for OV 3 is not permitted.

Tiffany Dumback pleaded guilty to failure to stop at the scene of an accident when at fault and resulting in death and to careless or negligent driving, MCL 257.626b. The trial court sentenced Dumback to serve 4 years and 9 months to 15 years in prison for failure to stop, and assessed 100 points for OV 3 at sentencing. As this score was not permitted, we vacate Dumback's sentence and remand for resentencing under the cor-

rected guidelines. We otherwise affirm Dumback's convictions.

I. BACKGROUND

At approximately 10:30 p.m. on December 3, 2016, Chippewa County Sheriff's deputies responded to a single-vehicle rollover accident involving a pickup truck. The only person inside the pickup truck, Benjamin Hilts, was in the passenger seat; he had been killed in the accident. The deputies found open and unopened beer containers in the truck cabin and noted that Hilts smelled of alcohol. The deputies further noted that the driver's seat was pulled too close for Hilts to have been driving. A search of the vehicle uncovered a cellular telephone and purse belonging to Hilts's girlfriend, Tiffany Dumback.

Dumback was driving Hilts's truck when the accident occurred. She was traveling 82 miles per hour in a 55-mph zone. Dumback asserted that she and Hilts were arguing at the time of the accident and that the truck had many structural and mechanical issues that made it hard to control. After the accident, Dumback "did not know what to do," so she exited the vehicle and ran to her parents' house, which was approximately one mile from the accident scene. Dumback claimed that she did not report the accident to the authorities when she reached her destination because her sister was listening to a police scanner and learned that assistance had already been summoned. There is no record indication that Dumback was intoxicated during these events.

Sheriff's deputies arrested Dumback in January 2017. The prosecutor charged her with manslaughter with a motor vehicle, failure to report an accident, reckless driving causing death, failure to stop at the

scene of an accident when at fault resulting in death, and a moving violation causing death. Dumback ultimately pleaded guilty to failure to stop at the scene of an accident when at fault and resulting in death and careless or negligent driving.

Before sentencing, the Department of Corrections (DOC) created a presentence investigation report (PSIR) and sentencing information report (SIR). In scoring Dumback's prior record variables (PRVs), the DOC assessed two points for PRV 5, MCL 777.55(1)(e), placing Dumback in PRV Level B. The DOC scored several offense variables. At issue in this appeal is the DOC's assessment of 100 points for OV 3. OV 3 is governed by MCL 777.33, which provides, in relevant part:

> (1) [OV] 3 is physical injury to a victim. Score [OV] 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was killed.....100 points.
>
> (b) A victim was killed.....50 points.
>
> * * *
>
> (f) No physical injury occurred to a victim.....0 points.
>
> (2) All of the following apply to scoring [OV] 3:
>
> * * *
>
> (b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

MCL 777.33(2)(c), which is not applicable in this case, directs that 50 points should be scored if the victim is killed, the "offense involve[d] the operation of a" motor vehicle, and the offender was under the influence of

drugs or alcohol. The assessment of 100 points for OV 3 led to a total OV score of 120 and placement in OV Level VI.[1]

Dumback contended at sentencing that zero points should have been assessed for OV 3 because OV 3 precludes assessing 100 points if the death of a human being is an element of the offense. She asserted that the death of a human being is an element of failure to stop at the scene of an accident when at fault and resulting in death. Relying on *People v Conklin*, unpublished per curiam opinion of the Court of Appeals, issued October 28, 2004 (Docket No. 248542), the trial court determined that the death of a human being is not an element of the offense because "[a] person can commit an offense of failing to stop at a scene of an accident without causing the death of another person." Accordingly, the court affirmed the 100-point score for OV 3.

The recommended guidelines minimum sentence range for a class C offense against a person for a defendant scored in grid B-VI is 36 to 71 months. The trial court sentenced Dumback within that range to a term of 57 to 180 months' imprisonment. Without the 100-point score for OV 3, Dumback would have been scored in grid B-II, with a recommended minimum guidelines range of only 5 to 17 months.

Dumback subsequently filed a delayed application for leave to appeal in this Court. We granted the application limited to the following issues:

> (1) Whether the death of a human being is an element of the offense defined in MCL 257.617(3) for purposes of Offense Variable 3 (OV 3), MCL 777.33, and if so
>
> (2) Whether Model Criminal Jury Instruction 15.14a conflicts with this Court's decision regarding OV 3 scoring

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[1] A typographical error on the SIR lists Dumback's OV Level as IV.

in *People v Lacosse*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2014 (Docket No. 310987), rev'd in part on other grounds 499 Mich 873 (2016). [*People v Dumback*, unpublished order of the Court of Appeals, entered October 26, 2018 (Docket No. 345467).]

II. ANALYSIS

We review de novo the trial court's interpretation of the statutory sentencing guidelines. *People v Babcock*, 469 Mich 247, 253; 666 NW2d 231 (2003). "[O]ur goal in interpreting a statute is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Hardy*, 494 Mich 430, 439; 835 NW2d 340 (2013) (cleaned up).[2]

As noted, MCL 777.33(2)(b) precludes assessing 100 points for OV 3 if homicide is the sentencing offense. A "homicide" for purposes of the sentencing guidelines is "any crime in which the death of a human being is an element of that crime." MCL 777.1(c).

Relevant to this appeal, Dumback pleaded guilty to a violation of MCL 257.617(3). MCL 257.617 provides in full:

> (1) The driver of a vehicle who knows or who has reason to believe that he or she has been involved in an accident upon public or private property that is open to travel by

[2] 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).

> the public shall immediately stop his or her vehicle at the scene of the accident and shall remain there until the requirements of [MCL 257.619] are fulfilled or immediately report the accident to the nearest or most convenient police agency or officer to fulfill the requirements of [MCL 257.619(a) and (b)] if there is a reasonable and honest belief that remaining at the scene will result in further harm. The stop shall be made without obstructing traffic more than is necessary.
>
> (2) Except as provided in subsection (3), if the individual violates subsection (1) and the accident results in serious impairment of a body function or death, the individual is guilty of a felony punishable by imprisonment for not more than 5 years or by a fine of not more than $5,000.00, or both.
>
> (3) If the individual violates subsection (1) following an accident caused by that individual and the accident results in the death of another individual, the individual is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00, or both.

MCL 257.617(1) criminalizes leaving the scene after being involved in an accident. MCL 257.617(2) more specifically criminalizes leaving the scene after being involved in an accident that resulted "in serious impairment of a body function or death," and MCL 257.617(3) criminalizes leaving the scene of an accident when at fault and resulting "in the death of another individual."

A

In two unpublished opinions, this Court has held that the conduct described in MCL 257.617(3) does not amount to a "homicide" under the sentencing guidelines and therefore that a convicted defendant can be

assessed 100 points for OV 3. See *Conklin*, unpub op at 2; *Lacosse*, unpub op at 4. In *Conklin*, unpub op at 2, a panel of this Court held:

> Homicide, i.e., the death of a human being, MCL 777.1(c), is not an element of the failing to stop offense. A person can commit the offense of failing to stop at the scene of an accident without causing the death of another person. MCL 257.617(3) is a penalty provision, and does not make homicide an element of the failing to stop offense.[3]

In *Lacosse*, unpub op at 4, this Court described the defendant's position that he could not be assessed any points for OV 3 as follows:

> [D]efendant contends that the sentencing offenses—the failure to stop and report the accident—did not cause the victims' death and injury. Rather, the accident itself caused the death and injury. As defendant was not convicted of a crime related to the actual accident, he contends that he could not be assessed points for [OV 3].

The *Lacosse* panel ultimately held:

> However, defendant's interpretation of the statute under which he was convicted is not accurate. The judgment of sentence does not indicate under which subsection of MCL 257.617 defendant was convicted. MCL 257.617(3) provides the punishment for a failure to stop or report an accident "following an accident caused by that individual." At the plea hearing, defendant admitted that his car struck something on the night in question. Accordingly, contrary to defendant's assertion, the underlying accident caused by defendant is part of the sentencing offense.
>
> Defendant's score of 100 points for OV 3 fits squarely within the parameters of the statute. A victim was killed as required by MCL 777.33(1)(a). One hundred points

[3] The Legislature amended MCL 257.617 after *Conklin* was issued, but the amendments had no impact on this Court's reasoning. See 2005 PA 3.

> were permitted because homicide was not the sentencing offense. MCL [777.33(2)(b)]. And the court was required to select the relevant option with the highest number of points, precluding consideration of a lower score based on drunken driving. MCL 777.33(1); see also MCL 777.33(2)(c). [*Id*.]

As the defendant in *Lacosse* did not argue that a resultant death was an element of the offense proscribed in MCL 257.617(3), the panel did not address this question and instead resolved whether 100 points could be assessed consistent with *Conklin*.

B

We now conclude that *Conklin* was wrongly decided and that the result in *Lacosse* cannot stand. We first note that the reasoning employed by the *Conklin* panel was recently overruled by the Michigan Supreme Court in *People v McBurrows*, 504 Mich 308, 318-320; 934 NW2d 748 (2019). The Court of Appeals held in *People v McBurrows*, 322 Mich App 404, 413; 913 NW2d 342 (2017), that the offense of delivering a controlled substance causing death, MCL 750.317a, was "properly understood as providing a penalty enhancement when a defendant's criminal act—the delivery of a controlled substance in violation of MCL 333.7401—has the result or effect of causing a death to any other individual." (Emphasis omitted.) The Supreme Court found this characterization erroneous. *McBurrows*, 504 Mich at 318.

> The Court of Appeals characterized MCL 750.317a as a "penalty enhancement" in reliance on this Court's statement in [*People v*] *Plunkett*, 485 Mich [50, 60; 780 NW2d 280 (2010)], that MCL 750.317a "provides an additional punishment for persons who 'deliver[]' a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by 'any . . . person' and it

causes that person's death." The Court of Appeals read too much into our characterization of MCL 750.317a as providing "an additional punishment." It is only an "additional punishment" because MCL 333.7401 itself criminalizes the delivery of a controlled substance, without regard to the consequences, and punishes it to a lesser degree than MCL 750.317a. Nothing requires the Legislature to criminalize delivery of a controlled substance *at all*; it could content itself with only punishing a delivery *if* the consumption of the delivered substance causes a death. In such a scenario, *no crime at all* would have occurred—and criminal liability would not have attached—until the death occurred, which illustrates the necessity of the death as an element of the crime itself, rather than a mere basis for a penalty enhancement.

To express this concept another way, MCL 750.317a establishes a crime that is distinct from the crime established in MCL 333.7401, with its own elements. The elements of a prosecution under MCL 750.317a are: (1) delivery to another person, (2) of a schedule 1 or 2 controlled substance (excluding marijuana), (3) with intent to deliver a controlled substance as proscribed by MCL 333.7401, (4) consumption of the controlled substance by a person, and (5) death that results from the consumption of the controlled substance. Although MCL 750.317a is predicated on a violation of MCL 333.7401, it adds elements that make it a distinct offense. While, as noted, it would be entirely possible for the Legislature not to criminalize delivery of a controlled substance at all, the fact that it has—and has provided a different punishment when the consumption of the delivered substance causes a death—illustrates that what the Court of Appeals characterized as a "penalty enhancement" is in fact a distinct crime. An "element" of a crime is any "fact[] that increase[s] the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (quotation marks and citation omitted). Because death, if proved, "increase[s] the prescribed range of penalties," it is an "element" as defined in *Apprendi* and

> not a mere "sentencing consideration" or "penalty enhancement," meaning it "must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. [*McBurrows*, 504 Mich 318-320 (alterations in original).]

While *McBurrows* involved the interaction of two separate statutes, its reasoning applies to the interaction of the subsections in the current matter. MCL 257.617(1) and MCL 257.617(3) establish crimes distinct from each other, each with its own elements, and Subsection (3) is not a mere "penalty enhancement" or "penalty provision." Applying *McBurrows*' reasoning, MCL 257.617(3) "is only an 'additional punishment' because" MCL 257.617(1) "itself criminalizes" leaving the scene of an accident "without regard to the consequences, and punishes it to a lesser degree than" MCL 257.617(3). See *McBurrows*, 504 Mich at 319.

To support conviction under Subsection (1), the prosecution must establish that the driver of a vehicle was involved in an accident, knew or had reason to know that the accident occurred, and did not stop or report it. To support conviction under Subsection (3), the prosecution must again establish that the driver of a vehicle was involved in an accident, knew or had reason to know that the accident occurred, and did not stop or report the accident, but the prosecution must also prove that the driver caused the accident and that another person died as a result of the accident. These additional requirements are elements of the offense because they " 'increase[] the prescribed range of penalties to which a criminal defendant is exposed.' " *Id*. at 320, quoting *Apprendi*, 530 US at 490. These additional requirements must be presented to and found by the jury. Therefore, they are offense elements.

C

Moreover, treating the "results in the death of another individual" piece of failure to stop at the scene of an accident when at fault and resulting in death offense as a penalty provision rather than an element is contradictory to this Court's treatment of similar offenses. A string of decisions from this Court, both published and unpublished, has determined that similar vehicular crimes involving death are homicides for purposes of OV 3, precluding a score of 100 points. In *People v Brown*, 265 Mich App 60, 61-62; 692 NW2d 717 (2005), rev'd on other grounds 474 Mich 876 (2005), for example, the defendant pleaded guilty to driving with a suspended license causing death, MCL 257.904(4). The question in *Brown*, 265 Mich App at 63-64, was whether the court could assess 25 points under MCL 777.33(1)(c) (reflecting a life-threatening or permanent injury) or was required to assess zero points. This Court stated without analysis that driving with a suspended license causing death was a "homicide" offense and therefore 100 points was not permissible. *Id*. at 65.

The statutory framework of MCL 257.904, proscribing driving with a suspended license, is similar to MCL 257.617. At the time the defendant in *Brown* committed his offense, MCL 257.904 provided, in relevant part:

> (1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in [MCL 257.212] of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally

> accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.
>
> * * *
>
> (3) Except as otherwise provided in this section, a person who violates subsection (1) . . . is guilty of a misdemeanor . . . [.]
>
> * * *
>
> (4) A person who operates a motor vehicle in violation of subsection (1) and who, by operation of that motor vehicle, causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. . . . [MCL 257.904, as amended by 2000 PA 77.]

Subsequent amendments of MCL 257.904 have not altered the substance of these provisions. As with MCL 257.617, the first subsection of MCL 257.904 defines an operating offense in which no one is injured. Later subsections define the same offense, but with added elements of the harm caused to a victim. The purpose of MCL 257.904(4) was not to create a "punishment provision" for an offense in which operating with a suspended license "causes the death of another person"; rather, the statute created a new offense, one element of which was a resultant death.

In *People v Charles (On Reconsideration)*, unpublished per curiam opinion of the Court of Appeals, issued February 2, 2006 (Docket No. 246034), p 1, the defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor causing death, MCL 257.625(4), as well as driving with a suspended license causing death. The trial court scored 25 points for OV 3, reflecting that the defendant caused the victim to suffer a "[l]ife threatening . . . injury."

Charles, unpub op at 6-7. This Court noted that the injury ultimately resulted in death, but explained that 100 points could not be assessed for OV 3 as "homicide was the sentencing offense." *Id*. at 7.

MCL 257.625 is structured similarly to both MCL 257.617 and MCL 257.904. At the time of the defendant's offense in *Charles*, MCL 257.625 provided, in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:
>
> (a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> * * *
>
> (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.
>
> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) or (3) and by the operation of that motor vehicle causes the death of another person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less

> than $2,500.00 or more than $10,000.00, or both. . . . [MCL 257.625, as amended by 1999 PA 73.]

The statute has been amended many times to lower the legal limit of intoxication and to reorganize certain provisions, but the structure of the offense elements have remained substantively the same. Despite that MCL 257.625(4) provides a different penalty for operating under the influence causing death than for operating under the influence without causing injury, this Court did not characterize MCL 257.625(4) as a "penalty provision." See *Charles*, unpub op at 3-4.

And in *People v Titus*, unpublished per curiam opinion of the Court of Appeals, issued February 15, 2018 (Docket Nos. 336352 and 337177), p 1, defendant Titus pleaded guilty to reckless driving causing death, MCL 257.626(4). "The trial court cited the death of a victim . . . as [an] aggravating circumstance[]" in imposing a sentence that departed from the guidelines. *Titus*, unpub op at 6. This Court noted that "the death of a victim is not itself an aggravating circumstance. Indeed, it is an element of the offense of reckless driving causing death." *Id*. And again, the statute at issue provided a general offense of "reckless driving" punishable by different degrees depending on the addition of certain elements. The addition of elements in these provisions created additional, separate offenses.

D

We find further support for holding that "results in the death of another individual" is an element of the subject offense in *People v Feezel*, 486 Mich 184, 193-194; 783 NW2d 67 (2010). MCL 257.617(3) also requires the prosecution to prove causation, an element not included in Subsections (1) or (2). In *Feezel*, 486 Mich at 193, the Supreme Court noted that "the

plain language of MCL 257.617(3) contains an element of causation." The Court continued, "Specifically, the statute imposes criminal liability if an individual fails to stop 'following an accident *caused* by that individual and the accident results in the death of another.' " *Id*. at 194. As "the statute specifically requires the prosecution to establish that the accident was 'caused' by the accused," the Court held, causation was an element of the offense. *Id*.

Just as causation is an element of a violation of MCL 257.617(3), so too is "results in the death of another." The prosecution cannot establish that a defendant violated the statute without proving that a death resulted. If causation is more than a penalty provision, so too is a resultant death.

E

As we have determined that "results in the death of another" is an element of a violation of MCL 257.617(3) and that this Court's unpublished opinion in *Lacosse* cannot stand, we need not reach the second issue addressed by Dumback on the order of this Court. M Crim JI 15.14a directs trial courts to inform the jury that it must find beyond a reasonable doubt that the defendant both caused the accident and that the accident resulted in death. As now clarified, these instructions are in conformity with the law.

We affirm Dumback's conviction, but vacate her sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

MURRAY, C.J., and SAWYER and GLEICHER, JJ., concurred.

PEOPLE v ABBOTT (ON REMAND)

Docket No. 336332. Submitted June 27, 2019, at Detroit. Decided December 17, 2019, at 9:10 a.m.

Derrin T. Abbott was convicted following a jury trial in the Wayne Circuit Court of conducting a criminal enterprise, MCL 750.159i(1); five counts of breaking and entering a building with intent to commit larceny, MCL 750.110; five counts of safebreaking, MCL 750.531; and five counts of possession of burglar's tools, MCL 750.116. In support of the criminal-enterprise charge, the prosecution set forth 21 dates of criminal activity between June 13, 2015, and March 21, 2016; the five incidents that formed the basis of the separate charges for breaking and entering, safebreaking, and possession of burglar's tools were included in those 21 dates. In scoring the sentencing guidelines, the court, Thomas C. Cameron, J., assessed 10 points for Offense Variable (OV) 12, MCL 777.42(1)(c), finding that defendant had committed three or more contemporaneous felonious criminal acts involving other crimes within 24 hours of the sentencing offense that had not resulted in a separate conviction; the court stated that the contemporaneous criminal acts included at least two incidents of receiving or concealing stolen property as well as acts of breaking and entering and safebreaking committed as part of the criminal enterprise. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years in prison for the criminal-enterprise conviction, 20 to 40 years in prison for each safebreaking conviction, and 10 to 20 years in prison for each breaking-and-entering and possession-of-burglar's-tools conviction. Defendant appealed but did not raise any issues related to his sentencing. In an unpublished per curiam opinion issued April 12, 2018, the Court of Appeals, SAWYER, P.J., and HOEKSTRA and MURRAY, JJ. (Docket No. 336332), affirmed defendant's convictions. Defendant applied for leave to appeal in the Supreme Court, challenging for the first time the trial court's scoring of the guidelines. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals to address whether OV 12 was correctly scored, taking into consideration whether defendant committed three or more felonious criminal acts within 24 hours of the sentencing offense and whether the predicate of-

fenses for the criminal-enterprise conviction constituted "the sentencing offense" or could be considered as contemporaneous felonious criminal acts for the purpose of scoring OV 12.

On remand, the Court of Appeals *held*:

1. For purposes of scoring OV 12, MCL 777.42(1)(c) provides that a trial court must assess 10 points if three or more contemporaneous felonious criminal acts involving other crimes were committed and MCL 777.42(1)(e) provides that a trial court must assess 5 points if two or more contemporaneous felonious criminal acts involving other crimes were committed. MCL 777.42(a) provides that a felonious criminal act is contemporaneous if the act occurred within 24 hours of the sentencing offense and the act and will not result in a separate conviction. When scoring OV 12, a court must look beyond the sentencing offense and consider as contemporaneous felonious acts only those separate acts or behavior that did not establish the sentencing offense. Accordingly, when the sentencing offense includes predicate offenses relied on by the prosecution to establish the sentencing offense, the predicate offenses do not constitute contemporaneous felonious acts for purposes of OV 12.

2. MCL 750.159i(1) provides that conducting a criminal enterprise occurs when a person employed by, or associated with, an enterprise knowingly conducts or participates in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity. In turn, MCL 750.159g defines "racketeering" as committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit certain enumerated offenses for financial gain, including breaking and entering and safebreaking. A "pattern of racketeering activity" means not less than two incidents of racketeering. Conducting a criminal enterprise may be punished separately from and cumulatively with the underlying predicate offenses. The prosecution must normally prove the commission of each element of the underlying predicate acts, in addition to the other elements of conducting a criminal enterprise, in order to prove a charge of conducting a criminal enterprise.

3. In this case, it was undisputed that under MCL 777.42(2)(a)(*ii*), the five dates related to the predicate offenses for which defendant was separately charged and convicted (the five counts of breaking and entering and five counts of safebreaking) could not be used to score OV 12 because those acts resulted in separate convictions. However, the predicate offenses for defendant's conviction of conducting a criminal enterprise—that is, all 21 dates on which defendant committed breaking and entering or

safebreaking that were listed in the felony information, including the five dates that resulted in separate convictions—constituted the sentencing offense of conducting a criminal enterprise and could not be scored for purposes of OV 12. Because they were not contemporaneous felonious criminal acts and could not be used to score OV 12, there was insufficient evidence to support the assessment of 10 points for OV 12. The scoring error altered the appropriate sentencing guidelines range, and defendant was entitled to be resentenced. On remand, the trial court was to consider whether the two acts of receiving and concealing stolen property constituted contemporaneous felonious acts such that defendant could be assessed five points for OV 12.

Criminal-enterprise conviction vacated and case remanded for resentencing.

SENTENCES — OFFENSE VARIABLES — CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS — SEPARATE ACTS — CONDUCTING A CRIMINAL ENTERPRISE — PREDICATE OFFENSES.

When scoring Offense Variable (OV) 12, a trial court must look beyond the sentencing offense and consider as contemporaneous felonious acts only those separate acts or behavior that did not establish the sentencing offense; when a sentencing offense includes predicate offenses relied on by the prosecution to establish the sentencing offense, the predicate offenses do not constitute contemporaneous felonious acts for purposes of OV 12 (MCL 777.42).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for defendant.

ON REMAND

Before: SAWYER, P.J., MURRAY, C.J., and SHAPIRO, J.

PER CURIAM. This case is before us on remand from the Michigan Supreme Court to address (1) whether defendant committed three or more felonious criminal

acts within 24 hours of his sentencing offense to justify the trial court's assessment of 10 points for Offense Variable (OV) 12, MCL 777.42, and (2) "whether the predicate offenses for the defendant's conviction of conducting a criminal enterprise constitute 'the sentencing offense' or can be considered as contemporaneous felonious criminal acts for the purpose of scoring OV 12." *People v Abbott*, 504 Mich 851, 851 (2019).

In answering these questions, we conclude that (1) the "sentencing offense" is the criminal-enterprise conviction, (2) the 21 dates listed on the felony information are the predicate offenses, which constitute the sentencing offense, (3) the predicate offenses cannot be considered contemporaneous felonious criminal acts for the purpose of scoring OV 12, and (4) defendant did not commit three or more contemporaneous felonious criminal acts within 24 hours of the sentencing offense to justify the assessment of 10 points for OV 12. Accordingly, we vacate defendant's sentence for conducting a criminal enterprise and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

Defendant was involved in two cases consolidated for trial, only one of which, Wayne Circuit Court Case No. 16-006549-01-FC, is at issue on remand.[1] In that case, defendant was charged with and convicted after a jury trial of conducting a criminal enterprise, MCL 750.159i(1); five counts of breaking and entering a building with intent to commit larceny (breaking and entering), MCL 750.110; five counts of safebreaking,

[1] In the second case, Wayne Circuit Court Case No. 16-003219-FH, defendant was convicted of breaking and entering with intent to commit larceny (breaking and entering), MCL 750.110; conspiracy to commit breaking and entering, MCL 750.157a; and possession of burglar's tools, MCL 750.116, related to an incident that occurred on March 21, 2016.

MCL 750.531; and five counts of possession of burglar's tools, MCL 750.116. For the offense of conducting a criminal enterprise, the information listed 21 dates, from June 13, 2015, to March 21, 2016, on which defendant and his codefendant committed or conspired to commit the crimes of breaking and entering and safebreaking for financial gain. The five incidents for which defendant was separately charged with breaking and entering, safebreaking, and possession of burglar's tools were included in those 21 dates.

Before sentencing, the prosecution filed a sentencing memorandum, asserting that the trial court should assess 10 points for OV 12 because defendant had engaged in three or more contemporaneous felonious acts within 24 hours of the sentencing offense of conducting a criminal enterprise. These included, according to the prosecution, acts of breaking and entering and safebreaking committed as part of the criminal enterprise and acts of receiving and concealing stolen property for which defendant was neither charged nor convicted. Ultimately, the trial court assessed 10 points for OV 12 and sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 20 to 40 years' imprisonment for the conducting-a-criminal-enterprise and safebreaking convictions and to 10 to 20 years' imprisonment for the breaking-and-entering and possession-of-burglar's-tools convictions. In so doing, the trial court stated:

> [T]he People have charged that the sentencing offense of conducting a criminal enterprise took place over a lengthy period of time, specifically, the conducting a criminal enterprise date range is identified in the Information and was before the jury from June 13, 2015, through April 11, 2016. During that time, the People argue that the defendant conducted three contemporaneous felonious criminal acts as understood by Offense

> Variable 12, including at least two incidences of receiving/concealing stolen property as well as numerous separate offenses ranging from September 16th to the end of the year.
>
> I've reviewed my notes. I do note that a number of these separate offenses were introduced during the trial. I do find that three or more contemporaneous felonious criminal acts based on the record here today were committed, therefore, Offense Variable 12 is properly scored at 10 points.

Defendant appealed his convictions to this Court but failed to challenge the scoring of OV 12 or to raise any sentencing issues at all. We rejected the arguments defendant did raise and affirmed his convictions. *People v Abbott*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2018 (Docket No. 336332). Thereafter, in his form application for leave to appeal to the Supreme Court, defendant listed Prior Record Variables (PRV) 1, 2, and 7 and OVs 9, 12, 13, 14, and 16 as being challenged, but he only stated a general challenge to the OV scoring, making no argument as to any particular OV:

> There should be a resentence in this case because the evidence in scoring OV is incorrect, and my PRV scoring was incorrect base[d] on my PSI information. A sentencing court should consider all record evidence before it when calculating the guideline including the contents of the PSI report. The information before the sentencing court was materially false, and the court relied on the prosecutor['s] false evidence or information in imposing the sentence.

After ordering the prosecution to file an answer on the scoring of OV 12, the Supreme Court remanded the case to this Court to decide these issues in the first instance.

II. ANALYSIS

We first address the Supreme Court's directive to determine "whether the predicate offenses for the defendant's conviction of conducting a criminal enterprise constitute 'the sentencing offense' or can be considered as contemporaneous felonious criminal acts for the purpose of scoring OV 12," *Abbott*, 504 Mich at 851, and hold, for the reasons that follow, that the predicate offenses constitute the sentencing offense and that they, therefore, cannot be scored for OV 12.

Under the sentencing guidelines, a trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). Clear error exists when we are left with a definite and firm conviction that a mistake was made. *People v McChester*, 310 Mich App 354, 358; 873 NW2d 646 (2015). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

A trial court must assess 10 points for OV 12 if "[t]hree or more contemporaneous felonious criminal acts involving other crimes were committed," MCL 777.42(1)(c), and five points if "[t]wo contemporaneous felonious criminal acts involving other crimes were committed," MCL 777.42(1)(e). A felonious criminal act is contemporaneous if "[t]he act occurred within 24 hours of the sentencing offense" and "[t]he act has not and will not result in a separate conviction." MCL 777.42(2)(a)(*i*) and (*ii*). "[W]hen scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not

establish the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010).

Conducting a criminal enterprise, defendant's sentencing offense, occurs when "[a] person employed by, or associated with, an enterprise . . . knowingly conduct[s] or participate[s] in the affairs of the enterprise directly or indirectly through a pattern of racketeering activity." MCL 750.159i(1).[2] "Racketeering" is "committing, attempting to commit, conspiring to commit, or aiding or abetting, soliciting, coercing, or intimidating a person to commit" certain enumerated offenses for financial gain, MCL 750.159g, including breaking and entering and safebreaking, MCL 750.159g(n) and (kk).[3] And a "pattern of racketeering activity" requires the commission of at least two incidents of racketeering that share certain characteristics. MCL 750.159f(c). "[T]he prosecution must normally prove the commission of each element of the predicate acts of [conducting a criminal enterprise], in addition to the other elements of [conducting a criminal enterprise], in order to prove a [conducting a criminal enterprise] violation." *People v Martin*, 271 Mich App 280, 290; 721 NW2d 815 (2006).[4]

With respect to "whether the predicate offenses for the defendant's conviction of conducting a criminal

---

[2] An " '[e]nterprise' includes an individual, sole proprietorship, partnership, corporation, limited liability company, trust, union, association, governmental unit, or other legal entity or a group of persons associated in fact although not a legal entity," and encompasses "illicit as well as licit enterprises." MCL 750.159f(a).

[3] These enumerated offenses are the predicate offenses. See *Black's Law Dictionary* (7th ed) (defining "predicate act" for purposes of racketeering).

[4] We note that the *Martin* Court referred to the offense listed in MCL 750.159i as racketeering, rather than conducting a criminal enterprise. *Martin*, 271 Mich App at 286, 321.

enterprise [here, the breaking-and-entering and safebreaking offenses, demonstrating racketeering activity] constitute 'the sentencing offense,' " *Abbott*, 504 Mich at 851, we hold that they do. There is no dispute that the five dates[5] related to the predicate offenses for which defendant was separately charged and convicted cannot be used to score OV 12 because those acts resulted in separate convictions. MCL 777.42(2)(a)(*ii*). Nonetheless, we conclude that all 21 dates listed as predicate offenses in the felony information under Count I constitute the sentencing offense and cannot be scored for purposes of OV 12.

The rationale set forth in *People v Carter*, 503 Mich 221; 931 NW2d 566 (2019), is dispositive. In *Carter*, the defendant was convicted of assault with intent to do great bodily harm (AWIGBH), among other things, for firing three gunshots through the door of an apartment he knew to be occupied. *Id*. at 223. This Court affirmed the assessment of 10 points for OV 12, reasoning that each gunshot was a separate act but only one was needed to support the AWIGBH conviction, and therefore the other two gunshots were contemporaneous felonious criminal acts warranting a 10-point assessment. *People v Carter*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2017 (Docket No. 331142), p 3. In addressing "whether factual support for defendant's AWIGBH conviction was established on the basis of all three gunshots or only one," *Carter*, 503 Mich at 227-228, the Supreme Court relied on the prosecution's closing argument to conclude that "[g]iven that, in this case, the prosecution relied on all three gunshots as evidence of defendant's intent to commit murder or inflict great bodily harm, a finding

[5] These dates are November 13, 2015, November 26, 2015, December 6, 2015, December 28, 2015, and March 7, 2016.

that two of the gunshots were not part of the sentencing offense cannot be supported by the evidence," *id*. at 229. Because the prosecution relied on all three shots in arguing for a conviction, "it was inappropriate for the Court of Appeals to distinguish two gunshots from the conduct constituting the 'sentencing offense.' " *Id*.

Here, Count I of the felony information charging defendant with conducting a criminal enterprise listed 21 dates in which defendant committed breaking and entering and safebreaking. Just as the prosecution in *Carter* relied on all three gunshots as the acts establishing AWIGBH, *id*., the prosecution relied on all 21 acts to charge defendant with conducting a criminal enterprise. That the prosecution chose to separately charge defendant with five counts of breaking and entering, safebreaking, and possession of burglar's tools for incidents that occurred on five of those 21 dates, and the jury convicted defendant of those crimes, does not affect our decision. Conducting a criminal enterprise may be punished separately from and cumulatively with the underlying predicate offenses. *Martin*, 271 Mich App at 295 (quotation marks omitted).[6] However, it is not clear that the jury relied solely on those five predicate acts to find defendant guilty of conducting a criminal enterprise. And what is determinative under *Carter* is that the prosecution listed all 21 dates under Count I of the charging document as predicate offenses constituting the sentencing offense of conducting a criminal enterprise. As

[6] The *Martin* Court quoted MCL 750.159j(11), as enacted by 1995 PA 187, which is now MCL 750.159j(13), see 2006 PA 129. The current version of the statute provides, "Criminal penalties under this section are not mutually exclusive and do not preclude the application of any other criminal or civil remedy under this section or any other provision of law."

a result, they cannot be considered contemporaneous felonious criminal acts for the purpose of scoring OV 12.

This conclusion resolves the second question posed by the Supreme Court on remand and also provides the conclusion to the first question, which is that there is insufficient evidence that defendant committed three or more contemporaneous acts within 24 hours to justify the 10-point assessment of OV 12.

The sentencing offense of conducting a criminal enterprise is a class B crime. MCL 777.16i. Defendant's total OV score, including the 10-point assessment for OV 12, was 40 points. His PRV score was 125 points. His sentencing guidelines range, enhanced by his fourth-offense habitual-offender status, was 87 to 290 months. MCL 777.63; MCL 777.21(3)(c). If a scoring error does not alter the appropriate guidelines range, a defendant is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). For a class B crime, an OV score of 35 to 49 points is OV Level III. MCL 777.63. An OV score of 25 to 34 points is OV Level II. MCL 777.63. Given defendant's habitual-offender status, the sentencing guidelines range for OV Level II is 84 to 280 months. MCL 777.63; MCL 777.21(3)(c).

The trial court erred by assessing defendant 10 points for OV 12. A subtraction of 10 points from defendant's OV score reduces his total to OV Level II, which decreases the minimum sentencing guidelines range and entitles defendant to resentencing. *Francisco*, 474 Mich at 89 n 8. There is no argument from the prosecution that absent consideration of the 21 dates corresponding to the predicate offenses, defendant committed three or more contemporaneous felonious criminal acts. Rather, the prosecution contends

that five points should be assessed for OV 12 because on the day defendant was arrested, March 23, 2016, he possessed stolen property. In assessing 10 points for OV 12, the trial court stated that defendant committed contemporaneous felonious acts, including two incidents of receiving and concealing stolen property, but did not explicitly indicate that it used those acts to score OV 12. To determine whether the incidents of receiving and concealing stolen properly discovered on the day of defendant's arrest may be considered contemporaneous felonious acts under OV 12, factual findings, which are the province of the trial court, *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 364; 824 NW2d 609 (2012), must be made. Thus, this matter is remanded to the trial court for resentencing, which shall include a determination regarding whether an assessment of five points can be scored for OV 12.

III. CONCLUSION

Defendant's sentence for conducting a criminal enterprise is vacated, and this matter is remanded to the trial court for resentencing of defendant's criminal-enterprise conviction only. We do not retain jurisdiction.

SAWYER, P.J., MURRAY, C.J., and SHAPIRO, J., concurred.

NICHOLL v TORGOW
In re TALMER BANCORP SHAREHOLDER LITIGATION

Docket Nos. 344000 and 344009. Submitted September 5, 2019, at Detroit. Decided October 17, 2019. Approved for publication December 17, 2019, at 9:15 a.m.

Regina G. Lee and the City of Livonia Employees Retirement System (CLERS), shareholders of Talmer Bancorp, Inc., filed actions in the Oakland Circuit Court in 2016 against Gary Torgow, David T. Provost, Gary S. Collins, and others, members of the board of directors of Talmer (the Talmer defendants), for breach of fiduciary duty, and against Keefe Broyette & Woods, Inc. (KBW) for aiding and abetting the Talmer defendants' breach of fiduciary duty. These actions were later consolidated (the 2016 action). Lee and CLERS filed the actions after Talmer entered into a merger agreement with Chemical Financial Corporation in 2015. As part of the agreement, Chemical offered Torgow and Provost positions on Chemical's board of directors. Talmer engaged KBW, an investment bank and advisor, to represent it in negotiations with Chemical. In 2017, Kevin Nicholl, a shareholder of Talmer, filed a separate action against the same defendants, asserting the same claims as in the 2016 action (the 2017 action). An amended complaint added Lee and CLERS as plaintiffs to the 2017 action, but the trial court, Wendy Potts, J., later dismissed them from that action pursuant to MCR 2.116(C)(6) on the ground that they were already engaged in litigation arising from the same transaction. The trial court also granted summary disposition for defendants in the 2017 action pursuant to MCR 2.116(C)(10). The trial court also granted summary disposition in separate orders for defendants in the 2016 action pursuant to (C)(10). Lee, Nicholl, and CLERS (collectively, plaintiffs) appealed as of right.

The Court of Appeals *held*:

1. Under MCL 450.1545a, a transaction in which a director or officer is determined to have an interest is permissible if the transaction was fair to the corporation at the time it was entered into and the material facts of the transaction were known to and approved by the board or the shareholders. Plaintiffs' argument

that MCL 450.1545a is not applicable because it applies only to transactions between the corporation and its directors or officers is not supported by the plain language of the statute, which makes no distinction regarding transactions between a director and the corporation and transactions between the corporation and a third party. Although Torgow and Provost received benefits as a result of the merger, the pertinent inquiry for purposes of the statute is not whether defendants benefited, but whether the merger was approved by Talmer's board of directors and shareholders with disclosure of the material facts. Additionally, plaintiffs argued that the approval of the transaction by the Talmer board of directors and shareholders did not validate the transaction because the Talmer board obtained benefits from the transaction that were not available to shareholders. However, under MCL 450.1545a, the relevant inquiry is not whether the transaction was more favorable to directors than to shareholders, but whether a majority of all disinterested board members or a majority of shareholders approved the transaction with sufficient disclosure of the material facts. Because the entire board of directors and a 99% majority of shareholders approved the transaction after the terms of employment offered to some of the Talmer defendants as well as other pertinent details of the merger agreement were disclosed, the transaction complied with the statute.

2. Plaintiffs argued that there was a question of fact regarding the Talmer board's knowledge of KBW's potential conflicts of interest based on its previous work on behalf of Chemical. Summary disposition was appropriate because the evidence established that the Talmer board was aware of KBW's contacts with Chemical and that KBW had previously advised Chemical regarding mergers in 2014 and 2015. Plaintiffs also asserted that KBW had an incentive to encourage Talmer to merge with Chemical, noting that a provision in the July 2015 letter engaging KBW to advise Talmer in future negotiations concerning acquisitions stipulated that KBW would receive fees in connection with any transaction that occurred during the succeeding 18 months. Assuming plaintiffs' interpretation of the letter is accurate, KBW would have received fees if Talmer entered into a transaction with any "acquiror," so the letter does not support an inference that KBW was working "both sides" of a Talmer and Chemical transaction, or that the Talmer board and shareholders approved the merger without disclosure of KBW's potential conflicts of interest.

3. Before 2015, Talmer had pursued a plan of growth by acquiring other banking institutions. KBW prepared financial models for the Federal Deposit Insurance Corporation (FDIC) that forecasted Talmer's continued growth through future acquisitions. However, the financial forecasts KBW provided to shareholders assumed that Talmer would discontinue its strategy of growth. Plaintiffs argued that failing to provide the shareholders with the financial forecasts prepared for the FDIC was a material omission that invalidated the transaction. In order for an alleged omission to be material, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the totality of information made available to the shareholders. Plaintiffs have not shown that the omission of the FDIC forecasts was material because the evidence showed that in the future, there would be fewer opportunities for acquisitions. Therefore, KBW's forecast that Talmer would not continue to pursue its previous growth strategy was reasonable.

4. The elements that must be established in order to prove aiding-and-abetting liability are (1) that an independent wrong occurred, (2) that the aider and abettor had knowledge of the wrong's existence, and (3) that substantial assistance was given to effecting that wrong. Because the trial court properly dismissed plaintiffs' claim of breach of fiduciary duty, plaintiffs cannot establish the element of the existence of an independent wrong with respect to their aiding-and-abetting claim against KBW. Therefore, the trial court properly granted summary disposition.

5. The trial court did not err by granting summary disposition before plaintiffs had the opportunity to conduct full discovery. A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. Plaintiffs obtained documentary evidence related to all of the principal factual issues in the case and that addressed the pertinent question under MCL 450.1545a regarding whether the material facts of the transaction and the directors' interests were disclosed to Talmer board members and shareholders before the transaction was approved. Plaintiffs did not show that further discovery was fairly likely to yield support for their position.

6. The trial court denied the motion filed by Lee and CLERS to voluntarily dismiss the 2016 action in order to continue the 2017 action with Nicholl. Instead, the trial court dismissed Lee and CLERS from the 2017 action. Plaintiffs argued that the court

was required to consider the procedural posture of an action before granting summary disposition under MCR 2.116(C)(6). Under *Fast Air, Inc v Knight*, 235 Mich App 541, 545 (1999), MCR 2.116(C)(6) does not operate when another suit between the same parties involving the same claims is no longer pending when the motion is decided. Because the 2016 and 2017 actions were both pending when the trial court granted the motions for summary disposition, the trial court was not precluded from granting the (C)(6) motion with respect to Lee and CLERS. Additionally, the trial court's dismissal of plaintiffs' claims on the merits in the 2016 and 2017 actions was dispositive of all claims raised by plaintiffs in both cases, regardless of whether Lee and CLERS were proper parties to the 2017 action.

Affirmed in both appeals.

CORPORATIONS — TRANSACTIONS — MERGERS AND ACQUISITIONS — INTEREST OF DIRECTORS AND OFFICERS IN TRANSACTION — FIDUCIARY DUTY.

MCL 450.1545a provides that a transaction in which a director or officer is determined to have an interest is permissible if the transaction was fair to the corporation at the time it was entered into and the material facts of the transaction were known by the board or the shareholders at the time the transaction was approved; the pertinent inquiry under the statute is not whether the directors benefited from the transaction, but whether a majority of disinterested members of the board of directors or a majority of shareholders approved the transaction with knowledge of the material facts.

The Miller Law Firm, PC (by *E. Powell Miller* and *Marc L. Newman*) and *Robbins Geller Rudman & Dowd LLP* (by *David T. Wissbroecker* and *Maxwell R. Huffman*) for Kevin Nicholl, City of Livonia Employees Retirement System, and Regina G. Lee.

King and Murphy, PLLC (by *Stephen W. King*) and *Manatt, Phelps & Phillips LLP* (by *Andrew L. Morrison*) for Keefe Broyette & Woods, Inc.

Warner Norcross & Judd LLP (by *Michael G. Brady* and *Matthew T. Nelson*), *Dechert LLP* (by *David H. Kistenbroker*, *Joni S. Jacobsen*, and *Melanie McKay*),

and *Zausmer, August & Caldwell, PC* (by *Gary August*) for Gary Torgow, David T. Provost, Gary S. Collins, and others.

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

PER CURIAM. In these consolidated cases, plaintiffs challenge the trial court's orders granting defendants summary disposition pursuant to MCR 2.116(C)(6) (prior action between the same parties) and (10) (no genuine issue of material fact). We affirm.

I. BASIC FACTS

Plaintiffs are shareholders of Talmer Bancorp, Inc. (Talmer). The individual defendants (hereafter "the Talmer defendants") are members of Talmer's board of directors (the Board). Defendant Keefe Broyette & Woods, Inc. (KBW) is an investment bank and advisor. Before 2015, Talmer's growth strategy involved acquisitions of other regional banking institutions. In 2015, the Board contemplated entering into a merger or acquisition transaction with another regional banking institution. Talmer approached Chemical Financial Corporation (Chemical) and five other companies, which we shall refer to as Companies A, B, C, D, and E to preserve confidentiality. Chemical and Company E were the only companies to express an interest in a transaction with Talmer. In July 2015, the Board entered into an agreement with KBW whereby KBW would represent Talmer in negotiations with Company E. KBW had also made contacts with Chemical in 2015 regarding a potential merger with Talmer. Company E withdrew from negotiations in July 2015.

In December 2015, Talmer entered into an agreement for KBW to represent Talmer in negotiations with Chemical. On January 25, 2016, Talmer and Chemical entered into a merger agreement. The Board unanimously approved the merger. A 99% majority of Talmer shareholders also approved the merger. Chemical compensated Talmer shareholders with consideration of 90% stock and 10% cash. Chemical also offered 25% cash for outstanding stock options. Defendants Gary Torgow and David Provost were offered positions, respectively, as chairman and vice chairman of Chemical's board of directors.

In 2016, plaintiffs Regina Lee and the City of Livonia Employees Retirement System (CLERS) initiated separate actions against the Talmer defendants for breach of fiduciary duty and against KBW for aiding and abetting the Talmer defendants' breach of fiduciary duty. These two actions were consolidated in the trial court (hereafter referred to as the "2016 action"). In 2017, plaintiff Kevin Nicholl initiated a separate action against the same defendants (hereafter the "2017 action"), asserting the same claims as alleged in the 2016 action. An amended complaint added Regina Lee and CLERS as plaintiffs to the 2017 action. The trial court denied plaintiffs' motion to consolidate the 2016 and 2017 actions.

In May 2018, the trial court dismissed Lee and CLERS as plaintiffs in the 2017 action pursuant to MCR 2.116(C)(6) on the ground that they were already engaged in litigation arising from the same transaction. The court also granted summary disposition for all defendants in the 2017 action pursuant to MCR 2.116(C)(10). Plaintiffs appeal this order as of right in Docket No. 344000. In addition, the trial court issued separate orders granting summary disposition for the

Talmer defendants and for defendant KBW in the 2016 action, both pursuant to MCR 2.116(C)(10). Plaintiffs Lee and CLERS appeal this order as of right in Docket No. 344009.

II. BREACH OF FIDUCIARY DUTY

Plaintiffs allege that the Talmer defendants breached their fiduciary duty to shareholders by pursuing the transaction with Chemical against the best interests of the Talmer shareholders and for the benefit of Provost and Torgow. They further assert that KBW aided and abetted the breach of fiduciary duty in furtherance of its own advantageous relationship with Chemical. Plaintiffs contend that KBW failed to disclose the extent of its contacts with Chemical and its potential conflicts of interest to the full Board and to shareholders. Plaintiffs also submit that a discounted cash flow (DCF)[1] analysis that KBW prepared for presentation to the Board and shareholders falsely depressed the value of Talmer's future income by assuming that Talmer would abandon its successful strategy of growing through future acquisitions. Plaintiffs assert that KBW concealed from Talmer shareholders a DCF analysis that projected future growth through acquisitions.

III. SUMMARY DISPOSITION FOR THE TALMER DEFENDANTS

In both actions, the trial court granted summary disposition in favor of the Talmer defendants and KBW pursuant to MCR 2.116(C)(10). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodring v Phoe-*

[1] A discounted cash flow analysis determines the value of a business by estimating its future cash flow, discounted to present value.

nix Ins Co, 325 Mich App 108, 113; 923 NW2d 607 (2018). "When reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in favor of the party opposing the motion." *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4; 927 NW2d 262 (2018) (quotation marks and citation omitted). "The motion is properly granted if (1) there is no genuine issue related to any material fact and (2) the moving party is entitled to judgment as a matter of law." *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." *Id*. (quotation marks and citation omitted).

The trial court determined that the Talmer defendants were entitled to summary disposition under MCR 2.116(C)(10) because MCL 450.1545a precluded plaintiffs from maintaining their actions. MCL 450.1545a provides:

> (1) A transaction in which a director or officer is determined to have an interest shall not, because of the interest, be enjoined, set aside, or give rise to an award of damages or other sanctions, in a proceeding by a shareholder or by or in the right of the corporation, if the person interested in the transaction establishes any of the following:
>
> (a) The transaction was fair to the corporation at the time entered into.
>
> (b) The material facts of the transaction and the director's or officer's interest were disclosed or known to the board, a committee of the board, or the independent director or directors, and the board, committee, or independent director or directors authorized, approved, or ratified the transaction.

(c) The material facts of the transaction and the director's or officer's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction.

(2) For purposes of subsection (1)(b), a transaction is authorized, approved, or ratified if it received the affirmative vote of the majority of the directors on the board or the committee who had no interest in the transaction, though less than a quorum, or all independent directors who had no interest in the transaction. The presence of, or a vote cast by, a director with an interest in the transaction does not affect the validity of the action taken under subsection (1)(b).

(3) For purposes of subsection (1)(c), a transaction is authorized, approved, or ratified if it received the majority of votes cast by the holders of shares who did not have an interest in the transaction. A majority of the shares held by shareholders who did not have an interest in the transaction constitutes a quorum for the purpose of taking action under subsection (1)(c).

(4) Satisfying the requirements of subsection (1) does not preclude other claims relating to a transaction in which a director or officer is determined to have an interest. Those claims shall be evaluated under principles of law applicable to a transaction in which a director or officer does not have an interest.

(5) The board, by affirmative vote of a majority of directors in office and irrespective of any personal interest of any of them, may establish reasonable compensation of directors for services to the corporation as directors or officers, but approval of the shareholders is required if the articles of incorporation, bylaws, or another provision of this act requires that approval. Transactions pertaining to the compensation of directors for services to the corporation as directors or officers shall not be enjoined, set aside, or give rise to an award of damages or other sanctions in a proceeding by a shareholder or by or in the right of the corporation unless it is shown that the compensation was unreasonable at the time established.

In *Camden v Kaufman*, 240 Mich App 389, 398; 613 NW2d 335 (2000), this Court held that under MCL 450.1545a, the "interested person" must "demonstrate that the transaction was validated in one of the ways permitted by statute." "[O]nce proper approval of an interested transaction is obtained, the type of challenges available are limited to waste, fraud, illegality, or the like." *Id*. at 396.

We reject plaintiffs' argument that MCL 450.1545a is not applicable because the statute applies only to transactions between a corporation and its directors or officers. Clear and unambiguous statutory language must be applied as written. *Camden*, 240 Mich App at 394. "[N]othing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself." *Detroit Pub Sch v Conn*, 308 Mich App 234, 248; 863 NW2d 373 (2014). The statutory language "[a] transaction in which a director or officer is determined to have an interest," MCL 450.1545a(1), does not contain any language restricting the types of transactions to which the statute applies. The statute makes no distinction regarding transactions between a director and the corporation and transactions between the corporation and a third party.

Plaintiffs argue that the Board's negotiations over the terms of the merger were tainted from the time that the Talmer defendants began to bargain for their own financial benefit. Plaintiffs cite Torgow's and Provost's appointments as chairman and vice chairman, respectively, and other Board members' appointments as directors of the Chemical board of directors. However, the question is not whether these defendants benefited, but whether the merger was approved by the Board or the shareholders with disclosure of material

facts. Plaintiffs also cite the Talmer defendants' opportunities to tender 25% of their outstanding stock options in exchange for cash. However, this opportunity was available to all shareholders, not just directors.

Plaintiffs argue that the Board's and shareholders' approval of the merger did not validate the transaction under § 1545a(1) because Board members used the transaction to obtain unique financial benefits not shared by the shareholders. Plaintiffs cite several cases that recognize the potential for corporate officers and directors to negotiate deals that are advantageous to themselves but suboptimal for public shareholders. Under § 1545a, however, the pertinent inquiry is not whether a transaction was more favorable to directors than shareholders, but whether a majority of all disinterested Board members or a majority of shareholders approved the transaction with sufficient disclosure of the material facts.

The Talmer defendants argue that the conditions stated in § 1545a(1)(b) and (c) were satisfied because the material facts concerning KBW's potential conflicts and the directors' benefits were disclosed before the Board unanimously approved the merger, and 99% of the shareholders voted to approve the merger. The Talmer Board was composed of 12 directors, five of whom received positions on the Chemical Board. A majority of the disinterested directors approved the merger. A proxy statement disclosed that the merger agreement was accompanied by service agreements for Torgow, Provost, and Dennis Klaeser, and it also recited the terms of employment for Torgow, Provost, and Klaeser. It further disclosed that all shareholders holding outstanding stock options would receive 25% of their value in cash. Consequently, the entire Board and 99% of the shareholders approved the merger after

they received disclosure of these material facts. Plaintiffs emphasize that the interested directors negotiated their own employment terms before the terms of the merger agreement were finalized, but regardless of when these conditions were first discussed, the Board members and the shareholders had knowledge of these facts when they voted to approve the merger.

Plaintiffs contend that the Talmer defendants disregarded KBW's conflicts of interest. Plaintiffs argue that defendant Ronald Klein's deposition testimony establishes a question of fact with respect to the Board's knowledge of the potential conflicts of interest for KBW because he "could not confirm" that he had knowledge of KBW's contacts with Chemical. We disagree. Klein testified that he knew about KBW's contacts with Chemical. He just could not recall specific details about what information KBW had shared with Chemical. Additionally, the minutes for a November 3, 2015 meeting of Talmer's Strategic Initiatives Committee (SIC) state that KBW had previously advised Chemical in transactions in 2014 and 2015 involving other bank mergers. Plaintiffs cite these minutes in support of their argument that the full Board did not properly vet KBW's conflicts of interest. However, the Talmer defendants presented evidence that KBW gave a presentation to the Board regarding a merger with Chemical on March 31, 2015. The Talmer defendants also cite Klein's deposition testimony that the Board "asked KBW to go share some information with Chemical," knowing that KBW had a relationship with Chemical. The Talmer defendants were thus aware of and approved KBW's contacts with Chemical during the early phases of negotiation. Additionally, the minutes for the November 17, 2015 Board meeting state that Provost reported that the SIC had met with

KBW's managing director, James Harasimowicz, on November 3, 2015, to conduct a conflict-of-interest analysis with KBW.

Plaintiffs observe that the July 2015 engagement letter entitled KBW to receive fees for any transaction over the next 18 months. The letter states that it "confirms the engagement" of KBW by Talmer to offer financial advisory and investment banking services on an exclusive basis "in connection with the possible acquisition" of Talmer "by [Company E] *or another acquiror* . . . ." (Emphasis added.) Plaintiffs argue that this agreement gave KBW an incentive to encourage a merger with Chemical because it would have received fees if Talmer entered into a merger agreement with Company E or with any other institution. The Talmer defendants dispute this interpretation, but even if plaintiffs' interpretation of the phrase "another acquiror" is correct, KBW would have benefited from any transaction that Talmer entered into. It also would not have been necessary for Talmer and KBW to enter into a new agreement with the December 2015 engagement letter if the July 2015 engagement letter had engaged KBW to represent Talmer in negotiations with Chemical. Under these circumstances, the July 2015 engagement letter does not support an inference that KBW was working both sides of a Talmer and Chemical transaction, or that the Board and shareholders approved the merger without disclosure of KBW's potential conflicts.

Plaintiffs argue that the approval of the merger was tainted because the Board and the shareholders relied on financial forecasts that KBW contrived to undervalue Talmer's stock. Plaintiffs state that although Talmer pursued a successful plan of growth by acquiring other banking institutions before 2015, the finan-

cial forecasts that KBW prepared for the merger assumed that Talmer would discontinue this strategy. Plaintiffs state that KBW never provided shareholders with financial models that were prepared for the Federal Deposit Insurance Corporation (FDIC) and that forecasted growth through future acquisitions. Plaintiffs cite Dennis Klaeser's deposition testimony in support of this allegation. Klaeser, Talmer's chief financial officer, testified in his deposition that acquisitions were the core strategy for Talmer's growth. He stated that Talmer submitted plans to the FDIC in 2010 and 2014 that included financial projections based on the continuation of the acquisition strategy. In early 2014, Klaeser submitted a five-year plan and a three-year update to the FDIC. The model in these plans projected growth of nearly $10 billion by 2017. Klaeser agreed that Talmer likely would have continued to pursue this plan if it had not merged with Chemical, but he also stated that there were fewer banking institutions available for acquisition because they were recovering from the downturn in the industry. He stated that the merger and acquisition market had "changed significantly." He explained that there were opportunities for acquisitions, but greater risk that these opportunities would not materialize. Klaeser explained that the FDIC required the financial forecasts in order to monitor institutions that might grow too rapidly and stress its capital base.

Plaintiffs argue that the omission of the FDIC forecasts was a material omission. "In order for a plaintiff to state properly a claim for breach of a disclosure duty by omission, he must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials." *Orman v Cullman*, 794 A2d 5, 31 (Del Ch,

2002).[2] In order for an alleged omission to be material, there must be a " 'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available' to the shareholders." *Id*. at 31-32 (citations omitted). Plaintiffs characterize this omission as an intentional withholding of material information. They emphasize that Klaeser testified that Talmer would have continued to seek acquisition opportunities, but Klaeser testified that such opportunities were becoming less certain. KBW's assumption that there would not be future acquisitions was thus reasonable. Moreover, the salient fact is that the shareholders and Board members received projections and information regarding what factors were and were not included in those projections. Financial forecasts are not definitive facts, but are inherently uncertain predictions of future events. KBW disclosed that its forecasts were based on the assumption that Talmer would not continue its acquisition strategy.

For these reasons, the trial court did not err by ruling that the Talmer defendants were entitled to summary disposition pursuant to MCR 2.116(C)(10).

IV. SUMMARY DISPOSITION FOR KBW

Plaintiffs also argue that the trial court erred by granting summary disposition in favor of KBW pursuant to MCR 2.116(C)(10) on their claims alleging that KBW aided and abetted the Talmer defendants' breach of fiduciary duty. We disagree.

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[2] "In the absence of clear Michigan law on matters of corporate law, Michigan courts often refer to Delaware law." *Glancy v Taubman Ctrs, Inc*, 373 F3d 656, 674 n 16 (CA 6, 2004), citing *Russ v Fed Mogul Corp*, 112 Mich App 449, 457-458; 316 NW2d 454 (1982).

Michigan law recognizes a cause of action for aiding and abetting a breach of fiduciary duty. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 445; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005). "Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary." *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 106; 11 NW2d 329 (1943). The essential elements required for aiding-and-abetting liability are: (1) that an independent wrong occurred, (2) that the aider or abettor had knowledge of the wrong's existence, and (3) that substantial assistance was given to effecting that wrong. See Restatement Torts, 2d, § 876(b).

As discussed earlier, the trial court properly granted summary disposition for the Talmer defendants with respect to plaintiffs' claim for breach of fiduciary duty. Accordingly, plaintiffs cannot satisfy the element of the existence of an independent wrong with respect to their aiding-and-abetting claim against KBW. Accordingly, the trial court did not err by granting KBW's motion for summary disposition pursuant to MCR 2.116(C)(10).

V. PLAINTIFFS' REQUEST FOR ADDITIONAL DISCOVERY

Plaintiffs also argue that the trial court erred by granting summary disposition prematurely, before they had the opportunity to conduct full discovery. We disagree.

"A motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position." *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich

App 25, 33-34; 772 NW2d 801 (2009). The principal factual issues surrounding plaintiffs' claims concerned financial benefits to various Board members from the merger with Chemical, KBW's alleged potential conflicts of interest, the Board members' knowledge and disclosure of these conflicts, the data KBW considered or failed to consider in its financial projections, and disclosures of these matters to shareholders. Plaintiffs obtained documentary evidence of the merger agreement, Torgow's and Provost's financial benefits, minutes of Board meetings and SIC meetings, and the materials that KBW presented to Talmer and Chemical. Plaintiffs also obtained the proxy and supplemental proxy statements that were presented to shareholders. Under MCL 450.1545a, the pertinent question was whether the material facts of the transaction and the directors' interests were disclosed to Board members and shareholders. The documentary evidence addressed this question. Individuals' deposition testimony might add personal recollections and subjective impressions to the documentary evidence, but such evidence does not supplant the documents. Plaintiffs have not made a persuasive showing that further discovery was fairly likely to yield support for their position. Accordingly, we reject plaintiffs' argument that discovery was premature.

VI. TIMELINESS OF MOTION FOR CLASS CERTIFICATION

Plaintiffs argue that the trial court erred by denying their motion to strike defendants' notice of plaintiffs' failure to timely move for class certification under MCR 3.501(B)(1) in the 2017 action. They assert that their motion was timely filed pursuant to the trial court's stipulated order extending the time for moving for class certification, which was entered before plain-

tiffs filed their first amended complaint. In light of our conclusion that the trial court properly granted summary disposition, we need not address this issue. *Inge v Rock Fin Corp*, 388 F3d 930, 941 (CA 6, 2004).

VII. DISMISSAL OF LEE AND CLERS UNDER MCR 2.116(C)(6)

After the 2017 action was filed, plaintiffs Lee and CLERS moved to voluntarily dismiss the 2016 action without prejudice so that they, along with plaintiff Nicholl, could continue with the 2017 action. The trial court did not grant Lee and CLERS's motion for voluntary dismissal, but instead dismissed Lee and CLERS from the 2017 action.

Summary disposition is permissible under MCR 2.116(C)(6) when "[a]nother action has been initiated between the same parties involving the same claim." "A circuit court's ruling under MCR 2.116(C)(6) is reviewed de novo on the basis of the record as it existed at the time the ruling was made." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 325-326; 900 NW2d 680 (2017). Plaintiffs argue that in *Fast Air, Inc v Knight*, 235 Mich App 541; 599 NW2d 489 (1999), this Court held that the trial court is required to consider the procedural posture of an action before granting summary disposition under Subrule (C)(6). Actually, in *Fast Air*, this Court held "that MCR 2.116(C)(6) does not operate where another suit between the same parties involving the same claims is no longer pending at the time the motion is decided." *Id*. at 545. Here, the 2016 and 2017 actions were pending simultaneously up until the time that the trial court granted the summary disposition motions. There was no factor precluding the trial court from granting the (C)(6) motion with respect to Lee and CLERS. In any event, the trial court's dismissal of plaintiffs' claims on the

merits in both the 2016 and 2017 actions is dispositive of all claims raised in both cases regardless of whether Lee and CLERS were proper parties in the 2017 action.

Affirmed in both appeals.

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

COVE CREEK CONDOMINIUM ASSOCIATION, INC v VISTAL LAND & HOME DEVELOPMENT, LLC

Docket Nos. 342372 and 343144. Submitted July 9, 2019, at Detroit. Decided December 19, 2019, at 9:00 a.m. Leave to appeal denied 506 Mich 890 (2020).

Cove Creek Condominium Association, Inc., filed an action in the Oakland Circuit Court against Vistal Land & Home Development, LLC (Vistal) and The Maria A. Cervi and Americo Cervi Revocable Living Trust Dated February 12, 2016 (the trust), seeking a declaration under MCL 559.167, as amended by 2002 PA 283, that (1) Units 1 through 14 of the Cove Creek Condominium project—units that were designated in the master deed as "need not be built" and had never been constructed—no longer existed; (2) all land on which those units were to be constructed was now part of the project's general common elements; and (3) defendants did not have the right to withdraw those units from the project for potential future construction. Plaintiff asserted other claims for relief in the alternative. Defendants filed a counterclaim, asserting slander of title and breach of fiduciary duty and seeking declaratory relief to quiet title. The original developer of the condominium project recorded the master deed for the project in April 1989, designating Units 15 through 31 as "must be built" and Units 1 through 14 as "need not be built"; the first unit was sold in 1989. The original developer transferred its interest in the project in May 1989 to Cove Creek Limited Partnership. In 2004, that partnership transferred Units 1 through 14 to Vistal Cothery, LLC. Successive transfers of those units occurred through the years, culminating in the successor owner transferring its interest in Units 1 through 14 to Vistal in 2006. Vistal, in turn, quitclaimed its interest in Units 1 through 14 to the trust in October 2016. In November 2016, citing MCL 559.167, as amended by 2016 PA 233, the trust informed plaintiff that it had withdrawn the relevant units from the project. Plaintiff amended its complaint, still seeking relief under MCL 559.167, as amended by 2002 PA 283, and defendants moved for summary disposition, arguing that the 2016 amendment of the statute repealed and restated the 2002 version of the statute and that the 2016 amendment applied retroactively and did not divest

plaintiff of any vested rights. Plaintiff requested summary disposition in its favor, arguing that the 2016 amendment only applied to current "need not be built" units and that it did not revive former "need not be built" units that had already ceased to exist. In addition, plaintiff argued that application of the 2016 amendment would abrogate vested property rights and violate co-owners' due-process rights. The court, Phyllis C. McMillen, J., denied defendants' motion and granted summary disposition in favor of plaintiff under MCR 2.116(I)(2). The court concluded that under the 2002 version of MCL 559.167, the land on which Units 1 through 14 were to be constructed had become part of the general common elements of the project because the 10-year period under which defendants could have withdrawn the undeveloped units began before October 1989 and expired in October 1999. The court reasoned that even if the 10-year period had not begun to run until 2002 when the statute was amended, the right to withdraw the land had expired and the developer had lost all rights to develop in May 2012. The court determined that title had vested in plaintiff by operation of law when the 10-year period expired, which occurred before the statute was amended in 2016. The court also concluded that the 2016 amendment of MCL 559.167 did not apply retroactively. The court denied defendants' motion for reconsideration but granted defendants' motion to amend their counterclaim. In the counterclaim, defendants sought restitution for the real-property taxes they had paid through the years on the undeveloped Units 1 through 14 and asserted claims of indemnification, quantum meruit, promissory estoppel based on detrimental reliance, account stated, quiet title, adverse possession, and unjust enrichment. In two separate motions, plaintiff moved for summary disposition of defendants' counterclaims. Defendants opposed the motions and requested summary disposition in their favor under MCR 2.116(I)((2). The court granted plaintiff's motion for summary disposition, denied defendants' request for summary disposition, and dismissed defendants' claims. Plaintiff moved for attorney fees and costs as sanctions under former MCL 2.114, MCR 2.313, MCR 2.625, and MCL 600.2591; the court denied the motion, reasoning that there was no basis for imposing sanctions because the pleadings were not frivolous. In Docket No. 342372, defendants appealed the trial court's order granting summary disposition in favor of plaintiff on plaintiff's complaint and the court's order dismissing defendants' counterclaims. In Docket No. 343144, plaintiff appealed the court's order denying its request for attorney fees and costs.

The Court of Appeals *held*:

1. Statutes and amended statutes are applied prospectively unless the Legislature manifests an intent to the contrary. The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself. There is an exception to the general rule that newly enacted statutes are presumed to apply prospectively; that is, no such presumption exists when the statute is remedial or procedural in nature as long as the statute does not deny vested rights. Accordingly, a statute may not be applied retroactively if it abrogates or impairs vested rights, creates new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past. The 2016 amendment of MCL 559.167(3) provides that for 10 years after the recording of the master deed, the developer, its successors, or assigns may withdraw from the project any undeveloped land or convert the undeveloped condominium units located thereon to "must be built" without the prior consent of any co-owners, mortgagees of condominium units in the project, or any other party having an interest in the project. In turn, MCL 559.167(4) provides that if the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable period under Subsection (3), the association of co-owners, by an affirmative vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and that all rights to construct condominium units upon that undeveloped land shall cease. MCL 559.167(5) further provides that a reversion under Subsection (4), whether occurring before or after the date of the 2016 amendatory act that added Subsection (5), is not effective unless the election, notice, and recording requirements of Subsection (4) have been met. The 2016 amendment of MCL 559.167 does not contain clear, direct, or unequivocal language that the statute is to be applied retroactively; that is, the statute does not contain language stating that the amendment shall be given retroactive application. The use of the word "occurring" in Subsection (5)—specifically, the language providing that a reversion under Subsection (4), whether *occurring* before or after the date of the 2016 amendatory act, is not effective unless the election, notice, and recording requirements of Subsection (4) have been met—is not a clear and unequivocal expression of the Legislature's intent to apply the amendment retroactively. Because earlier amendments did not use the term "reversion" or contain Subsection (4), "a reversion under subsection (4)" could not have occurred before the effective date of the 2016 amendment. In addition, the Legisla-

ture's use of the present participle "occurring" was significant because it indicated that the 2016 amendment did not apply to any "reversion" that had already occurred; the statutory language also does not suggest that transfers completed under the earlier versions of the statute should be reversed. Moreover, even if the 2016 amendment could be considered remedial, when the right to construct units ceased, plaintiff obtained a vested right in the undeveloped lands. Accordingly, the trial court correctly concluded that the 2016 version of MCL 559.167 did not apply retroactively.

2. Both the state and federal Constitutions provide that private property shall not be taken without due process of law or just compensation. Due process is violated only when legislation impairs vested rights. A vested right is something more than a mere expectation based on 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. The state may condition the permanent retention of a property right on the performance of an affirmative act within a reasonable statutory period. With regard to enacted or amended legislation that affects citizens' property rights, there is no due-process violation so long as the published law affords citizens a reasonable opportunity to familiarize themselves with the terms of the statute that could result in the lapse of those property rights. The Takings Clauses of the United States Constitution and Michigan's 1963 Constitution provide that the government may not take private property for public use without just compensation. The 2002 version of MCL 559.167(2) provided that if a change involves a change in the boundaries of a condominium unit or the addition or elimination of condominium units, a replat of the condominium subdivision plan must be prepared and recorded assigning a condominium unit number to each condominium unit in the amended project. In turn, MCL 559.167(3) provided, in part, that if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project; however, if the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time period, those undeveloped lands remain part of the project

as general common elements and all rights to construct units upon that land cease. In other words, if the developer had not completed development of the "need not be developed" units within the 10-year period after the development of the project was commenced or did not withdraw the undeveloped portions of the project from the project before the period expired, the undeveloped land by operation of law automatically remained part of the project as general common elements and all rights to develop the land cease. Although MCL 559.167(2) required a replat to be prepared and recorded if there was a change in the boundaries of a condominium unit or the addition or elimination of condominium units, nothing in Subsection (2) linked the requirement to Subsection (3) or conditioned the "reversion" in Subsection (3) on that replat requirement.

3. In this case, regardless of whether the triggering event occurred in 1999 (10 years after the project was commenced) or 2012 (10 years after 2002 PA 283 was enacted), defendants' right to construct units on the undeveloped land ended and plaintiff obtained a vested right in that land without any action; that is, the land reverted to plaintiff in either 1999 or 2012 by operation of law. Before that action occurred, defendants had title to the entire project, including the "need not be built" units, because they were successor developers of the land; as a result, defendants had a vested property interest—that is, they had a right to develop or withdraw Units 1 through 14 from the project—before the 10-year period set forth in MCL 559.167(3) expired. Defendants had sufficient notice of the 2002 version of MCL 559.167(3), and the requirements were reasonable in that they were designed to further the legitimate objectives of preventing incomplete projects and providing finality. Under those facts, defendants were not denied due process of law when any vested rights they possessed in the property lapsed by 2012, ten years after the statute was amended in 2002. The 2002 version of MCL 559.167(3) also did not violate the Takings Clauses of the state and federal Constitutions because it was defendants' failure to act within the 10-year period that caused the lapse of their property nights, not any action by the state; for that reason, there was no "taking" that required compensation under the state and federal Constitutions. Because the relevant land reverted to plaintiff by operation of law by 2012 and the 2002 version of the statute did not violate defendants' due-process rights or the Takings Clauses of the federal and state Constitutions, the trial court correctly granted summary disposition in favor of plaintiff on Count I of its complaint.

4. Because defendants failed to provide any supporting reasoning for their arguments, they waived appellate review of the trial court's grant of summary disposition in favor of plaintiff on defendants' counterclaims for reimbursement for tax bills they paid until 2015.

5. Sanctions are warranted under former MCR 2.114 when a plaintiff asserts claims without any reasonable basis in law or fact or when the claims are asserted for an improper purpose. In this case, defendants asserted various theories of relief in their counterclaims, seeking to recover the property taxes that they or their predecessors had allegedly paid through 2015. Although the trial court properly dismissed defendants' counterclaims because there was an available statutory remedy, there was arguable legal merit in the argument that the statutory remedy was not sufficient. Moreover, there was arguable legal merit that their motions were timely under MCR 3.411(F), given their filing of the motion for reconsideration and plaintiff's failure to establish that defendants merely intended to increase costs by filing the counterclaims. Therefore, the trial court correctly denied defendants' request for attorney fees and costs related to defendants' filing of the counterclaims. The trial court also did not abuse its discretion by denying plaintiff's request for sanctions related to defendants' motion to strike plaintiff's response and defendants' motion to compel discovery.

Affirmed.

STATUTES — CONDOMINIUM ACT — MCL 559.167 — APPLICATION OF AMENDED LANGUAGE — PROSPECTIVE APPLICATION ONLY.

MCL 559.167, as amended by 2016 PA 233, applies prospectively only, not retroactively; the 2016 amendment does not allow transfers completed under earlier versions of the statute to be reversed.

Hirzel Law, PLC (by *Kevin M. Hirzell*, *Joe Wloszek*, and *Brandan A. Hallaq*) for plaintiff.

Gerald A. Fisher, *Kim Thomas Cappello*, and *Martin J. Fisher* for defendants.

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

STEPHENS, J. In Docket No. 342372, defendants/counterplaintiffs, Vistal Land & Home Development,

LLC (Vistal) and The Maria A. Cervi and Americo Cervi Revocable Living Trust dated February 12, 2016 (the Trust) (collectively, defendants), appeal as of right the order granting summary disposition in favor of plaintiff/counterdefendant, Cove Creek Condominium Association, Inc. (plaintiff), dismissing all claims in defendants' second amended counterclaim and denying defendants' motions for summary disposition. The gravamen of this matter is a dispute as to which version of MCL 559.167 of the Condominium Act, MCL 559.101 *et seq*., applies. The statute was amended several times during the existence of the condominium project. In Docket No. 343144, plaintiff appeals as of right the order denying its motion for attorney fees and costs. We affirm in both appeals.

I. BACKGROUND

This case arises from plaintiff's claims for declaratory and other relief related to former Units 1 through 14 of the Cove Creek Condominium project (the Condominium or the project). The Condominium was established by the recording of the master deed on April 21, 1989, and was composed of 31 units. It is undisputed that Units 15 to 31 were designated as "must be built," were constructed, and are currently owned, while Units 1 through 14 were identified as "need not be built" and were never constructed. The first unit was sold sometime in 1989.[1] On May 17, 1989, Lifestyle Homes, the original developer of the project, transferred its interest by quitclaim deed to

[1] The parties dispute the exact date in 1989 on which the first unit was conveyed. As discussed later in this opinion, however, the exact date is not dispositive, and, for purposes of this appeal, it is significant that *construction commenced* sometime before either May 9, 1989, or October 27, 1989 (the dates alleged by the parties).

Cove Creek Limited Partnership (Cove Creek LP). On September 15, 2004,[2] Cove Creek LP executed a deed transferring Units 1 through 14 to Vistal Cothery, LLC.[3] On November 6, 2006, Vistal Cothery, LLC, executed a deed conveying Units 1 through 14 to Vistal. Additional purported conveyances occurred in 2012; ultimately, however, on October 25, 2016, Vistal quitclaimed its interest in Units 1 through 14 to the Trust.[4] The day before, on October 24, 2016, plaintiff filed a complaint against defendants. In Count I, plaintiff sought a declaration that Units 1 through 14 no longer existed, that all land on which Units 1 through 14 were to be constructed was part of the general common elements, and that defendants did not have the right to withdraw Units 1 through 14.[5] Plaintiff relied on, and the trial court applied, MCL 559.167(3), as amended by 2002 PA 283, effective May 9, 2002, of the Condominium Act, MCL 559.101 *et seq*., which read:

> Notwithstanding section 33, if the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or

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[2] The parties executed the deed on July 12, 2004, but it was not recorded until September 15, 2004.

[3] The trial court found that there was no entity registered in Michigan as "Vistal Cothery, LLC," in 2004.

[4] According to the document, the deed was "recorded to replace a certain Quit Claim[] dated approximately August, 2012 which has been lost."

[5] In Counts II through V, plaintiff alternatively sought to quiet title, alleged a violation of the Condominium Act and breach of covenant for the failure to pay assessments, sought to foreclose on a statutory lien for the unpaid assessments, and alleged unjust enrichment.

> assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project. If the master deed contains provisions permitting the expansion, contraction, or rights of convertibility of units or common elements in the condominium project, then the time period is 6 years after the date the developer exercised its rights with respect to either expansion, contraction, or rights of convertibility, whichever right was exercised last. The undeveloped portions of the project withdrawn shall also automatically be granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped portions of the project. *If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease*. In such an event, if it becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95. [MCL 559.167(3), as amended by 2002 PA 283 (emphasis added).][6]

On November 3, 2016, the Trust informed plaintiff that it had withdrawn Units 1 through 14 from the project. The Trust relied on MCL 559.167(3), (4), and (5), as amended by 2016 PA 233. The 2016 version of the statute, effective September 21, 2016, provides, in relevant part:

> (3) Notwithstanding section 33, for 10 years after the recording of the master deed, the developer, its successors, or assigns may withdraw from the project any undeveloped land or convert the undeveloped condominium units

[6] We note that Subsection (3) itself and the language in dispute (emphasized above) was first added in 2000. See 2000 PA 379. The 2002 version made other changes that are not in dispute. See 2002 PA 283.

located thereon to "must be built" without the prior consent of any co-owners, mortgagees of condominium units in the project, or any other party having an interest in the project. If the master deed confers on the developer expansion, contraction, or convertibility rights with respect to condominium units or common elements in the condominium project, then the time period is 10 years after the recording of the master deed or 6 years after the recording of the amendment to the master deed by which the developer last exercised its expansion, contraction, or convertibility rights, whichever period ends later. Any undeveloped land so withdrawn is automatically granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped land.

(4) *If the developer does not withdraw undeveloped land from the project or convert undeveloped condominium units to "must be built" before expiration of the applicable time period under subsection (3), the association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and that all rights to construct condominium units upon that undeveloped land shall cease*. When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds. The association of co-owners shall also file notice of the declaration with the local supervisor or assessing officer. In such an event, if it becomes necessary to adjust percentages of value as a result of fewer condominium units

> existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95.
>
> (5) *A reversion under subsection (4), whether occurring before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice, and recording requirements of subsection (4) have been met*. [MCL 559.167(3) through (5), as amended by 2016 PA 233 (emphasis added).]

On December 9, 2016, plaintiff filed a first amended complaint, which addressed events that occurred after the filing of the complaint. Nevertheless, plaintiff's Count I continued to seek declaratory relief against the Trust under MCL 559.167, as amended by 2002 PA 283. On November 21, 2016, defendants moved for summary disposition under MCR 2.116(C)(8) on Count I, arguing that plaintiff's claim solely relied on the 2002 version of MCL 559.167, which was repealed and restated, effective September 21, 2016. Defendants argued that the 2016 amendment applied retroactively and did not divest plaintiff of any vested rights. Plaintiff replied that the 2016 amendment only applied to current "need not be built" units and did not revive former "need not be built" units that had already ceased to exist. It also argued that applying the 2016 amendment retroactively would abrogate vested property rights and violate the due-process rights of co-owners. Plaintiff contended that summary disposition should be granted in its favor under MCR 2.116(I)(2).

On January 11, 2017, a hearing was held on defendants' motion for summary disposition regarding Count I. Defendants argued that plaintiff's claim that the constitutionality of the 2016 amendment was not properly before the court. Plaintiff argued that if the motion was decided in its favor, then the other claims

in the complaint and in defendants' counterclaim[7] were moot. On February 10, 2017, the trial court issued an opinion and order denying defendants' motion for summary disposition on Count I and granting summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). The court applied the 2002 version of MCL 559.167 and concluded that all the land on which Units 1 through 14 were to have been constructed had become part of the general common elements. It further ruled that the Trust did not have the right to withdraw Units 1 through 14, or the land on which Units 1 through 14 were to be located, from the Condominium. In accordance with the 2002 amendment, the trial court found that the 10-year period for defendants to withdraw the undeveloped units began before October 27, 1989, the time of construction, and expired on October 27, 1999. The trial court further found that even if the 10-year period had not begun to run until 2002, the right to withdraw expired and the developer lost all rights to develop on May 9, 2012. The trial court found that the vesting of title in plaintiff occurred by operation of law when the 10-year period expired before the enactment of the 2016 amendments. The trial court finally ruled that the 2016 amendments were not retroactive. A motion to reconsider was denied.

On June 30, 2017, the trial court granted defendants leave to file an amended counterclaim. On July 5, 2017, defendants filed a second amended counterclaim in which defendants sought reimbursement for the payment of real-property taxes in the amount of $80,986.64 under theories of restitution (Count I), indemnification (Count II), quantum meruit/unjust enrichment (Count III), detrimental reliance/promissory

[7] Defendants' counterclaims are discussed elsewhere in this opinion.

estoppel (Count IV), and account stated (Count V). Defendants also sought to quiet title to the property, arguing that their deeds were recorded before plaintiff recorded notice of its interest in Units 1 through 14 (Count VI), and claiming that plaintiff lost any interest in Units 1 through 14 through adverse possession (Count VII). Finally, in Count VIII, defendants alleged that if the trial court gave plaintiff title, then plaintiff would receive a windfall and be unjustly enriched. In early October 2017, defendants moved for summary disposition under MCR 2.116(C)(10) as to their counterclaims.

On October 17, 2017, plaintiff moved for summary disposition, seeking dismissal of defendants' second amended counterclaim under MCR 2.116(C)(7), (8), and (10). Plaintiff argued that defendants were attempting to avoid the court's prior ruling regarding title and that Count VI should be dismissed because the court had already rejected that argument in ruling on defendants' earlier motion for reconsideration; plaintiff also argued that defendants' adverse-possession claim, Count VII, should be dismissed.

On November 15, 2017, plaintiff moved for summary disposition of Counts I, II, III, IV, V, and VIII of defendants' counterclaim. Plaintiff argued that defendants' claims for property taxes failed as a matter of law because (1) there was an adequate remedy at law and (2) defendants did not provide a benefit to plaintiff because common elements may not be taxed. Plaintiff argued that Michigan law provides a clear legal remedy for reimbursement of taxes assessed or paid by mistake.[8] Plaintiff additionally argued that there was no wrongful conduct necessary for a claim of indem-

[8] Plaintiff noted that defendants had also filed a lawsuit seeking legal relief against the entities that sold them the property in 2004.

nity, defendants' claim for promissory estoppel was based on a 2007 purchase agreement between Vistal and plaintiff, which was an express contract that barred the claim of promissory estoppel, and there was no agreement as required for a claim of account stated. Finally, plaintiff argued that defendants' claims were barred by MCR 3.411(F). Defendants opposed plaintiff's motion and requested summary disposition in their favor under MCR 2.116(I)(2). In response to defendants' motion for summary disposition regarding Count VI, plaintiff argued that (1) the trial court had already ruled on the issue of title, (2) MCL 565.29 was not controlling because defendants were not "purchasers in good faith," (3) MCL 559.143 was inapplicable, and (4) the exact time that the developer rights were lost was not dispositive.

On January 31, 2018, the trial court issued an opinion and order granting plaintiff's motion for summary disposition, dismissing all claims in defendants' second amended counterclaim, and denying defendants' motions for summary disposition. Regarding Counts I and II (restitution and indemnification), the trial court ruled that plaintiff was entitled to summary disposition pursuant to MCR 2.116(C)(10) because defendants were not entitled to contractual indemnity. The trial court reasoned that there was no evidence of any implied or express contract of indemnity, and defendants did not have a valid common-law claim for restitution because there was no evidence that plaintiff committed any wrongful act that caused defendants to pay the property taxes. The trial court also found that plaintiff was entitled to summary disposition on Counts III and VIII (quantum meruit and unjust enrichment) because there was a remedy at law and no evidence that plaintiff was unjustly enriched because the property would not have been foreclosed upon.

Next, the trial court ruled that plaintiff was entitled to summary disposition on Count IV (detrimental reliance/promissory estoppel) because there was no evidence that plaintiff made a promise or that plaintiff should have expected defendants to act or fail to act on the basis of any promise. As to Count V (account stated), the trial court ruled that plaintiff was entitled to summary disposition because there was no evidence of an account stated in writing by the creditor and accepted as correct by the debtor. The trial court concluded that plaintiff was entitled to summary disposition on Count VI (quiet title/declaratory relief) pursuant to MCR 2.116(C)(7) because MCL 565.29 was inapplicable for the reason that there was no conveyance, defendants were not subsequent purchasers in good faith, and defendants failed to comply with MCR 3.411(F). Finally, the trial court ruled that plaintiff was entitled to summary disposition on Count VII (adverse possession) pursuant to MCR 2.116(C)(10) because defendants' use of the land was not actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of 15 years, nor was it hostile and under cover of claim of right. Defendants filed their claim of appeal from this order on February 12, 2018 (Docket No. 342372).

On February 27, 2018, plaintiff filed a motion for attorney fees and costs as a form of sanctions against defendants pursuant to MCR 2.114,[9] MCR 2.313, MCR 2.625, and MCL 600.2591. After a hearing on plaintiff's motion, the trial court found no basis to sanction defendants and denied the motion. The trial court

[9] MCR 2.114 was repealed, effective September 1, 2018, and substantially relocated to current MCR 1.109(E). See 501 Mich cxxxvii, cliii-cliv. Plaintiff filed its motion under MCR 2.114 before the court rule was repealed. All references in this opinion to MCR 2.114 are to the rule that was in effect when the parties filed their complaints and motions.

stated: "I can't remember any point in this entire litigation where I thought this is a frivolous pleading that has been filed, this was a frivolous motion that has been brought. I think this was a difficult case." On March 23, 2018, the trial court entered an order denying the motion for attorney fees and costs. Plaintiff filed its claim of appeal from this order on April 2, 2018 (Docket No. 343144).[10]

II. DOCKET NO. 342372

In Docket No. 342372, defendants contend that the trial court erred by applying the 2002 version of MCL 559.167 because the 2016 amendment applies retroactively and, in the alternative, that the earlier versions of the statute violated defendants' due-process rights and constituted an unconstitutional taking. We disagree.

A. SUMMARY DISPOSITION

Defendants moved for summary disposition of plaintiff's amended Count I pursuant to MCR 2.116(C)(8), and the trial court granted summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2).

1. ISSUE PRESERVATION AND STANDARD OF REVIEW

"In order to properly preserve an issue for appeal, it must be raised before, and addressed and decided by, the trial court." *Henderson v Dep't of Treasury*, 307 Mich App 1, 7-8; 858 NW2d 733 (2014) (quotation marks and citation omitted). Defendants moved for

[10] The appeals were consolidated on April 19, 2018. See *Cover* [sic] *Creek Condo Ass'n v Vistal Land & Home Dev LLC*, unpublished order of the Court of Appeals, entered April 19, 2018 (Docket Nos. 342372 and 343144).

summary disposition on Count I of plaintiff's amended complaint on the ground that plaintiff's claim for relief was based on a repealed version of MCL 559.167. The trial court disagreed and granted summary disposition in favor of plaintiff on Count I. Therefore, the issue of whether the 2016 amendment of MCL 559.167 applies retroactively is preserved.

The parties, as early as November 2016, addressed the constitutional issues of due process and the Takings Clause. The court implicitly acknowledged that the parties raised those issues when it ruled. The court made the decision to decide this case on nonconstitutional grounds. There is a preference for resolution of controversies on nonconstitutional grounds when possible. *Lichtman v Detroit*, 75 Mich App 731, 734; 255 NW2d 750 (1977). As early as November, this issue was noted in defendants' motion for summary disposition as to Count I. It was later argued in a reply brief filed by defendants, but like other constitutional issues, was not discussed by the court in its opinion. In fact, the court specifically declined to rule on any constitutional issues, stating: "Plaintiff makes other valid arguments as to why a reading of MCL 559.167 as proposed by the Defendants would render the statute unconstitutional. However, the Court need not address that issue at this time." An argument could be made that because the parties did not address this issue at oral argument and the trial court failed to address the issue in its opinion and order, it is not preserved. However, because the issue was raised in the parties' briefing, it is preserved for appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). In this instance, even if the issue were unpreserved, this Court, having all relevant facts before it, would review the legal issue. *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 518; 847 NW2d 657 (2014).

MCR 2.116(I)(2) provides that "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Rataj v Romulus*, 306 Mich App 735, 746; 858 NW2d 116 (2014). "A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Id*. at 746-747 (quotation marks and citations omitted). "A court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment." *Ashley Capital, LLC v Dep't of Treasury*, 314 Mich App 1, 6; 884 NW2d 848 (2016) (quotation marks and citation omitted). This Court also reviews de novo an issue of statutory construction, which is a question of law. *Id*.

With regard to defendants' unpreserved due-process argument, whether a party has been afforded due process, *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009), and whether MCL 559.167, as amended by 2002 PA 283, caused an unconstitutional taking, are questions of law this Court reviews de novo, *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 541; 688 NW2d 550 (2004). The relevant facts are available for both issues; therefore, appellate consideration is not precluded. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

2. ANALYSIS

i. RETROACTIVITY

Whether the 2016 amendment of MCL 559.167 applies retroactively is a question of first impression. We begin with the presumption that statutory amendments operate prospectively. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006). "[S]tatutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary. The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id*. at 155-156 (citations omitted). Legislative intent governs the determination of statutory retroactivity. *Id*. at 156. "[T]he Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively." *Id*. (quotation marks and citation omitted). For example, MCL 141.1157 provides, "This act shall be applied retroactively," and MCL 324.21301a(2) formerly provided, "The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application." See *Davis*, 272 Mich App at 156.[11]

"There is an exception to the general rule that newly enacted statutes are presumed to apply prospectively, which exception provides that no such presumption exists where the statute is remedial or procedural in nature, as long as it does not deny vested rights." *Id*. at 158. Therefore, "[a] statute may not be applied retroactively if it abrogates or impairs vested rights, creates

[11] MCL 324.21301a was amended in 2012, see 2012 PA 108, and currently provides: "The liability provisions that are provided for in this part shall be given retroactive application."

new obligations, or attaches new disabilities concerning transactions or considerations occurring in the past." *Id*.

The 2016 amendment of MCL 559.167 does not expressly provide that it is retroactive. In other words, there is no clear, direct, or unequivocal language in the actual statute that the amended statute is to be applied retroactively, such as language stating that "these amendments shall be given retroactive application." Defendants argue that the use of the word "occurring" in Subsection (5) expressly makes the 2016 amendment retroactive. MCL 559.167(5) provides, "A reversion under subsection (4), whether *occurring* before or after the date of the 2016 amendatory act that added this subsection, is not effective unless the election, notice, and recording requirements of subsection (4) have been met." MCL 559.167(5), as amended by 2016 PA 233 (emphasis added). This language, however, is not a clear and unequivocal expression of the Legislature's intent to apply the amendment retroactively.[12] The Legislature's choice of the word "occurring," rather than "occurred," is significant.[13] As the

[12] In *Ferry Beaubien LLC v Centurion Place on Ferry Street Condo Ass'n*, unpublished per curiam opinion of the Court of Appeals, issued December 14, 2017 (Docket No. 335571), pp 5-6, 7 n 4, this Court applied the 2002 version of the statute because it was in effect at the time in question and noted that "nothing in the language of amended Subsection (3) suggests that it applies retroactively. We presume that statutory amendments operate prospectively unless a contrary intent is clearly manifested in the language of the statute." This Court, however, also stated that it was not addressing the effect of the 2016 amendment of MCL 559.167 on the reversion to general common elements of the condominium. *Id*. at 6 n 3. We recognize that unpublished opinions are not binding under the rule of stare decisis, but they may be considered for their instructive or persuasive value. *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

[13] See *People v Manuel*, 319 Mich App 291, 301-302; 901 NW2d 118 (2017).

trial court determined, the present participle indicates that the 2016 amendment does not apply to any "reversion" that had already occurred. Before the 2016 amendment, MCL 559.167 did not use the term "reversion" or contain Subsection (4). Therefore, "[a] reversion under subsection (4)" could not have *occurred* before the effective date of the 2016 amendment. Likewise, the use of the word "occurring" in Subsection (5) signals the progressive aspect and shows that an action was, is, or will be unfinished at the time referred to. *People v Manuel*, 319 Mich App 291, 301-302; 901 NW2d 118 (2017). Thus, the statute signals that a "reversion under subsection (4)" may be in the process of occurring when the statute became effective. In those cases, the requirements of the 2016 amendment must be satisfied. As plaintiff argues, however, nothing suggests that completed transfers under the earlier versions of the statute are to be reversed.[14]

Defendants also argue that the statute is remedial and that it must, therefore, be applied retroactively. "A statute is remedial or procedural in character if it is designed to correct an existing oversight in the law or redress an existing grievance[.]" *Davis*, 272 Mich App at 158-159 (quotation marks and citation omitted). Defendants specifically argue that the 2016 amendment was intended to address due-process deficiencies in the prior versions of the statute. However, the "legislative history" cited by plaintiff indicates that the purpose of the 2016 amendment was to address "con-

[14] We note that plaintiff argued to the contrary below. In its complaint, plaintiff asserted that "MCL 559.167, as amended by 2016 PA 233, which became effective on September 21, 2016 attempts to retroactively undo any prior reversion of units to common elements . . . ." Plaintiff's position changed in its response to defendants' motion for summary disposition on Count I of the complaint.

fusion regarding the timing of the transfer of property and the title history of transferred property."[15]

Nonetheless, even if the 2016 amendment is considered remedial, it cannot apply retroactively if it abrogates or impairs vested rights. See *Davis*, 272 Mich App at 158. Under the 2002 version of MCL 559.167(3), "[i]f the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, *those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease*." MCL 559.167(3), as amended by 2002 PA 283 (emphasis added). In this case, 10 years after the date of commencement of the project was sometime in 1999, or possibly sometime in 2012 at the latest.[16] When the right to construct units ceased, plaintiff obtained a vested right in the undeveloped lands (former Units 1 through 14). The trial court concluded that plaintiff's rights vested by operation of law, without any action. We agree.

Defendants' arguments against vesting are that (1) plaintiff did not prepare and record a replat under MCL 559.167(2), and (2) the 2002 version of MCL 559.167 violated defendants' due-process rights. That version of MCL 559.167(2), as amended by 2002 PA 283, provides: "If a change involves a change in the boundaries of a condominium unit or the addition or elimination of condominium units, a replat of the condominium subdivision plan shall be prepared and

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[15] Senate Legislative Analysis, SB 610 (July 14, 2016), p 1.

[16] As noted earlier, the first unit was sold at some point in 1989, and therefore, construction must have commenced before that date. Furthermore, as the trial court concluded, even if the 10-year period did not begin to run until the 2002 amendment became effective, it would still have lapsed in 2012.

recorded assigning a condominium unit number to each condominium unit in the amended project." As determined by the trial court, nothing in this language required a replat to be recorded or conditioned a "reversion" on the recording.[17] Thus, a "reversion" occurred regardless of whether a replat was prepared or recorded. While plaintiff's failure to record a replat may have some other effect, it did not prevent the undeveloped property from remaining part of the project as general common elements and the right to construction ceasing under Subsection (3). We discuss defendants' due-process argument separately below.

ii. DUE PROCESS

Defendants contend that they were deprived of their due-process rights under the 2002 version of MCL 559.167 because they were not provided with notice and a hearing before they were permanently deprived of their property rights in former Units 1 through 14. We disagree.

"Both the state and federal constitutions provide that private property shall not be taken without due process of law or just compensation. Due process is violated only when legislation impairs vested rights." *Attorney General v Mich Pub Serv Comm*, 249 Mich App 424, 435; 642 NW2d 691 (2002) (citations omitted). "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 prop-

[17] Although the preparation and recording of a replat was required by MCL 559.167(2), there is nothing linking this requirement to Subsection (3) or conditioning the "reversion" in Subsection (3) on that requirement.

erty . . . ." *Id*. at 436 (quotation marks and citation omitted).

Preliminarily, plaintiff argues that defendants and their predecessors did not have any vested property rights in Units 1 through 14 that were affected by operation of the 2002 version of the statute. They argue that at all times before the 10-year period expired, Units 1 through 14 were part of the project and defendants had the option to either complete construction or withdraw those units from the project. According to plaintiff, the option was merely a contingent interest. See *Amoco Oil Co v Kraft*, 89 Mich App 270, 275; 280 NW2d 505 (1979). As successor developers of the project, however, defendants had title to the entire project, including the "need not be built" units, which it had the right to develop or withdraw. Accordingly, defendants had a vested property interest in former Units 1 through 14 before the 10-year period expired.

Even if defendants had a vested property right in former Units 1 through 14, the lapse of that right did not deny defendants due process of law. In *Kentwood v Sommerdyke Estate*, 458 Mich 642, 646; 581 NW2d 670 (1998), our Supreme Court held that "the state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period." That case involved the highway-by-user statute, MCL 221.20. *Kentwood*, 458 Mich at 645. As stated by the Court:

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature

> acts within its powers in imposing such new constraints or duties. [L]egislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. [*Id*. at 652-653 (quotation marks and citation omitted; alteration in original).]

Therefore, the Court held that "the state may condition the permanent retention of a property right on performance of reasonable conditions that indicate a present intention to retain the property interest." *Id*. at 655-656. The Court concluded that "by treating property that has not been reserved for private use for ten years or longer as dedicated to the public for use as a highway, the Michigan statute is a reasonable exercise of police power." *Id*. at 656. Regarding whether due process was afforded, the Court stated, "[G]enerally, a legislature need only enact and publish a law and afford citizens a reasonable opportunity to familiarize themselves with the terms of a statute to advise its citizens of the lapse of a property right." *Id*. at 664.

Similarly, MCL 559.167(3), as amended by 2002 PA 283, conditioned the retention of a property right on the performance of reasonable conditions that indicate a present intention to retain that property interest. Within the 10-year period, defendants were required to either develop Units 1 through 14 or withdraw the undeveloped portions from the project. See MCL 559.167(3), as amended by 2002 PA 283. Defendants had sufficient notice of the law and that their property rights would lapse if they did not take action within the 10-year period. Moreover, the requirements of either completing the project or withdrawing the units from the project are reasonable requirements designed to further the legitimate objectives of preventing incomplete projects and providing finality. Defendants rely on cases involving the forfeiture of real property for the failure to pay taxes, which require notice and a

hearing to afford due process. Under the applicable caselaw, however, defendants received all the process that was due. As a consequence, any vested rights defendants possessed in the property lapsed by 2012.

iii. UNCONSTITUTIONAL TAKING

Defendants also contend that the 2002 version of MCL 559.167, which mandated a permanent transfer of title, caused an unconstitutional taking without just compensation and in violation of the public-use requirement. We disagree.

"The Fifth Amendment provides in part: '[N]or shall private property be taken for public use, without just compensation.' " *Kentwood*, 458 Mich at 656 (alteration in original). "The Fifth Amendment prohibition applies against the states through the Fourteenth Amendment. Michigan's Constitution is substantially similar to the Taking Clause of the United States Constitution." *Id*. (citation omitted). "One who asserts an uncompensated taking claim must first establish that a vested property right is affected." *Mich Pub Serv Comm*, 249 Mich App at 436 (quotation marks and citation omitted).

As discussed, defendants had a vested property right in former Units 1 through 14, such that they could properly assert a claim for an uncompensated taking. Nonetheless, the necessary state action required to find an unconstitutional taking is not present. As stated in *Kentwood*, 458 Mich at 663, "It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation." (Quotation marks and citation omitted.) Similarly, in this case, it was defendants' failure to act within the 10-year period that caused the lapse of their property right, not any

action of the state. Therefore, there is no "taking" that requires compensation under the United States and Michigan Constitutions. We further reject defendants' claim for inverse condemnation because it was not raised below and is not asserted against the government. "Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." *Mays v Governor*, 323 Mich App 1, 79; 916 NW2d 227 (2018) (quotation marks and citations omitted). In this case, defendants make this claim against plaintiff, a condominium association, not a governmental unit, and therefore, their claim for inverse condemnation fails.

Summarily, the trial court correctly applied MCL 559.167, as amended by 2002 PA 283, and properly granted summary disposition in favor of plaintiff on Count I of the complaint. Further, MCL 559.167, as amended by 2002 PA 283, did not cause an unconstitutional taking nor did it deny defendants due process of law.

B. DEFENDANTS' COUNTERCLAIMS

The trial court granted summary disposition in favor of plaintiff on defendants' counterclaims for reimbursement for the payment of tax bills and denied defendants' motion under MCR 2.116(C)(10). This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Rataj*, 306 Mich App at 746. "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is

entitled to judgment as a matter of law." *Id*. at 747 (quotation marks and citation omitted).

This issue is waived for appellate review. Defendants merely contend that they are entitled to reimbursement because they paid the taxes on Units 1 through 14 until 2015 and that the payment of taxes constitutes an improvement to the property. However, defendants provide no supporting reasoning. They fail to address, for example, any of the specific causes of actions alleged in their second amended counterclaim, the elements of those causes of action, or the trial court's rulings on those claims. "A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Caldwell v Chapman*, 240 Mich App 124, 132-133; 610 NW2d 264 (2000).

III. DOCKET NO. 343144

Following the filing of defendants' claim of appeal in Docket No. 342372, plaintiff filed a motion for attorney fees and costs, which the trial court denied. In Docket No. 343144, plaintiff appeals the order denying its motion for attorney fees and costs. Plaintiff contends that the trial court erred by denying its request for attorney fees and costs related to defendants' filing of (1) the counterclaims in defendants' second amended counterclaim, (2) the motion to strike, and (3) the motion to compel. We disagree.

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a request for sanctions under MCR 2.114 and MCR 2.313. *Sprenger v Bickle*, 307 Mich App 411, 422-423; 861 NW2d 52 (2014); *Phinisee v Rogers*, 229 Mich App

547, 561-562; 582 NW2d 852 (1998). "A trial court abuses its discretion when it chooses an outcome that falls outside the range of reasonable and principled outcomes." *Fette v Peters Constr Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015). "[T]he court's underlying factual findings, including a finding of frivolousness, are reviewed for clear error." *Sprenger*, 307 Mich App at 423. "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

B. ANALYSIS

"Sanctions are warranted under MCR 2.114 where a plaintiff asserts claims without any reasonable basis in law or fact for those claims, or where the claims are asserted for an improper purpose." *Robert A Hansen Family Trust v FGH Indus, LLC*, 279 Mich App 468, 486; 760 NW2d 526 (2008), citing MCR 2.114(D).[18] MCR 2.114(E), which was in effect at the time plaintiff filed its motion for attorney fees and costs and the trial court ruled on the motion, provided:

> 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.

[18] MCR 2.114 was repealed, effective September 1, 2018, and substantially relocated to current MCR 1.109(E). 501 Mich cclxxviii.

Under MCR 2.114(F), "a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." MCR 2.625(A)(2) provides, "In an action filed on or after October 1, 1986, if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

As this Court explained in *Guerrero*, 280 Mich App at 677-678:

> Pursuant to MCR 2.114(D), an attorney is under an affirmative duty to conduct a reasonable inquiry into both

> the factual and legal basis of a document before it is signed. Under MCR 2.114(D), the signature of a party or an attorney is a certification that the document is "well grounded in fact and . . . warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law" and that "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 filing of a signed document that is not well grounded in fact and law subjects the filer to sanctions pursuant to MCR 2.114(E). MCR 2.114(E) states that the trial court "shall" impose sanctions upon finding that a document has been signed in violation of the rule. Therefore, if a violation of MCR 2.114(D) has occurred, the sanctions provided for by MCR 2.114(E) are mandatory. [Citations omitted.]

1. COUNTERCLAIMS

Plaintiff first argues that the trial court was required to impose sanctions for defendants' filing of frivolous and untimely counterclaims, as well as for defendants' misrepresenting that they had paid property taxes on former Units 1 through 14. Plaintiff argues that defendants' counterclaims were frivolous because (1) restitution is not a cause of action, (2) there was no special relationship necessary for indemnification, (3) there was a statutory remedy available and no benefit to plaintiff, (4) no promises were made, (5) there were no mutual dealings necessary for a claim of account stated, (6) defendants had no basis to assert a claim for quiet title because the trial court had already ruled on the issue, and (7) there was no factual basis for a claim of adverse possession.

We disagree that defendants misrepresented that they had paid taxes on the property. The second amended counterclaim alleged that "Defendants, directly or through their predecessors in title, paid real

property taxes on Units 1 through 14 commencing prior to tax year 2000." They argued the same in their motion for summary disposition. Defendants attached to their motion for summary disposition a tax history showing taxes paid on the property, receipts, checks, and tax statements. The motion also specifically alleged that "[a]ny entity paying any taxes on any of the 14 units has assigned its interest and claim to reimbursement to VISTAL and or TRUST." Defendants attached the assignments to their motion. Accordingly, there was at least a question of fact regarding whether defendants, or their predecessors whose rights defendants had acquired, paid property taxes on Units 1 through 14, and the amount of the taxes paid, such that the trial court did not abuse its discretion by denying sanctions on this ground.

Moreover, the trial court's finding that the counterclaims were not frivolous is not clearly erroneous. After the trial court determined that defendants lost any right to construct Units 1 through 14, defendants sought to recover the property taxes that they or their predecessors had allegedly paid by asserting various theories of relief. Although we agree with the trial court's dismissal of those claims because there is a statutory remedy available, there was arguable legal merit to their claim that the statutory remedy was not sufficient. There was also arguable legal merit to defendants' arguments that their motion was timely under MCR 3.411(F) given the filing of their motion for reconsideration. Furthermore, plaintiff fails to establish that defendants merely intended to increase costs by filing the counterclaims.

Defendants' specific counterclaims for restitution, indemnification, quantum meruit/unjust enrichment, and promissory estoppel were properly dismissed by

the trial court. However, the trial court's finding that those claims had arguable legal merit is not clearly erroneous. "A claim is not frivolous merely because the party advancing the claim does not prevail on it. Instead, 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." *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 365; 891 NW2d 884 (2016) (quotation marks and citations omitted).

With regard to the claim of restitution, plaintiff relies on the fact that restitution is a remedy, not a claim. Although we agree that restitution is merely a remedy, our Supreme Court has nonetheless referred to a "claim of restitution." See, e.g., *Zerrenner v Zerrenner*, 474 Mich 1103, 1103 (2006). In any event, courts look beyond labels. See, e.g., *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). Therefore, this claim was not devoid of arguable legal merit.

Concerning the claim for indemnification, "[t]he right to common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party's being held liable, the latter party is entitled to restitution for any losses." *Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 62; 807 NW2d 354 (2011) (quotation marks and citation omitted). Plaintiff asserts that this Court has "routinely upheld the dismissal of indemnification claims in which a party has failed to plead a special relationship or course of conduct amongst the parties." Plaintiff, however, only cites cases decided before November 1, 1990, which are not binding on this Court. MCR 7.215(J)(1). Moreover,

as explained by Justice MCCORMACK, "[r]estitution recognizes the need for compensation in instances when the receipt and retention of a benefit by a person without payment made to the person providing that benefit would result in injustice." *In re Bradley Estate*, 494 Mich 367, 409 & n 7; 835 NW2d 545 (2013) (MCCORMACK, J., dissenting), citing 1 Restatement of Restitution and Unjust Enrichment, 3d, § 1, p 3; Sherwin, *Restitution and Equity: An Analysis of the Principles of Unjust Enrichment*, 79 Tex L R 2083 (2001). Therefore, defendants could have reasonably believed that they had a claim against plaintiff for the taxes that they had allegedly paid on property that was owned by plaintiff. This argument was not devoid of arguable legal merit even though real-property taxes were not actually owed on former Units 1 through 14 because they were general common elements and common elements are not taxable. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 149; 783 NW2d 133 (2010).

In support of the claims of quantum meruit and unjust enrichment, plaintiff merely relies on the fact that a statutory remedy was available and no benefit was received. "The theory underlying quantum meruit recovery is that the law will imply a contract in order to prevent unjust enrichment when one party inequitably receives and retains a benefit from another." *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006) (quotation marks and citation omitted). Although taxes were not actually owed on common general elements, defendants allegedly paid the taxes on the basis of a mutual mistake. Accordingly, there was arguable legal merit to their claim to recover that money from plaintiff on the basis that plaintiff, as the owner of the property, received an unfair benefit.

With regard to defendants' claim of promissory estoppel, the elements are "(1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Klein v HP Pelzer Auto Sys, Inc*, 306 Mich App 67, 83; 854 NW2d 521 (2014) (quotation marks and citation omitted). Defendants' second amended counterclaim referred to a 2007 contract, but it did not allege that any specific promise was made. However, in reliance on *Ollig v Eagles*, 347 Mich 49; 78 NW2d 553 (1956), defendants alleged a claim of "promissory estoppel" on the basis of plaintiff's alleged silence or acquiescence while defendants paid the real-property taxes. Although *Ollig* involved equitable estoppel rather than promissory estoppel,[19] the substance of the claim controls, not its label. *Norris*, 292 Mich App at 582. In *Ollig*, 347 Mich at 60, the Court considered whether

> [w]hen an occupying claimant in good faith, but mistakenly, relied upon the belief that his wife had title to land and built a house thereon with the full knowledge and silent acquiescence of the actual owner and upon discovery brings suit in equity for an accounting for the value of his improvements, . . . a chancery court [is] powerless to grant relief[.]

Based on *Ollig*, there was arguable legal merit to defendants' claim even though the claim was properly dismissed because the payment of taxes that were not owed did not improve the land.

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[19] The distinction is that "[e]quitable estoppel is essentially a doctrine of waiver," whereas promissory estoppel "substitutes for consideration in a case where there are no mutual promises[.]" *Huhtala v Travelers Ins Co*, 401 Mich 118, 132-133; 257 NW2d 640 (1977).

Defendants' claims for account stated, to quiet title, and for adverse possession were also dismissed by the trial court. For the reasons discussed, however, those claims were not devoid of arguable legal merit, and therefore, the trial court did not abuse its discretion by declining to impose sanctions.

First, "[a]n account stated is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and of the promise by the debtor to pay the amount due." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 557; 837 NW2d 244 (2013). "The parties to an account stated need not expressly assent to the sum due, as there are instances when assent may be inferred from a party's inaction[.]" *Id*. at 558 (emphasis omitted). Defendants alleged that they sent an account to plaintiff for monies due and that because plaintiff failed to object, the accounting became an "account stated." The trial court found that there was no written account stated that was accepted by the debtor, but it did not address whether plaintiff's assent could be inferred. Under the above caselaw, there was arguable legal merit to defendants' claim, even though it was rejected by the trial court.

Defendants' claim to quiet title and for declaratory relief alleged that plaintiff lost any title to Units 1 through 14 because defendants' deeds were recorded before plaintiff recorded notice of its interest. The trial court rejected this claim on the basis that the race-notice statute, MCL 565.29, applies to conveyances and there was no conveyance in this case because "Units 1 through 14 were converted to common elements by operation of law." The trial court additionally found that defendants were not subsequent purchasers in good faith because they knew or should have known

of the effect of the law on "need not be built" units, which were identified in the master deed. As noted, plaintiff argues on appeal that sanctions should have been imposed because this issue was already decided in the trial court's orders entered on February 10, 2017, and March 15, 2017. The race-notice issue, however, was not previously decided by the trial court.[20] As defendants argue, although the trial court found that plaintiff had title to former Units 1 through 14 and defendants' rights ceased by at least 2012, defendants' counterclaim related to events that occurred *after* the "reversion" by operation of law that occurred under MCL 559.167, as amended by 2002 PA 283. Therefore, the trial court did not abuse its discretion by declining to impose sanctions on this basis.

Last, defendants alleged that they obtained title to former Units 1 through 14 by adverse possession. As stated by this Court in *Waisanen v Superior Twp*, 305 Mich App 719, 731; 854 NW2d 213 (2014):

> A claim of adverse possession requires clear and cogent proof that possession of the disputed property has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period. The use of the property must be hostile, that is without permission and in a manner that is inconsistent with the rights of the true owner. The statutory period of limitations for adverse possession is 15 years. [Quotation marks and citation omitted.]

Defendants alleged facts in support of each of these elements, asserting that a for-sale sign was placed on the property; the real-estate efforts were open and obvious; plaintiff was on notice of the 2004 transfer to Vistal Cothery, LLC, and did not object; defendants

[20] The trial court had only previously addressed the applicability of MCL 559.167(2) and MCL 559.143.

and their predecessors paid taxes on the property and openly surveyed, staked, and grubbed the property; defendants were in actual and constructive possession of the property; defendants and their predecessors had held the property exclusively, uninterrupted, and continuously since before 1990; and defendants' claim was hostile and notorious. The trial court, however, found that defendants did not have exclusive use for 15 years and that they were given express permission to access and possess the land in 2007. On appeal, plaintiff argues that defendants' claim was frivolous because the payment of taxes is insufficient to establish adverse possession, defendants never actually possessed the property, and defendants were provided permission to enter the property in 2007. In response to plaintiff's motion for summary disposition on defendants' second amended counterclaim, defendants argued that the 2007 purchase agreement was for the common elements only, not Units 1 through 14, and that there were disputed questions of fact regarding the elements of adverse possession. In ruling on plaintiff's motion for fees, the trial court stated that even though defendants did not prevail on their claim of adverse possession, "that doesn't mean that there wasn't an argument to be made." Given the allegations and arguments made by defendants, the trial court did not clearly err by finding that defendants' claim was not frivolous.

2. MOTION TO STRIKE RESPONSE

Plaintiff also argues that the trial court erred by denying its request for attorney fees and costs because defendants violated MCR 2.114 by filing a motion to strike plaintiff's response to defendants' motion for summary disposition. Plaintiff argues that MCR 2.115(B) only allows pleadings to be struck and that a response to a motion is not a pleading. MCR 2.115(B)

provides that "the court may strike from a pleading" and "may strike all or part of a pleading." MCR 2.110(A) defines "pleading" as a complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of the above, or a reply to an answer. Accordingly, plaintiff is correct that a response cannot be struck. Although the label "motion to strike" may have been improper, the substance of defendants' argument—that the response improperly raised new issues—had arguable legal merit. Further, defendants' reply and motion to strike were combined in a single document, and defendants were essentially requesting that the court only consider the issue before it and consider the "new" issues at a later time. Accordingly, it is not clear that plaintiff was *required* to file a response to defendants' combined reply and "motion to strike." Again, although the form was improper, there was arguable legal merit to defendants' claim that the trial court should only consider the issue before it. Therefore, the trial court did not abuse its discretion by denying sanctions on this basis.

3. MOTION TO COMPEL DISCOVERY

Lastly, plaintiff argues that the trial court was required to grant its request for attorney fees and costs after the trial court denied defendants' motion to compel discovery. On December 15, 2016, defendant Vistal filed a motion to compel discovery, arguing that plaintiff failed to fully answer interrogatories and provide all of the documents requested. On January 6, 2017, plaintiff filed a response to defendants' motion to compel in which it argued that the requested information was not relevant, was in the possession of Vistal's predecessors, or was already provided. Plaintiff also requested attorney fees under MCR 2.313(A)(5)(b) for having to respond to a frivolous motion.

At the January 11, 2017 hearing, defendants argued that they were asking for documents going back to 1990 when the project started, but plaintiff only provided documents for the last 10 years because that was the period for which it was requesting the payment of assessments. Defendants argued that they were seeking information regarding when plaintiff began assessing the units and whether there were, in fact, 31 units. Defendants also wanted to know how plaintiff calculated the $200,000 in interest and late fees. The trial court subsequently denied Vistal's motion to compel in light of its ruling on Count I. On March 21, 2017, defendants filed a motion for reconsideration; the trial court denied the motion on April 13, 2017.

On appeal, plaintiff argues that the motion to compel was not related to the time period of the assessments requested, all of the requested information was provided, and the motion was intended to harass and increase the costs of the litigation. Defendants respond that the date of commencement of the 10-year period was a material issue and that the requested information was relevant to other claims and defenses, including adverse possession. Defendant's original counterclaim did not allege a claim of adverse possession.[21] Nonetheless, the trial court did not clearly err by finding that defendants' requests were not "inappropriate." Given defendants' arguments, there was a reasonable basis for defendants to believe that their requests would lead to relevant evidence. Because defendants' motion had arguable legal merit and a basis in fact, the trial court did not clearly err by concluding that the motion was not frivolous.

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[21] We note that defendants' claim of adverse possession was not filed until *after* the motion to compel was filed.

As plaintiff argues, however, its request for fees was under MCR 2.313(A)(5)(b). MCR 2.313(A)(5) relates to awards for the expenses of motions, and Subsection (b) provides:

> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust. [MCR 2.313(A)(5)(b).]

Thus, the trial court was required to order defendants to pay plaintiff's reasonable expenses incurred in opposing the motion unless it found that the making of the motion was substantially justified or that other circumstances made an award of expenses unjust. At the hearing, the trial court stated:

> You know, Plaintiff argues that the motion to compel that was filed was inappropriate, but, you know, our discovery rules have built in procedures for dealing with overbroad requests. That was followed. There's nothing inappropriate about the decision that was made to—to make those discovery requests.

Although the trial court did not expressly find that the motion was "substantially justified" or that an award of expenses would be "unjust" under the circumstances, its finding that the motion was not "inappropriate" indicates that it so found. Therefore, the trial court did not abuse its discretion by denying the motion for fees and costs related to defendants' motion to compel discovery.

Affirmed.

RONAYNE KRAUSE, P.J., and METER, J., concurred with STEPHENS, J.