MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

September 16, 2021 through December 28, 2021

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOLUME 339
FIRST EDITION

THOMSON REUTERS®

2024

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
CHRISTOPHER M. MURRAY	2027
Chief Judge Pro Tem	
JANE M. BECKERING	2025[1]
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2027
KATHLEEN JANSEN	2025
JANE E. MARKEY	2027
KIRSTEN FRANK KELLY	2025
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2027
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2027
MARK T. BOONSTRA	2027
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2027[2]
ANICA LETICA	2027
JAMES R. REDFORD	2023
MICHELLE M. RICK	2027

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

[1] To December 24, 2021.

[2] The Michigan Court of Appeals mourns the loss of Judge Jonathan Tukel, who died on September 17, 2021.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
BRIDGET M. McCORMACK	2029
Justices	
BRIAN K. ZAHRA	2023
DAVID F. VIVIANO	2025
RICHARD H. BERNSTEIN	2023
ELIZABETH T. CLEMENT	2027
MEGAN K. CAVANAGH	2027
ELIZABETH M. WELCH	2029

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

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

State Court Administrator
THOMAS P. BOYD

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

TABLE OF CASES REPORTED

PAGE

PAGE

I

J

K

L

PAGE

COURT OF APPEALS CASES

In re CHRISTIE

Docket No. 355940. Submitted September 8, 2021, at Detroit. Decided September 16, 2021, at 9:00 a.m.

The Department of Health and Human Services (the DHHS) petitioned the Grand Traverse Circuit Court to terminate respondent-mother's parental rights to three children after respondent-mother's infant daughter died in a co-sleeping incident. The father of two of the children, NC and CC, moved to dismiss them from the petition on jurisdictional grounds. NC and CC had lived exclusively with their father in another county for several years; their father had sole physical custody, and respondent-mother had only supervised parenting time. The DHHS explained that it included NC and CC in the petition even though they did not live with respondent-mother because it was required to do so under MCL 722.638(1). The circuit court denied the motion to dismiss, reasoning that it could exercise jurisdiction over the out-of-county children because respondent-mother lived in Grand Traverse County and that is where the boys' half-sister died. The father sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the motion.

The Court of Appeals *held*:

To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists. MCL 712A.2(b) governs a circuit court's jurisdiction over a minor child in a child protective proceeding. A court's jurisdiction under MCL 712A.2(b) has two components, one pertaining to the child and the other primarily to the parent. Under MCL 712A.2(b), the court has jurisdiction in proceedings concerning a juvenile under 18 years of age *found within the county* when the juvenile's parent neglects the juvenile, does not provide a suitable living environment for the juvenile, or the juvenile is in danger of harm. In this case, the question was whether NC and CC were "found within the county." MCR 3.926(A) provides that as used in MCL 712A.2, a child is "found within the county" in which the offense against the child occurred, in which the offense committed by the juvenile occurred, or in which the minor is physically present. In this case, neither NC nor CC were physically present in Grand Traverse County, and neither commit-

ted any offense in that county triggering the Grand Traverse Circuit Court's jurisdiction. Jurisdiction could be established only if Grand Traverse County was the location of an "offense against" them. The events that resulted in the death of respondent-mother's infant daughter were insufficient, by themselves, to permit the Grand Traverse Circuit Court to exercise jurisdiction over NC and CC. MCR 3.903(C)(9) defines "offense against a child" as an act or omission by a parent asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code, and MCR 3.903(C)(3) defines a "child" as a minor alleged or found to be within the jurisdiction of the court pursuant to MCL 712A.2(b). The plain language of the court rules requires an act or omission against the child over which jurisdiction is sought. The DHHS did not allege any act or omission committed by respondent-mother directly against NC or CC; the critical acts and omissions cited in the petition were committed only against respondent-mother's younger children. Furthermore, the doctrine of anticipatory neglect did not satisfy the geographic component relative to the child required by MCL 712A.2(b). Finally, MCL 722.638(1)(a)—which requires the DHHS to submit a petition for authorization by the circuit court if a parent has abused "the child or a sibling of the child" and that abuse included life-threatening injury—does not indicate that the location of the life-threatening injury to one sibling overcomes the geographic component of the jurisdictional statute as it relates to other siblings. Accordingly, the DHHS's reliance on MCL 722.638 was misplaced. Because neither NC nor CC were "found within" Grand Traverse County pursuant to MCL 712A.2(b), the circuit court lacked jurisdiction over them. Accordingly, the circuit court erred when it denied nonrespondent-father's motion to dismiss them from the petition.

Reversed and remanded for entry of an order of dismissal.

Brett Christie *in propria persona*.

Marie Walker, PLLC (by *M. Marie Walker*) for the minor children.

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

PER CURIAM. The Grand Traverse Circuit Court took jurisdiction over NC and CC when a younger child of respondent-mother was taken into care. NC and CC had lived exclusively with their father in another

county for several years. The circuit court lacked jurisdiction over NC and CC and should have granted their father's motion to dismiss them from the petition. We reverse and remand for entry of an order of dismissal.

I. BACKGROUND

Respondent-mother and father share two sons, NC and CC, who are now teenagers. When the parents' relationship ended, they shared joint legal and physical custody of their sons. In 2015, father secured sole physical custody; respondent-mother had only supervised parenting time. NC and CC have not seen their mother since 2018. At the time of these child protective proceedings, NC and CC lived exclusively with their father in Kent County.

At some point, respondent-mother moved to Grand Traverse County and had two more children. On September 1, 2020, respondent-mother's infant daughter died in a co-sleeping incident. Child Protective Services took respondent-mother's three-year-old son into care, and the Department of Health and Human Services (the DHHS) filed a petition to terminate respondent-mother's parental rights to that son, as well as to NC and CC. The DHHS explained that it included NC and CC in the petition even though they did not live with respondent-mother because it was required to do so under MCL 722.638(1).

Father moved to dismiss NC and CC from the petition on jurisdictional grounds. The circuit court denied the motion, reasoning that it could exercise jurisdiction over the out-of-county children because respondent-mother lived in Grand Traverse County

and that is where the boys' half-sister died. We granted father's application for leave to appeal that decision. *In re Christie*, unpublished order of the Court of Appeals, entered March 3, 2021 (Docket No. 355940).

II. ANALYSIS

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "Jurisdiction must be established by a preponderance of the evidence," and "[w]e review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *Id*. We review de novo underlying issues of statutory interpretation. *In re LaFrance*, 306 Mich App 713, 723; 858 NW2d 143 (2014).

MCL 712A.2(b) governs a circuit court's jurisdiction over a minor child in a child protective proceeding. A court's jurisdiction under MCL 712A.2(b) has two components, one pertaining to the child and the other primarily to the parent. The statute provides, in relevant part:

> The court has the following authority and jurisdiction:
>
> * * *
>
> (b) Jurisdiction in proceedings concerning a juvenile under 18 years of age *found within the county*:
>
> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship. . . .

> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. . . .
>
> (3) If the juvenile is dependent and is in danger of substantial physical or psychological harm. [Emphasis added.]

Respondent-mother lives in Grand Traverse County. The question is whether NC and CC are "found within the county."

MCR 3.926(A) provides, "As used in MCL 712A.2, a child is 'found within the county' in which the offense against the child occurred, in which the offense committed by the juvenile occurred, or in which the minor is physically present." Neither NC nor CC were "physically present" in Grand Traverse County, and neither committed any offense in that county triggering the Grand Traverse Circuit Court's jurisdiction. Jurisdiction could be established only if Grand Traverse County was the location of an "offense against" them.

The events that resulted in the death of respondent-mother's infant daughter were insufficient, by themselves, to permit the Grand Traverse Circuit Court to exercise jurisdiction over NC and CC. MCR 3.903(C)(9) defines "offense against a child" as "an act or omission by a parent . . . asserted as grounds for bringing the child within the jurisdiction of the court pursuant to the Juvenile Code." MCR 3.903(C)(3) defines a "child" as "a minor alleged or found to be within the jurisdiction of the court pursuant to MCL 712A.2(b)." The plain language of the court rules requires an act or omission against the child over which jurisdiction is sought. The DHHS did not allege any act or omission committed by respondent-mother directly against NC or CC. The critical acts and omissions cited in the

petition were committed only against respondent-mother's younger children. The Grand Traverse Circuit Court could exercise jurisdiction over the surviving child who had been in respondent's care. However, "[t]he fact that there are statutory grounds to assume jurisdiction over one minor child does not automatically mean that there are statutory grounds to assume jurisdiction over a second minor child." *In re Kellogg*, 331 Mich App 249, 254; 952 NW2d 544 (2020).

In the circuit court, the DHHS relied on the theory of anticipatory neglect to bring NC and CC into the petition. The petition alleged that in light of respondent-mother's substance abuse, which allegedly led to the death of her infant daughter, NC and CC could be placed in harm's way if permitted unsupervised contact with respondent-mother. "The doctrine of anticipatory neglect recognizes that [h]ow a parent treats one child is . . . probative of how that parent may treat other children." *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001) (quotation marks and citation omitted). This doctrine inherently acknowledges that no actual detrimental act has occurred. While the doctrine of anticipatory neglect may satisfy the parental-conduct component of the jurisdictional statute, it does not satisfy the geographic component relative to the child required by MCL 712A.2(b).

The DHHS also suggested below that the provisions of MCL 722.638 conferred jurisdiction over NC and CC on the Grand Traverse Circuit Court. MCL 722.638(1)(a) requires the DHHS to submit a petition for authorization by the circuit court if a parent has abused "the child or a sibling of the child" and that abuse included life-threatening injury. But that statute does dictate *where* the petition must be filed. Indeed, MCL 722.638(1) provides, "The department

shall submit a petition for authorization by the court *under . . . MCL 712A.2*, if 1 or more of the following apply . . . ." (Emphasis added.) The Legislature thereby required the DHHS to file a petition in a court that has jurisdiction under MCL 712A.2(b). And while MCL 722.638 may satisfy the parental-conduct component of MCL 712A.2, it does not indicate that the location of the life-threatening injury to one sibling overcomes the geographic component of the jurisdictional statute as it relates to other siblings. Accordingly, the DHHS's reliance on MCL 722.638 is misplaced.

Because neither NC nor CC were "found within" Grand Traverse County pursuant to MCL 712A.2(b), the circuit court lacked jurisdiction over them. The circuit court erred when it denied nonrespondent-father's motion to dismiss them from the petition.

We reverse and remand for entry of an order of dismissal. We do not retain jurisdiction.

CAMERON, P.J., and JANSEN and GLEICHER, JJ., concurred.

In re ESTATE OF ELDRIDGE DEAN HUNTINGTON

Docket No. 354006. Submitted July 7, 2021, at Detroit. Decided September 16, 2021, at 9:05 a.m.

LaTonia McDaniel-Huntington filed a petition in the Oakland County Probate Court regarding the estate of her husband, decedent Eldridge D. Huntington, Sr., who died without a will in California where he was domiciled. Huntington Sr. was survived by his wife and two sons, including Eldridge Huntington, Jr.; the two sons were not McDaniel-Huntington's children. McDaniel-Huntington was appointed personal representative of Huntington Sr.'s estate in Michigan. After her appointment, the parties disputed the existence and disposition of assets located here and in California; the sole asset in Michigan appeared to be a condominium, but Eldridge Jr. argued that Eldridge Sr. had a Michigan-based consulting business that could have value. McDaniel-Huntington did not open a probate estate in California and, instead, sought to distribute the Michigan condominium to herself under MCL 700.2102 of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., as her intestate share. The probate court, Elizabeth M. Pezzetti, J., ordered administration of the estate to be supervised and froze the estate's Michigan assets. McDaniel-Huntington later petitioned for complete settlement, requesting that the condominium be distributed to her; Eldridge Jr. objected to the settlement and filed a request for admissions. McDaniel-Huntington did not address the requested admissions but, instead, replied that she did not have to answer the request for admissions because the court had not entered a discovery order. Following an evidentiary hearing, the probate court, Kathleen A. Ryan, J., denied McDaniel-Huntington's petition to allow final account and complete estate settlement; removed McDaniel-Huntington as personal representative of the estate because she had failed to investigate the estate; and appointed Huntington Jr. as successor personal representative, stating that Huntington Jr. could use the role to investigate the estate assets. McDaniel-Huntington filed another petition, this time requesting that Eldridge Jr. be required to provide statutory authority that allowed him to pursue assets outside of Michigan and arguing that the Michigan condominium should be distributed to McDaniel-

Huntington as her *intestate share* as the surviving spouse under MCL 700.2102. The probate court denied McDaniel-Huntington's petition, reasoning that McDaniel-Huntington had no right to Michigan *elections or allowances* as the surviving spouse under MCL 700.2202 because Huntington Sr. was not domiciled in Michigan at the time of his death and that because the Michigan property needed to be distributed through a California probate estate, she would have to apply for her intestate share in California under California law; in other words, the court concluded that it did not have authority to administer the portion of Eldridge Sr.'s estate located in Michigan because MCL 700.3919 (contained in Article III of EPIC, MCL 700.3101 through MCL 700.3988) applied in a case of intestate succession of a decedent not domiciled in Michigan and that, consequently, McDaniel-Huntington had no right to an intestate share of a surviving spouse under MCL 700.2102 (contained in Article II of EPIC, MCL 700.2101 through MCL 700.2959). The probate court also ordered that McDaniel-Huntington was deemed to have admitted the contents of Eldridge Jr.'s request for admissions. The probate court denied McDaniel-Huntington's motion for rehearing or reconsideration, stating that while McDaniel-Huntington might have a claim to an intestate share of her husband's assets, the California assets were unknown and that Eldridge Jr. had indicated he would open a probate estate in California, which would make the Michigan estate ancillary under MCL 700.3919. McDaniel-Huntington appealed.

The Court of Appeals *held*:

1. The probate court is a court of limited jurisdiction, and that jurisdiction is defined by statute. Relevant here, under MCL 700.1302(a), probate courts have jurisdiction over matters related to the settlement of a deceased individual's estate who was, at the time of death, domiciled out of state leaving an estate within the county to be administered. In other words, under MCL 700.1302, Michigan probate courts have jurisdiction over property located in this state, including property that is owned by a nonresident decedent, and under MCL 700.1301(b), the provisions set forth in EPIC explicitly apply to a nonresident's property located in Michigan. In this case, the probate court correctly recognized that it had jurisdiction under MCL 700.1302 to hear this dispute because Huntington Sr. was domiciled in California at the time of his death but left an estate in Michigan to be administered. McDaniel-Huntington erred by framing the issue in this appeal as relating to whether the probate court had subject-matter jurisdiction. Instead, the correct issue was whether the court had authority to administer the portions of Eldridge Sr.'s estate located in Michigan.

2. MCL 700.3919(1) provides that if there is a personal representative of the decedent's domicile willing to receive it, a nonresident decedent's estate being administered by a personal representative appointed in this state shall be distributed to the personal representative of the domiciliary state unless certain exceptions apply, including when, after reasonable inquiry, the Michigan personal representative is unaware of the existence or identity of a personal representative in the domiciliary state. When that occurs, distribution of the decedent's estate must be made in accordance with the other provisions of Article III of EPIC. In this case, there was no evidence that an estate had already been opened in California or that a personal representative had been appointed there. Accordingly, the probate court clearly erred by finding that a probate estate had been opened in California.

3. MCL 700.3101 provides that, upon an individual's death, the decedent's property devolves in the absence of testamentary disposition to the decedent's heirs or to those indicated as substitutes for them in cases involving disclaimer or other circumstances affecting devolution of an intestate estate, subject to homestead allowance, family allowance, and exempt property, to rights of creditors, to the surviving spouse's elective share, and to administration. By its terms, the provision incorporates by reference provisions of law outside of Article III of EPIC. By way of example, the word "heir" is defined in MCL 700.1104(p) of Article I of EPIC, and statutes "affecting the devolution of an intestate estate" are contained solely in Article II of EPIC. Thus, although MCL 700.2202(6)—which provides that the surviving spouse of a decedent who was not domiciled in this state is entitled to election against the intestate estate or against the will only as may be provided by the law of the place in which the decedent was domiciled at the time of death—in some narrow instances limits a certain type of relief under Article III (that of a surviving spouse of a non-Michigan domiciliary to invoke the right of election), it does not limit the rules of distribution of intestate Michigan property to the provisions of Article III only; instead, Article III clearly invokes definitions and substantive provisions of law outside of Article III's terms.

4. Article II of EPIC sets forth the rules of intestate succession. MCL 700.2101(1) provides, broadly, that any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in EPIC, except as modified by the decedent's will. When an out-of-state decedent passes away intestate, the decedent's Michigan property is controlled by Article II of EPIC, possibly with the exception of the rules

regarding spousal election. MCL 700.2203 provides that in the absence of a spousal election under MCL 700.2202, it is conclusively presumed that an intestate decedent's widow elects their intestate share subject to certain exceptions. In this case, McDaniel-Huntington sought to take property in Michigan under the MCL 700.2203 intestate rules of succession; she did not seek to make a surviving spouse's election under MCL 700.2202(6). Because spousal election was not an option in this case, either because MCL 700.2202(6) precluded it or because McDaniel-Huntington renounced any such right, or both, the default intestate succession rules of MCL 700.2203 controlled. The trial court should have determined the heirs of Huntington Sr., and each of their shares, under EPIC's rules of intestate succession. However, the trial court did not abuse its discretion by denying McDaniel-Huntington's request that Eldridge Jr. provide statutory authority that allows him to pursue assets outside the jurisdiction of the probate court. Assuming that McDaniel-Huntington was a surviving spouse for purposes of MCL 700.2102, her share was to be calculated, at least under some circumstances, on the basis of the entire intestate estate, which necessarily included the California property. If the probate court determined on remand that an estate had been opened in California, MCL 700.3919 would control provided that the California personal representative was willing to receive the Michigan property and otherwise comply with the applicable requirements of EPIC.

5. Because McDaniel-Huntington raised the issue for the first time on appeal, she waived review of her claim that the trial court abused its discretion by not allowing her to withdraw or amend her deemed admissions.

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

Laidler Law Office PLLC (by *Kevin Laidler*) for Eldridge Huntington, Jr.

Melissa Z. El, PC (by *Melissa Z. El-Johnson*) for LaTonia McDaniel-Huntington.

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

TUKEL, P.J. In this supervised administration of the estate of nonresident decedent Eldridge Huntington,

Sr. (Eldridge Sr.),[1] appellant, LaTonia McDaniel-Huntington, appeals as of right the probate court's order denying her petition to require Eldridge Huntington, Jr. (Eldridge Jr.) to "provide statutory authority that allows him to pursue assets outside the jurisdiction of [the probate court]," and deeming admitted the contents of Eldridge Jr.'s request for admissions. We affirm the probate court's decision that it had subject-matter jurisdiction over the portion of Eldridge Sr.'s estate in Michigan, but we reverse its decision that it did not have authority to distribute that portion of Eldridge Sr.'s estate. Additionally, we affirm the probate court's ruling that McDaniel-Huntington admitted the contents of Eldridge Jr.'s request for admissions because McDaniel-Huntington failed to address it at the probate court level and thus waived the issue. Thus, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. UNDERLYING FACTS

Eldridge Sr. died in California where he was domiciled, without a will, survived by his wife—McDaniel-Huntington—and two sons, including Eldridge Jr. The sons are not McDaniel-Huntington's children. McDaniel-Huntington was appointed personal representative of the estate in Michigan, but the parties soon began to contest the existence and proper disposition of various assets located in Michigan and California. The main, and perhaps only, asset located in

[1] It is undisputed that Eldridge Sr. was domiciled in California at the time of his death, and any distinction between residency and domicile is not at issue. We will therefore use terms such as residence and domicile interchangeably. See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 498-499; 835 NW2d 363 (2013) (discussing the distinction between residence and domicile).

Michigan was a condominium, though Eldridge Jr. argued that Eldridge Sr. had a Michigan-based consulting business that might have value. An initial hearing was held, at which it became clear that no California probate estate had been opened and that McDaniel-Huntington was hoping to distribute the condominium to herself under her intestate share, MCL 700.2102. The probate court ordered that the administration be supervised and that all Michigan assets be frozen. McDaniel-Huntington later filed a petition for complete estate settlement, requesting that the condominium be distributed to her. Eldridge Jr. objected, arguing that McDaniel-Huntington was withholding information and playing a "shell game." Eldridge Jr. also filed a request for admissions. McDaniel-Huntington replied to the request for admissions by stating that she did not have to answer the request for admissions because there had been no discovery order.

At an evidentiary hearing, it became clear that McDaniel-Huntington had not investigated certain potential assets in California, including a deed found in a safe-deposit box and a car that was repossessed by the financer when McDaniel-Huntington failed to make payments. The probate court told McDaniel-Huntington she should have listed all estate assets in her Michigan inventory, even if they were located in California. The probate court, concerned about McDaniel-Huntington's failure to investigate the estate, appointed Eldridge Jr. as successor personal representative and stated that he could use this role to investigate the estate assets. Soon thereafter, McDaniel-Huntington filed a petition, requesting Eldridge Jr. be required to "provide statutory authority that allows him to pursue assets outside the jurisdiction of this Court" and arguing that the Michigan condominium should be distributed to McDaniel-

Huntington under her intestate share, MCL 700.2102. In essence, McDaniel-Huntington argued that Eldridge Jr. was not entitled to use the Michigan probate proceeding to inquire into California assets.

At a final hearing on McDaniel-Huntington's petition, the probate court stated that McDaniel-Huntington had no right to "Michigan elections or allowances" and further stated that "[t]his administration is ancillary (ph). The distributions need to be made via a California Probate estate opened and administered in California. That's pursuant to MCL 700.4201. I'm not—we can't . . . partition this." The probate court further stated that, in terms of spousal elections, MCL 700.2202 states that "the surviving widow of a decedent who was domiciled in this state, and who dies intestate may file with the court an election in writing. She was not domiciled in this state. . . . [S]he's not entitled to real property pursuant to Michigan elections and allowances." McDaniel-Huntington argued that she was requesting an intestate share, not a spousal election.

After a recess to review the law, the following discussion occurred on the record:

> [*The Court*]: Okay, here's the bottom line, you are misinterpreting EPIC.[2] You are going under Part 1, which is basically exclusive rights to Michigan residents. What's really applicable is Part 3 of EPIC and that is [MCL] 700.4205, Ancillary and Other Local Administrations. Basically, the decedent was domiciled in California.
>
> [*Counsel for McDaniel-Huntington*]: Yes.
>
> [*The Court*]: Therefore, California laws apply. The only thing you can do in Michigan as full faith and credit is marshal the assets, liquidate them, and send it over to California. California has community property rights. For example, I own property in Tennessee, if I died today my

[2] Estates and Protected Individuals Code, MCL 700.1101 *et seq*.

> estate's not gonna be distributed or intestate or otherwise through Tennessee laws, it's gonna be Michigan laws. So the only jurisdiction we have here is full faith and credit to marshal the assets and send them to California. Your motion is denied and you've come back here three times. I'm not doing this again. The answer is no, she does not get her intestate share through Michigan.
>
> If she wants her intestate share follow California laws, they're totally different than Michigan.

The probate court later issued a written order denying McDaniel-Huntington's petition for the reasons stated on the record, further holding that "it is undisputed by the parties that the decedent was domiciled and a resident of the State of California at the time of his death, and the Michigan decedent estate administration is ancillary to California decedent estate administration[.]" (Emphasis added.)

The probate court also ordered that McDaniel-Huntington be deemed to have admitted the contents of Eldridge Jr.'s request for admissions. After a petition for rehearing or reconsideration, the probate court issued a further opinion and order denying the petition. The probate court "acknowledge[d] that LaTonia McDaniel-Huntington may have rights to claim an intestate share of her husband's assets" but noted that the California assets were unknown and that Eldridge Jr. stated he would open an estate in California, which would make the Michigan estate ancillary under MCL 700.3919. This appeal followed.[3]

---

[3] The trial court entered its order denying rehearing on April 7, 2020, and appellant filed a claim of appeal on June 29, 2020. The rule regarding appeals from a probate court order provides that in the absence of anything specific in the probate rules, the normal appellate rules of Chapter 7 apply. See MCR 5.802(A). Nothing in Chapter 5 modifies the time for filing an appeal, so the normal 21-day period of Chapter 7 applies. MCR 7.204(1)(d). That deadline was tolled by

II. THE PROBATE COURT'S AUTHORITY TO ADMINISTER ELDRIDGE SR.'S ESTATE

McDaniel-Huntington argues that the probate court wrongly held that it lacked subject-matter jurisdiction in this case. We disagree with her framing of the issue. Indeed, the probate court never concluded that it lacked subject-matter jurisdiction in this case. Rather, it concluded that it did not have the authority to administer the portion of Eldridge Sr.'s estate located in Michigan. The probate court erred by doing so, and we remand to the probate court for it to properly administer the portion of Eldridge Sr.'s estate located in Michigan.

A. STANDARD OF REVIEW

"Statutory interpretation and a determination whether subject-matter jurisdiction exists are questions of law reviewed de novo on appeal." *In re Haque*, 237 Mich App 295, 299; 602 NW2d 622 (1999).

Administrative Order No. 2020-4, 505 Mich cxxix (2020), until June 8, 2020, during the COVID pandemic, when the tolling order was lifted by Administrative Order No. 2020-16, 505 Mich cli (2020). Once lifted, appellant had the full 21 days to file a claim of appeal. That period ran on June 30, 2020, so the claim of appeal was timely filed.

Neither party saw fit to address in its brief the timeliness of the filing of the claim of appeal. "The time limit for an appeal of right is jurisdictional," MCR 7.204(A), and briefs are required to contain "[a] statement of the basis of jurisdiction of the Court of Appeals," MCR 7.212(C)(4). Thus, the parties' briefs were not in conformance with the rules. In the future, it would behoove counsel to comply with all requirements regarding briefs and appeals, rather than leaving it to this Court to construct a basis for jurisdiction. We have done so in this case, but not all panels would be as accommodating. See *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) ("It is not sufficient for a party 'simply to announce a position . . . and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' ") (citation omitted).

> Statutory interpretation begins with the plain language of the statute. We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted. [*O'Leary v O'Leary*, 321 Mich App 647, 652; 909 NW2d 518 (2017) (quotation marks and citations omitted).]

We also review de novo the probate court's interpretation of a court rule, which is "subject to the same rules of construction as statutes." *In re Leete Estate*, 290 Mich App 647, 655; 803 NW2d 889 (2010). Consequently, individual court rules are to be read in context to create a "harmonious whole." *Hill v LF Transp, Inc*, 277 Mich App 500, 507; 746 NW2d 118 (2008) (quotation marks and citation omitted).

This Court reviews "the probate court's findings of fact for clear error. A factual finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made." *In re Redd Guardianship*, 321 Mich App 398, 403; 909 NW2d 289 (2017) (quotation marks and citations omitted). The probate court's decisions are generally reviewed for an abuse of discretion. See *id*.; *In re Duane V Baldwin Trust*, 274 Mich App 387, 396-397; 733 NW2d 419 (2007) (listing several probate court decisions subject to abuse-of-discretion review), criticized on other grounds 480 Mich 915 (2007). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).

B. CLARIFICATION OF THE ORDER UNDER APPEAL

"The probate court is a court of limited jurisdiction. The jurisdiction of the probate court is defined by statute." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354-355; 833 NW2d 384 (2013) (citation omitted). Although McDaniel-Huntington characterizes the issue in this appeal as concerning whether the probate court had subject-matter jurisdiction, the probate court never ruled that it lacked subject-matter jurisdiction. Indeed, the probate court concluded that it had jurisdiction over this dispute under MCL 700.1302, which it plainly did. We agree that the probate court had jurisdiction over this matter because it "relates to the settlement of a deceased individual's estate . . . who . . . was at the time of death domiciled out of state leaving an estate within the county to be administered[.]" MCL 700.1302(a). Venue also was proper under MCL 700.3201(1)(b) (county where decedent's property was located). Consequently, regardless of how the parties frame this issue on appeal, the question before us is whether the probate court had the *authority* to administer the portions of Eldridge Sr.'s estate located in Michigan, not whether it had *jurisdiction* to do so.

C. ADMINISTRATION OF THE ESTATE'S ASSETS LOCATED IN MICHIGAN

The probate court made various rulings at different times in support of its order. First, it held that MCL 700.3919 would "impact the distribution of assets" because a California estate had been opened, or was about to be opened. That provision requires that "[i]f there is a personal representative of the decedent's domicile willing to receive it, a nonresident decedent's estate being administered by a personal representative

appointed in this state shall be distributed to the domiciliary personal representative . . . ." MCL 700.3919(1). The probate court was thus correct that, if at that time, an estate already had been opened in California and a personal representative already appointed there, then the Michigan property would have to be distributed to that personal representative, unless certain exceptions applied, provided the personal representative was willing to receive the property. *Id*.

But the record fails to establish that a California estate had been opened. At most, Eldridge Jr. claimed that he would open one on some undetermined date in the future, but nothing in the record establishes that he ever did so. The probate court chided McDaniel-Huntington for not having opened a California estate and then said to Eldridge Jr., "I don't know if that property in California, because he passed in California, is going to go through here, but if you find out what you think is true, you go out to California and open an Estate there." Eldridge Jr. responded, "Absolutely." At most, Eldridge Jr.'s response establishes that, at the time of the hearing, he had the conditional intention to open a California estate in the future if certain facts proved to be true. Nothing during the later hearings established that a California estate had, in fact, been opened. We are thus left with the definite and firm conviction that the probate court erred by finding that a California estate had been opened. See *In re Guardianship of Redd*, 321 Mich App at 403 (explaining the "clearly erroneous" standard).

As such, the question becomes how a Michigan probate court should proceed when an intestate person domiciled out of state dies leaving property in both Michigan and the domicile state, and no probate estate is opened in the domicile state. "Michigan probate

courts have jurisdiction over property located in this state, including property that is owned by a nonresident decedent, MCL 700.1302, and EPIC explicitly applies to a nonresident's property located in Michigan, MCL 700.1301(b)." *In re Leete Estate*, 290 Mich App at 662.

As noted, MCL 700.3919(1) provides that "if there is a personal representative of the decedent's domicile willing to receive it, a nonresident decedent's estate being administered" by a personal representative appointed in Michigan shall be distributed to the personal representative of the domiciliary state unless certain exceptions apply. Those exceptions include the situation in which, after reasonable inquiry, the Michigan personal representative "is unaware of the existence or identity of" a personal representative in the domiciliary state. MCL 700.3919(1)(b). Because MCL 700.3919(1) was inapplicable, given the lack of a California personal representative, "distribution of the decedent's estate shall be made in accordance with the other provisions of" Article III of EPIC, MCL 700.3101 through MCL 700.3988. MCL 700.3919(2). See also MCL 700.4205 (stating that Article III of EPIC governs orders concerning the estate of a nonresident decedent, as well as the powers and duties of the local personal representative, and the rights of claimants). The probate court apparently interpreted MCL 700.3919 as prohibiting it from applying any provisions of EPIC other than those contained within Article III. Consequently, it concluded that McDaniel-Huntington had no right to an intestate share under Article II of EPIC. See MCL 700.2102.

The trial court seemingly relied on MCL 700.2202(6), which provides, "The surviving spouse of a decedent who was not domiciled in this state is

entitled to election against the intestate estate or against the will only as may be provided by the law of the place in which the decedent was domiciled at the time of death." Because the decedent was not domiciled in Michigan, the trial court reasoned, McDaniel-Huntington was not entitled to make an election.

D. INTESTATE SUCCESSION UNDER EPIC AS APPLICABLE HERE

McDaniel-Huntington argues that the trial court's conclusion that no provision of EPIC other than Article III may apply in a case of intestate succession of a decedent not domiciled in Michigan is contrary to the express terms of Article III, which incorporates by reference provisions of law that exist only outside of Article III. MCL 700.3101, which is contained in Article III, provides:

> Upon an individual's death, the decedent's property devolves . . . in the absence of testamentary disposition, to the decedent's heirs or to those indicated as substitutes for them in cases involving disclaimer or other circumstances affecting devolution of an intestate estate, subject to homestead allowance, family allowance, and exempt property, to rights of creditors, to the surviving spouse's elective share, and to administration.

The word "heir" is defined by Article I of EPIC, not Article III, and determining its meaning thus requires reference to provisions outside of Article III. The word " '[h]eir' means, except as controlled by section 2720, a person, including the surviving spouse or the state, that is entitled under the statutes of intestate succession to a decedent's property." MCL 700.1104(p). Furthermore, the statutes "affecting devolution of an intestate estate" are contained solely within Article II. See MCL 700.2102 (intestate share of surviving spouse); MCL 700.2103 (share of heirs other than

surviving spouse). Thus, it is readily apparent that, although MCL 700.2202(6) in some narrow instances limits a certain type of relief under Article III (that of a surviving spouse of a non-Michigan domiciliary to invoke the right of election), it does not limit the rules of distribution of intestate Michigan property to the provisions of Article III only; to the contrary, Article III clearly invokes definitions and substantive provisions of law outside of Article III's terms.

We are required generally to harmonize all statutory provisions if we can do so reasonably, but if two provisions in a statute conflict, we must apply the more specific one. *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994) ("[R]ules of statutory construction require that separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision. Also, where a statute contains a general provision and a specific provision, the specific provision controls.") (citation omitted). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thompson/West, 2012), pp 180-182 (discussing the harmonious-reading canon, the application of which mandates that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory," but that "if context and other considerations (including the application of other canons) make it impossible to apply the harmonious-reading canon, the principles governing conflicting provisions" such as the "general/specific canon . . . must be applied") (emphasis omitted) and pp 183-188 (discussing the "general/specific canon" which provides that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails") (emphasis omitted).

There is some tension between MCL 700.2202(6) and MCL 700.3101, and thus, determining which is the more specific provision would present a close question. MCL 700.3101 provides that intestate property "devolves" to the decedent's heirs, meaning that it does so automatically, by operation of law, but "subject to" a surviving spouse's elective share.[4] That section, however, applies to all intestate successions and draws no distinction regarding the domicile of the decedent. MCL 700.2202(6), however, specifically applies to intestate succession involving circumstances in which a surviving spouse takes from the Michigan estate of a non-Michigan domiciled spouse. Section 2202(6) thus appears to be more specific, in that it specifically addresses a non-Michigan domiciled decedent, rather than surviving spouses generally.

Nevertheless, we need not answer that question, because McDaniel-Huntington did not seek to make a surviving spouse's election. Rather, she sought to take only under the intestate rules of succession. Therefore, even if McDaniel-Huntington was precluded from making an election under Michigan law by virtue of MCL 700.2202(6), Article III of EPIC, MCL 700.3101, would direct us to MCL 700.2203. That section provides, in relevant part, that in the absence of an election, "it is conclusively presumed that an intestate decedent's widow elects her intestate share," subject to exceptions not at issue here. Article II, which sets forth the rules of intestate succession, provides broadly that "[*a*]*ny* part of a decedent's estate not effectively disposed of by will passes by intestate succession to the

[4] EPIC does not define "devolve" so we must turn to a dictionary to do so. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). "Devolve" is defined as "pass to . . . ." *The Oxford Essential Dictionary* (1998). See also *Black's Law Dictionary* (11th ed) (defining "devolve" as "([o]f land, money, etc.) to pass by transmission or succession").

decedent's heirs as prescribed in this act, except as modified by the decedent's will." MCL 700.2101(1) (emphasis added). " 'Any' is defined as "every; all.' " *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010) (citation omitted). Thus, in a situation such as this, involving an out-of-state decedent whose Michigan property passes intestate, Article II of EPIC controls, possibly with the exception of the rules regarding spousal election, as we have noted. But as discussed, McDaniel-Huntington was not requesting to make a spousal election. Consequently, because spousal election was not an option in this case, either because MCL 700.2202(6) precluded it or because McDaniel-Huntington renounced any such right, or both, we proceed to MCL 700.2203 for the default rules regarding intestate succession. Section 2202(6), it should be noted, by its plain terms does not limit a surviving spouse's right to intestate succession; it limits only the election rights of a surviving spouse of a non-Michigan domiciliary decedent. In other words, absent an election by a spouse, the laws of intestate succession apply and provide the rules of decision. See MCL 700.2203 (providing that in the absence of an election, "it is conclusively presumed that an intestate decedent's widow elects her intestate share").

Thus, the trial court should have determined who the heirs are under EPIC's rules of intestate succession as regards all Michigan property, and the share of each such heir as provided for by EPIC. To the extent the trial court failed to do so, we reverse its judgment and remand the case to the trial court to make those determinations. On the other hand, there was no abuse of discretion in denying the specific request that Eldridge Jr. "provide statutory authority that allows him to pursue assets outside the jurisdiction of this Court." That is so because, assuming that

McDaniel-Huntington is a surviving spouse for purposes of MCL 700.2102, her share is to be calculated, at least under some circumstances, on the basis of "[t]he entire intestate estate." MCL 700.2102(1)(a). The "entire intestate estate" necessarily includes the California property.

We decline to address exactly how the probate court should consider or not consider out-of-state assets and obligations when it administers the estate under MCL 700.1301(b) and MCL 700.3919(2) because we do not view this question as properly before us and it has not been briefed by the parties. It is for the probate court to address this issue in the first instance on remand. We additionally note that if an estate has been opened in California then, of course, MCL 700.3919(1) controls, provided that the California personal representative is willing to receive the Michigan property and otherwise comply with the applicable requirements of EPIC. As explained earlier, however, the record before us fails to establish whether that has happened, so we must assume that no California estate has been opened.

III. MCDANIEL-HUNTINGTON'S ADMISSIONS

McDaniel-Huntington argues that the probate court abused its discretion by not allowing her to withdraw or amend her deemed admissions. McDaniel-Huntington failed to raise this argument at the probate court level, and therefore, she has waived the issue. We decline to address it on the merits.

As a general rule, "a failure to timely raise an issue waives review of that issue on appeal." *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) (quotation marks and citation omitted). But this Court has discretion to "overlook preservation requirements if the failure to consider the issue would result in

manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Indeed, this Court recently reiterated that unpreserved issues are generally waived and that we have discretion regarding whether to review them. *In re Murray Conservatorship*, 336 Mich App 234, 240-241; 970 NW2d 372 (2021).

McDaniel-Huntington consistently argued at the probate court level that she was not required to respond to Eldridge Jr.'s request for admissions. She never sought to amend or withdraw her deemed admissions, nor did she "state reasons why he or she cannot admit or deny" the matters submitted. MCR 2.312(B)(4). She now changes course on appeal and seeks to withdraw or amend her deemed admissions. In doing so, McDaniel-Huntington raises the issue of withdrawing or amending her deemed admissions for the first time on appeal. Given the circumstances, we decline to address this issue. McDaniel-Huntington took the position at the probate court level that she was not required to answer Eldridge Jr.'s request for admissions because she believed discovery was unavailable as a matter of law. However, given that she was generally required to "specifically deny the matter or state in detail the reasons why the answering party cannot truthfully admit or deny it," MCR 2.312(B)(2), her argument did not constitute a valid colorable objection. In order for McDaniel-Huntington to have been able to rely on an argument that discovery was precluded as a matter of law, thus excusing her failure to answer, she was obligated to seek a protective order pursuant to MCR 2.302(C).

In seeking relief on this issue, McDaniel-Huntington essentially asks us to conclude that the probate court erred by failing to sua sponte provide her an opportunity to withdraw or amend her admissions, relief McDaniel-Huntington never asked for and that was inconsistent with her position regarding her obligation to participate in the discovery process. We decline to order such relief. See, e.g., *Duray Dev, LLC v Perrin*, 288 Mich App 143, 161; 792 NW2d 749 (2010) ("[A] party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention.") (quotation marks and citation omitted; alteration in original); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.") (quotation marks and citation omitted). Consequently, we decline to exercise our discretion to review McDaniel-Huntington's argument that she should be permitted to amend or withdraw her deemed admissions, and we deem the issue waived. See *In re Murray Conservatorship*, 336 Mich App at 240-241; *Smith*, 269 Mich App at 427.

IV. CONCLUSION

For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

In re BMGZ

Docket No. 355922. Submitted September 9, 2021, at Grand Rapids. Decided September 16, 2021, at 9:10 a.m. Judgment vacated 509 Mich 919 (2022).

BMGZ's mother and stepfather petitioned the probate division of the Kent Circuit Court for a stepparent adoption and a hearing to identify BMGZ's legal father and to terminate his parental rights, and they moved the court to make special findings to enable BMGZ to apply for special immigrant juvenile (SIJ) status under 8 USC 1101(a)(27)(J). BMGZ was born in Honduras and came to the United States with her mother when she was seven or eight years old. BMGZ's mother and biological father were not married, and her father was not listed on her birth certificate. After moving to the United States, BMGZ's mother married. At the hearing on petitioners' motion for special findings, the trial court, Patricia D. Gardner, J., found that BMGZ was under the age of 21 and was unmarried, as required by the statute, but the court did not find that BMGZ was dependent on a juvenile court in the United States. The court also stated that it could not find that it was not in BMGZ's best interests to return to Honduras to her father because no legal father had been established. Further, the court could not find that reunification with one or both parents was not viable due to abuse, abandonment, or neglect, because BMGZ only had one legal parent and there were no allegations that she had been abused, neglected, or abandoned by her. Accordingly, the trial court denied the motion. Petitioners appealed.

The Court of Appeals *held*:

SIJ status provides a means for abused, neglected, and abandoned immigrant youth to obtain lawful permanent residency and a path to United States citizenship under federal law. Under 8 USC 1101(a)(27)(J)(*i*) and (*ii*), a prerequisite for applying for SIJ status is an order from a state juvenile court finding that (1) the juvenile immigrant has been declared dependent on a juvenile court located in the United States or has been legally committed to the custody of a state agency or an individual appointed by a state or United States juvenile court; (2) the juvenile immigrant's reunification with one or both parents is not viable due to abuse,

neglect, or abandonment; and (3) it would not be in the juvenile immigrant's best interests to return to his or her country of origin. Additionally, the juvenile must be under 21 years of age and unmarried when petitioning for SIJ status. In this case, the trial court determined that it could not make factual findings with regard to the second and third prerequisites because BMGZ had only a putative, not a legal, father. However, petitioners filed a petition seeking to identify BMGZ's putative father as her legal father and to terminate his parental rights simultaneously with their petition for stepparent adoption and motion for special findings. Given that this matter was pending before the trial court, its decision as to the second and third special findings was premature. Regardless, reversal was not required because the trial court did not clearly err by finding that BMGZ was not dependent on a juvenile court in the United States, noting that a stepparent adoption did not have the effect of making a minor child dependent on the court. Rather, under MCL 710.51(1), a court may enter an order terminating the rights of one or both parents and approving placement of the child with the petitioner if the judge is satisfied that the requirements in MCL 710.51(1)(a) and (b) have been met. Further, MCL 710.51(3) expressly provides that if the petitioner for adoption is married to the parent who has legal custody of the child, the child shall not be made a ward of the court after termination of the rights of the other parent. Therefore, pursuant to the statute, the court could not make BMGZ a ward of the court because, in these circumstances, the court was expressly prohibited from doing so. Contrary to petitioners' argument, MCL 710.39 also did not support their position that a court may make a child dependent on the court by terminating the rights of a putative father and approving the child's adoption by a stepparent. MCL 710.39 sets forth the procedure by which the trial court may terminate the parental rights of a putative father. But given that MCL 710.51(3) expressly states that such an action cannot make a child a ward of the court, petitioners' argument is without merit. If any order of a juvenile court that affected a juvenile immigrant was sufficient to establish dependency, then the alternative ways of meeting the definition of a "special immigrant" under 8 USC 1101(a)(27)(J)(*i*) would be rendered meaningless.

Affirmed.

Avanti Law Group, PLLC (by *Amy Grauman*) for petitioners.

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM. In this stepparent adoption case, petitioners appeal as of right the trial court order denying their motion for special findings of fact to enable juvenile BMGZ to apply for special immigrant juvenile (SIJ) status pursuant to 8 USC 1101(a)(27)(J).[1] Because there are no errors warranting reversal, we affirm.

I. BASIC FACTS

BMGZ was born in Honduras. Her mother and father were unmarried, and her father was not listed on her birth certificate. BMGZ was seven or eight years old when she and her mother came to this country. While in the United States, BMGZ's mother married. In February 2020, BMGZ's mother and stepfather petitioned for a stepparent adoption. As part of the petition, they alleged that BMGZ's biological father had "failed to provide support or comply with a support order and failed to visit or contact the adoptee for a period of 2 years or more." In connection with the petition for stepparent adoption, they also submitted a petition requesting a hearing to identify BMGZ's father and to terminate his parental rights. Finally, and relevant to the issue raised on appeal, petitioners filed a motion requesting that the trial court make special findings to enable BMGZ to apply for SIJ status.

[1] "Following the issuance of special, or predicate, findings by a juvenile court, a juvenile may file a petition with the [United States Citizenship and Immigration Services, a division of the United States Department of Homeland Security] for SIJ classification." *In re LFOC*, 319 Mich App 476, 482; 901 NW2d 906 (2017), citing 8 CFR 204.11(b) (2017). "If the application is granted, the juvenile may become a lawful permanent resident who, after five years, is eligible to become a United States citizen. Denial of SIJ status renders the applicant subject to deportation." *In re LFOC*, 319 Mich App at 485 (quotation marks and citation omitted).

The trial court held a hearing on the motion for special findings on the issue of SIJ status. The court found that BMGZ was under 21 years of age and was unmarried but did not find that she was dependent on a juvenile court located in the United States. In addition, the court noted that it was unable to find that it was not in BMGZ's best interests to return to Honduras to her father because no legal father had been established. Finally, the court explained that it could not find that reunification with one or both parents was not viable due to abuse, abandonment, or neglect, because BMGZ only had one legal parent (her mother) and there were no allegations that BMGZ's mother had abused, neglected, or abandoned her. As a result, the trial court denied the motion. This appeal follows.

II. SPECIAL FINDINGS RELATED TO SIJ STATUS

A. STANDARD OF REVIEW

Petitioners argue that the trial court erred by denying their motion for special findings related to the SIJ status. This Court reviews for clear error a trial court's factual findings in connection with a motion for special findings related to SIJ status. *In re LFOC*, 319 Mich App 476, 480; 901 NW2d 906 (2017). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made." *Id*. (quotation marks and citation omitted). Questions of law and statutory interpretation, including the interpretation of federal statutes and regulations, are reviewed de novo. *Id*.

B. ANALYSIS

"The Immigration and Nationality Act of 1990 . . . first established SIJ status as a path for resident

immigrant children to achieve permanent residency in the United States." *Id*. at 481 (quotation marks and citation omitted). "SIJ status provides a means for abused, neglected, and abandoned immigrant youth to obtain lawful permanent residency and a path to United States citizenship under federal law." *In re Guardianship of Guaman*, 879 NW2d 668, 671 (Minn App, 2016).[2] Such juvenile immigrants may seek SIJ status to avoid "being deported along with abusive or neglectful parents, or deported to parents who had abandoned them once in the United States . . . ." *Yeboah v US Dep't of Justice*, 345 F3d 216, 221 (CA 3, 2003). In *In the matter of Hei Ting C*, 109 App Div 3d 100, 102-103; 969 NYS2d 150 (2013), the New York Supreme Court succinctly set forth the history of SIJ status, explaining:

> As originally enacted, this legislation defined an eligible immigrant as being one who "has been declared dependent on a juvenile court located in the United States and has been deemed eligible by that court for long-term foster care" (Immigration Act of 1990, Pub L 101-649 . . . , 104 US Stat 4978, 5005 . . .). It also required a determination by the court that it would not be in the immigrant's best interests to return to his or her native country (see Immigration Act of 1990, Pub L 101-649 . . . , 104 US Stat 4978, 5005-5006 . . .). In 1997, Congress added the further requirement that the juvenile court find the child dependent upon the court "due to abuse, neglect, or abandonment," which limited the beneficiaries of the provision "to those juveniles for whom it was created" (143 Cong Rec H10809-01, 10815, 10844 [Nov. 13, 1997]).
>
> In 2008, Congress again amended the SIJS provision. In the "William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008," Congress expanded the definition of who qualified as a "special immigrant juvenile,"

[2] This Court may look to decisions from other jurisdictions for guidance if there is a lack of Michigan caselaw addressing or interpreting the federal statute at issue. *In re LFOC*, 319 Mich App at 481 n 1.

> enabling more children to qualify for the status (Pub L 110-457, 122 US Stat 5044 [Dec. 23, 2008]). The amendments removed the requirement that the immigrant child had to be deemed eligible for long-term foster care due to abuse, neglect, or abandonment, and replaced it with a requirement that the juvenile court find that "reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law" (Pub L 110-457 . . . , 122 US Stat 5079 [Dec. 23, 2008] . . .). The amendments also expanded eligibility to include, in addition to children declared dependent on a juvenile court, those who had been placed in the custody of "an individual or entity appointed by a State or juvenile court" (*id*). [Some citations omitted; brackets in original.]

Under the 2008 amendments, a prerequisite for applying SIJ status is a state juvenile court order finding: (1) that the juvenile immigrant "has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States . . . ;" (2) that the juvenile immigrant's reunification with "1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;" and (3) that it would not be in the juvenile immigrant's best interests to return to his or her country of origin. 8 USC 1101(a)(27)(J)(*i*) and (*ii*); see also 8 CFR 204.11 (2020).[3] Additionally, the juvenile must be under 21 years of age when petitioning for SIJ status and must be unmarried. 8 CFR 204.11(c)(1) and (2) (2020).

---

[3] Although the 2008 amendment removed the requirement that the child be "eligible for long-term foster care," see *In re LFOC*, 319 Mich App at 484, the CFR has not been amended to reflect that change, see 8 CFR 204.11(c)(4) and (5) (2020).

Here, with regard to the second and the third factual findings under 8 USC 1101(a)(27)(J)(*i*) and (*ii*), the trial court found that it could not make the required factual findings because BMGZ only had a putative father. However, simultaneously with the petition for stepparent adoption and the motion for special findings to enable BMGZ to apply for SIJ status, petitioners filed a petition seeking to identify BMGZ's putative father as BMGZ's legal father and to terminate his parental rights. Given that the matter was pending before the trial court, we conclude that its decision as to the second and third special findings was premature.

Reversal, however, is not required. The trial court did not clearly err by finding that BMGZ was not "dependent upon the juvenile court while [she] was in the United States and under the jurisdiction of the Court" because a "step-parent adoption does not make any minor child dependent upon the Court."[4] Although the trial court was a juvenile court located in the United States,[5] an order entered as a result of a stepparent adoption would not make BMGZ dependent upon the court "in accordance with state law governing such declarations of dependency . . . ." See 8 CFR 204.11(c)(3) (2020). Instead, as relevant here, under

[4] Petitioners suggest that this finding indicates that the trial court found it did not have jurisdiction to issue special findings that would allow BMGZ to apply for SIJ status. We disagree. Petitioners correctly point out that a juvenile court, such as a probate court in a stepparent adoption case, "has authority to issue factual findings pertinent to a juvenile's SIJ status." *In re LFOC*, 319 Mich App at 485. However, unlike the court in *LFOC*, the court in this case did make findings pertinent to BMGZ's SIJ status. Therefore, petitioners' argument that the trial court erroneously determined that it lacked jurisdiction to make findings pertinent to BMGZ's SIJ status is without merit.

[5] "*Juvenile court* means a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." 8 CFR 204.11(a) (2020).

MCL 710.51(1), the trial court may enter an order terminating the parental rights of one or both parents and approving the placement of the child with the petitioner if the judge is satisfied that the requirements in MCL 710.51(1)(a) and (b) are met. Nothing in MCL 710.51(1) addresses whether the court's order terminating one parent's parental rights and approving a stepparent's petition for adoption makes the child "dependent" on the juvenile court. However, MCL 710.51(3) provides:

> Upon entry of an order terminating rights of parents or persons in loco parentis, a child is a ward of the court and a consent to adoption executed under section 43 of this chapter shall not be withdrawn after the order is entered. Entry of the order terminates the jurisdiction of the same court or another court over the child in a divorce or separate maintenance action. *If the petitioner for adoption is married to the parent having legal custody of the child, the child shall not be made a ward of the court after termination of the rights of the other parent*. [Emphasis added.]

Here, because BGMZ's mother has legal custody of her and is married to the petitioner for adoption, the court cannot make BMGZ "a ward of the court" after terminating the parental rights of her biological father. Therefore, even if the stepparent adoption is approved, BMGZ cannot be made dependent on the court because under such circumstances the trial court is expressly prohibited from making her a ward of the court.

Petitioners' reliance on MCL 710.39 is misplaced. That statute sets forth the procedure by which the trial court may terminate the parental rights of a putative father. See *id*. Petitioners suggest that by terminating the parental rights of a putative father and approving the adoption of the child by a stepparent, the court's actions make the child dependent upon the court. However, given that MCL 710.51(3) expressly states that

such an action cannot make the child a ward of the court, we find the argument without merit. Dependency on the court means something more than being affected by a decision of the court. If that were not the case, then there would be no need for there to be three separate methods of satisfying the first special finding. Again, under 8 USC 1101(a)(27)(J)(*i*), a "special immigrant" is one who "has been declared dependent on a juvenile court located in the United States *or* whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, *or* an individual or entity appointed by a State or juvenile court located in the United States . . . ." (Emphasis added.) If any order by a juvenile court affecting a juvenile immigrant were sufficient to establish dependency, then the alternate ways of meeting the definition would be rendered meaningless. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

Finally, although *In re LFOC* was a stepparent adoption case, the opinion only addressed whether the probate court in such a case had *jurisdiction* to make findings pertinent to a juvenile's SIJ status. *In re LFOC*, 319 Mich App at 485. As to the actual, special findings, which include a finding that the child is dependent upon a juvenile court located in the United States, the *LFOC* Court expressly declined to make any such findings and instead remanded to the trial court to make the findings in the first instance. *Id*. at 488-489.

In sum, although the trial court prematurely made findings related to the second and third requirements

set forth in 8 USC 1101(a)(27)(J)(*i*) and (*ii*), its finding that the first requirement was not satisfied was not clearly erroneous. Consequently, reversal is not warranted.

Affirmed.

MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ., concurred.

DETROIT MEDIA GROUP LLC v DETROIT BOARD OF ZONING APPEALS

Docket No. 352452. Submitted September 15, 2021, at Detroit. Decided September 23, 2021, at 9:00 a.m. Leave to appeal denied 509 Mich 1072 (2022).

The Detroit Media Group LLC (DMG) appealed in the Wayne Circuit Court the decision of the Detroit Board of Zoning Appeals (the ZBA) that DMG had abandoned its license to display advertising banners on the Broderick Tower building in downtown Detroit. In 2004, DMG's affiliate, US Outdoor Advertising, Inc., leased the right to display advertising signs on the east face of the Broderick Tower from the owner of the building. The east face was covered by a mural known as the "Whaling Wall." US Outdoor Advertising petitioned the city of Detroit for permission to place a large sign over the Whaling Wall mural but was initially denied permission by the Detroit Buildings and Safety Engineering Department (Buildings Department). US Outdoor Advertising appealed in the ZBA, and the ZBA granted the appeal and entered an order authorizing a variance to the relevant regulations of the city's zoning ordinance. In 2005, the building owner began the process of applying for federal historic-preservation tax credits from the National Park Service (NPS) as part of its plan to finance renovations of the building and received preliminary approval in 2006. Between 2006 and 2012, DMG displayed approximately 18 different advertising banners over the Whaling Wall. In 2008, the building owner renewed DMG's lease through 2019. In 2010, the building was sold to Motown Construction Partners, LLC, and the lease was amended to provide for the potential removal of DMG's advertising signs for 60 days to accommodate building renovations. In 2010, Motown Construction applied to the NPS for federal historic-preservation tax credits and informed the NPS of the existing condition of advertising signs on the building. The NPS informed Motown Construction that the current advertising banner was not consistent with the preliminary approval the NPS had granted to the previous building owner in 2006. In 2012, Motown Construction informed DMG that it would need to remove any advertising signs while the building was renovated but apparently did not

mention the permanent removal of the signs or termination of the lease. In March 2013, DMG advised the Buildings Department that removal of the advertisements should not be construed as abandonment of its variance, license, or approvals. DMG applied for and received a sign license from the Buildings Department in 2014 but was denied sign licenses in 2015, 2016, and 2017. However, in 2016, DMG met with the Buildings Department, and the Buildings Department issued a zoning verification letter confirming that DMG's use of the Broderick Tower for advertising was permitted pursuant to the previously issued variance and sign permits. In 2018, the city issued licenses to DMG to display advertisements on downtown buildings, including the Broderick Tower. However, at some point during 2018, DMG applied to the Buildings Department for a change of advertising copy, and the Buildings Department indicated that DMG had abandoned its use variance. DMG appealed the presumption of abandonment in the ZBA. At a hearing on the appeal, the city argued that the building owner's conduct indicated that the variance had been abandoned and the ZBA should only consider the conduct of the property owner in determining the abandonment issue. Nevertheless, the ZBA concluded that DMG's conduct was dispositive and that DMG had overcome the presumption of abandonment. On reconsideration, pursuant to a request from a member of the Detroit City Council, the ZBA voted to uphold the Buildings Department's presumption of abandonment. On appeal, the circuit court, David A. Groner, J., reversed the ZBA's decision and concluded that DMG's conduct, and not that of the property owner, was dispositive of the abandonment issue. On this basis, the court concluded that the evidence did not establish that DMG had abandoned the use variance. The ZBA and the city appealed.

The Court of Appeals *held*:

1. Section 50-15-31 of the Detroit City Code sets forth the conditions in which a nonconforming-use variance may be presumed abandoned, including when "the owner" has indicated an intent to abandon the use or a conforming use has replaced the nonconforming use. Section 50-16-324 of the code defines "owner," in part, as the person having the right of legal title or beneficial interest in or a contractual right to purchase a parcel of land. By defining "owner" in three different ways, § 50-16-324 recognizes that property ownership encompasses a variety of rights that potentially may be held by different persons at the same time. Caselaw indicates that a lease is a conveyance by the owner of an estate to another of a portion of the owner's interest for a term less than the owner's for valuable consideration, thereby granting

the lessee the right of possession, use, and enjoyment of the portion conveyed during the specified period. DMG's predecessor in interest and affiliate, US Outdoor Advertising, entered into a lease agreement with the owner of the Broderick Tower for use of the building's east face as advertising space. US Outdoor Advertising applied for a variance from the city with the owner's approval, which was eventually granted in 2004 following an appeal in the ZBA. The ZBA's 2004 decision indicated that it recognized the distinction between the building owner's legal interest and the lessee's interest for whose benefit the ZBA had granted the variance. When DMG took over the lease, under Michigan law, it held absolute dominion over the leased portion of the Broderick Tower for all purposes not inconsistent with the lease. The record reflected that DMG held its lease interest continuously. Thus, although DMG did not hold legal title to the property, it owned a beneficial interest in the leased portion of the property with the right to exclusively possess, use, and enjoy it for advertising space under the nonconforming-use variance. Accordingly, DMG was an owner under § 50-16-324 of the city code and for purposes of applying the zoning ordinance provisions in § 50-15-31. Therefore, the circuit court properly concluded that DMG was an owner and did not err by considering DMG's conduct when determining the abandonment issue.

2. The ZBA and the city argued that the circuit court should have only considered the property owner's conduct in determining whether the presumption of abandonment had been rebutted rather than considering DMG's conduct. According to the ZBA and the city, the property owner signified its abandonment of the variance when it accepted the federal historic-preservation tax credits. However, the ZBA's decision on reconsideration was based on its mistake of law regarding the determination of who constituted the "owner" when it analyzed § 50-15-31. By adopting the city's mistaken analysis of who constituted an owner, the ZBA failed to consider the most relevant evidence and instead focused only on certain aspects of the property owner's conduct. Although the circuit court did not err when it determined that the presumption of abandonment applied given that, for a period exceeding six months, DMG ceased its use of the Broderick Tower advertising space at the request of the property owner during building renovations, DMG rebutted that presumption. DMG installed and changed advertising banners on the leased portion of the building from 2006 to 2012 and only ceased using the leased space in 2012 at the property owner's request. Further, DMG informed the Buildings Department that its nonuse of the space should not be construed as abandonment of its variance or permits, and it

continued to apply for sign permits and to communicate with the Buildings Department when its applications for permits were denied. Given that DMG made significant efforts to maintain its licenses, marketed the space for advertising usage, and engaged in other activities indicative of its intent not to abandon the variance, it did not establish the necessary elements of abandonment under Michigan law, i.e., the intent and some act or omission of the owner or holder that clearly manifests the voluntary decision to abandon.

Affirmed.

REAL PROPERTY — LEASES — OWNERSHIP RIGHTS.

Property ownership conceptually encompasses a variety of rights, including possession, use, and enjoyment, that may be held by different persons at the same time; a lease is a conveyance from the property owner to the lessee and gives the lessee possession of the leased property and exclusive use or occupation of it for all purposes not prohibited by the lease; therefore, for the term of the lease, the lessee has absolute dominion over the leased property for all purposes not inconsistent with the lease.

Dickinson Wright PLLC (by *Timothy A. Stoepker*, *Jeffery V. Stuckey*, and *Ariana F. Pellegrino*) for The Detroit Media Group LLC.

Charles N. Raimi for the Detroit Board of Zoning Appeals and the city of Detroit.

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

REDFORD, J. Appellants/cross-appellees, the Detroit Board of Zoning Appeals (ZBA) and the city of Detroit (the City), appeal by leave granted[1] the circuit court's December 18, 2019 order that reversed the ZBA's ruling that an advertising use had been abandoned. Appellee/cross-appellant, The Detroit Media Group

[1] *Detroit Media Group LLC v Detroit Bd of Zoning Appeals*, unpublished order of the Court of Appeals, entered March 25, 2020 (Docket No. 352452).

LLC (DMG), cross-appeals the circuit court's decisions that the ZBA did not violate its procedure or DMG's right to due process, that the City was not estopped from claiming a presumption of abandonment, and that the ZBA's decision did not unconstitutionally interfere with DMG's right to free speech.

The central issue before the Court is whether, when determining if a variance that applies to a leased portion of a freehold has been abandoned, the ZBA must base its determination on the conduct of the leaseholder or the freeholder? Because, like the circuit court, we conclude it is the conduct and actions of the leaseholder that are critical to the analysis, we affirm.

I. FACTUAL BACKGROUND

Around 1997, the owner of the Witherell Building in downtown Detroit (now known as the Broderick Tower) had a large mural painted onto the east face of the building which has been called the "Whaling Wall." In 2004, US Outdoor Advertising, Inc., an affiliate of DMG, leased from the building owner the right to place advertising signage over the Whaling Wall mural. US Outdoor Advertising petitioned the City for permission to place an illuminated changeable advertising sign, measuring 75 feet by 185 feet (13,875 square feet), on the east face of the Witherell Building that featured the Whaling Wall. The Detroit Buildings and Safety Engineering Department denied the petition, and US Outdoor Advertising appealed in the ZBA. On December 17, 2004, the ZBA found, among other things, that the request met the City's zoning-use variance provisions and noted that the building already had an advertising sign, the Whaling Wall, on the building, and that the limits of the wall sign would remain the same. The ZBA found that the proposed signage would beneficially

serve the area. The ZBA granted the appeal and entered a final order that required US Outdoor Advertising to comply with all applicable ordinances, regulations, and laws, and authorized a variance to regulations of the City's zoning ordinance. Additionally, the ZBA ordered US Outdoor Advertising to secure its permit by July 1, 2005, and record the ZBA's order in the Wayne County Register of Deeds.[2] In 2005, the City's Downtown Development Authority appealed the ZBA's decision in the circuit court. The circuit court affirmed the ZBA's order.

Meanwhile, in November 2005, the building's owner submitted an application to the National Park Service (NPS) for federal historic-preservation tax credits as part of its plan to finance the renovation of the building in 2006. It is unclear whether the owner informed the NPS of advertising signage on the building as an existing condition.

Following the circuit court's affirmance of the ZBA's final order, US Outdoor Advertising's affiliate, DMG, applied for a permit to change the advertising copy, but the Detroit Buildings and Safety Engineering Department declined to issue a permit on the ground that the Detroit Historic District Commission (DHDC) had to review and approve the sign before a permit could be issued. The DHDC ultimately voted not to approve, and the Detroit Buildings and Safety Engineering Department refused to issue DMG a permit, leading to a dispute between the building owner, DMG, the City, and the DHDC which was ultimately resolved by settlement. The settlement was entered into on December 14, 2005, and provided in relevant part that: (a) the Whaling Wall constituted an advertising

[2] A few months later, the ZBA entered an amended order substantially similar to its previous order.

graphic; (b) the DMG and the building owner had the right to place an advertising graphic on the building face over the Whaling Wall; (c) the Detroit Buildings and Safety Engineering Department was obligated to issue a sign-erection permit to DMG; (d) if the Detroit Buildings and Safety Engineering Department failed to issue the permit, the settlement agreement served as the permit; (e) for a period of five years, the City and the DHDC would refrain from interfering with or preventing the change of advertising on the building; and (f) if the City and the DHDC did not take action after five years and three months from the date of the settlement, they would be deemed to have irrevocably waived any right to challenge the rights of DMG or the building owner.

The Detroit Buildings and Safety Engineering Department issued an advertising sign permit, and DMG contracted for the installation of anchors and wire on the building's east wall. DMG displayed approximately 18 different advertising banners over the Whaling Wall from 2006 to 2012. In 2008, the building's owner extended DMG's lease to 2019. In 2010, Motown Construction Partners, LLC, purchased the Broderick Tower and amended and restated the lease to reflect the changed building ownership and to provide for the potential removal of DMG's advertising signage for 60 days to accommodate building renovations.

During 2010, Motown Construction Partners, a contractor, a design firm, attorneys from a local law firm, a financial and tax consulting firm, banks, and the Michigan Historic Preservation Network formed a development team to facilitate the renovation of the Broderick Tower building. As part of the team's renovation financing plan, Motown Construction Partners

applied to the NPS for federal historic-preservation tax credits and informed the NPS of the existing condition of advertising signage on the building. It advised the NPS that the development team anticipated that the signage would discontinue at the end of the current lease, but also that its redevelopment financing depended on obtaining historic-preservation-tax-credit certification and, in part, on the income derived from the advertising signage to meet the ratio of commercial to residential income required for new market tax credits. The project contract amended Motown Construction Partners' federal historic-preservation-certification application to include information regarding the advertising signage and the DMG lease that would expire in 2019. The NPS responded by informing the building owner in January 2012 that advertising-banner signage on the building was not consistent with the preliminary approval issued to the previous applicant by the NPS in 2006 and that any banner or signage placed on the building since 2006 would be subject to review regardless of who entered the lease that allowed for the erection of such banners. In July 2012, the building's owner advised DMG that it would need to remove its advertising signage in October 2012 for building renovations, but apparently made no mention of a permanent removal or termination of the lease.

The NPS issued final historic-preservation certification on February 21, 2013, approving the building for historic-preservation tax credits for a period of five years from 2012 to 2017. On September 14, 2014, the NPS responded to a postcertification amendment request made by Motown Construction Partners that proposed additional work on the building. The work would entail the installation of a commercial advertising banner measuring approximately 73 feet 6 inches

wide by 130 feet tall and would cover the Whaling Wall,[3] which the amendment request noted had already altered the historic character and appearance of the building. Motown Construction Partners apparently advised the NPS that the advertising signage constituted an existing condition to both the project and the original rehabilitation. NPS responded that it had not been provided a copy of the lease or with information or documentation that established the existence of an advertising banner on the building at the start of the rehabilitation project. The NPS informed Motown Construction Partners that the installation of any new advertising banners would constitute part of the project and thus was subject to review for certification purposes. Therefore, any such installation was required to meet the United States Secretary of the Interior's standards respecting historic character and appearance, but the advertising signage described in the amendment request did not meet these standards.[4] The NPS warned that certification could be revoked if the owner undertook further unapproved project work inconsistent with the federal rehabilitation standards.

In March 2013, DMG sent correspondence to the Detroit Buildings and Safety Engineering Department stating that the removal of the advertising should not be construed as abandonment or relinquishment of DMG's variance, sign permits, or approvals. DMG later sent

[3] The NPS characterized the Whaling Wall as a painted art mural that constituted an existing condition of the building.

[4] The NPS representative appears to have not known of the existing mechanical structures in place since 2006 that enabled the display of the advertising banner because he asserted that the requested banner would require drilling holes in the existing masonry and attaching anchors which would likely increase the potential for moisture infiltration that could damage the historic wall.

another letter to inform the Detroit Buildings and Safety Engineering Department that it temporarily removed the advertising banner to accommodate the historic restoration of the building and that doing so should not be construed as abandonment of the variance. DMG applied for and received a sign license from the City in 2014. In 2015, DMG again sought a license, but this time the City did not issue one. DMG met with the Detroit Buildings and Safety Engineering Department, which resulted in the issuance of a zoning verification letter by the department on January 28, 2016.

After receiving that letter, DMG obtained a 13-year extension of the lease term from the building owner, Motown Construction Partners, and DMG recorded that lease in the county register of deeds. DMG continued to contact the Detroit Buildings and Safety Engineering Department and the City's Law Department throughout 2016 and 2017 regarding sign license renewals. DMG expressed its understanding that the City had elected to stop issuing sign licenses. After the historic-preservation-tax-credit period elapsed, DMG submitted a change of copy application in December 2017. It never received a response. In 2018, however, the City issued licenses to DMG for downtown advertising signs, including for the Broderick Tower.

Because DMG had not received a response to its change of advertising copy application, it followed up several times during 2018 to no avail. DMG, therefore, filed an appeal with the ZBA on June 13, 2018, regarding its request for approval of change of advertising copy or, alternatively, for a decision from the ZBA indicating that it did not need approval from the Detroit Buildings and Safety Engineering Department or the ZBA. Eight days before the August 21, 2018 hearing on DMG's appeal, the Detroit Buildings and

Safety Engineering Department sent DMG a letter in which it raised for the first time the issue of abandonment of the variance and stated several grounds for its position. That prompted DMG to file an appeal on August 31, 2018, disputing the presumption of abandonment asserted by the Detroit Buildings and Safety Engineering Department. The City's Law Department responded on November 19, 2018, and contended that the ZBA had to consider the property owner's conduct alone and not DMG's conduct to determine the abandonment issue. DMG submitted to the ZBA a memorandum with supporting affidavits of the building owner, DMG, and the contractor who installed the banner for DMG to rebut the presumption of abandonment. The ZBA held a public hearing on December 4, 2018, at which DMG and the City argued their respective positions. The City contended that the building owner's conduct meant that the variance had been abandoned, while DMG argued that DMG's conduct determined the issue. The ZBA found DMG's conduct dispositive and voted that DMG had overcome the presumption of abandonment.

Two days later, the ZBA received a letter from a Detroit city council member who urged the ZBA to reconsider its vote so that the Whaling Wall could be preserved as public art. The next day, three ZBA members notified the ZBA office that they wished to reconsider the decision. The ZBA reconvened on December 11, 2018, to vote on reconsideration. At the hearing, a ZBA member moved for reconsideration of the ZBA's previous decision. The City and DMG were present, and a representative of the Detroit Buildings and Safety Engineering Department attended the proceedings for the first time. The parties presented no new information or evidence. DMG and the City argued their positions, and the Detroit Buildings and

Safety Engineering Department took the position that its January 8, 2016 zoning verification letter had been issued in error because the City's sign licensing department and the land use department were separate departments. On reconsideration, the ZBA voted to uphold the Detroit Buildings and Safety Engineering Department's presumption of abandonment. That prompted DMG to appeal the ZBA's decision to the circuit court.

On appeal, the circuit court reversed the ZBA's decision. The circuit court agreed that DMG's conduct, and not the building owner's actions, was relevant and dispositive of the issue of abandonment. The circuit court held that the ZBA made a legal error by looking to the building owner's actions. The circuit court held that the ZBA's decision on reconsideration had not been based on competent, material, and substantial evidence and that the ZBA erred by looking to the building owner's conduct. The circuit court analyzed DMG's conduct and found that no substantial evidence demonstrated that DMG had abandoned the advertising variance. The circuit court, however, on the basis of Detroit's city charter, zoning ordinances, and the zoning appeals rules, rejected DMG's argument that the ZBA had no authority to reconsider its first decision and rejected its claim that the ZBA had violated its right to procedural due process by holding a second vote. The circuit court explained that the ZBA had authority to reconsider its decision and it had followed the appropriate procedure for doing so. The circuit court also rejected DMG's claim that the City's Law Department and the Detroit Buildings and Safety Engineering Department were estopped from claiming a presumption of abandonment. It concluded that DMG failed to meet the legal standard for application of estoppel. The circuit court additionally found no merit to DMG's claim that the ZBA's decision

had violated DMG's First Amendment right to commercial free speech because neither the City's decision nor the ZBA's decision that DMG had abandoned the variance had anything to do with the content of the proposed speech in the advertising signage. The circuit court concluded that the ZBA's decision did not unconstitutionally prohibit commercial speech. The circuit court, therefore, reversed the ZBA's decision and remanded for entry of a decision consistent with the circuit court's decision.

The ZBA and the City appeal the circuit court's reversal of the ZBA's decision following reconsideration. DMG appeals the circuit court's decisions rejecting its claims of procedural due-process violation, estoppel, and free-speech violation.

II. STANDARD OF REVIEW

We review de novo a circuit court's decision in an appeal from a decision of a zoning board of appeals to determine whether the circuit court " 'applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the [ZBA]'s factual findings.' " *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009), quoting *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996) (brackets in original). We also review de novo issues involving the interpretation of statutes and ordinances. *Soupal v Shady View, Inc*, 469 Mich 458, 462; 672 NW2d 171 (2003). "Municipal ordinances are interpreted and reviewed in the same manner as statutes." *Sau-Tuk Indus, Inc v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016). Therefore, we review de novo a court's ordinance interpretation and apply the rules governing statutory interpretation to a municipal ordinance. *Id*.

III. ANALYSIS

The ZBA and the City argue that the circuit court erred by reversing the ZBA's reconsideration decision on the grounds that competent, material, and substantial evidence did not support the decision and that the ZBA had applied a wrong principle of law. They contend that the ZBA properly determined that the building title owner's conduct alone established abandonment of the variance and properly disregarded DMG's conduct; therefore, reversal of the circuit court's decision is required. We disagree.

The issues presented in this appeal concern the interpretation of a municipal ordinance. In *Sau-Tuk*, this Court explained how we must interpret an ordinance:

> When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. If the language of a statute is unambiguous, we presume the Legislature intended the meaning expressed in the statute. A statutory provision is ambiguous only if it conflicts irreconcilably with another provision or it is equally susceptible to more than one meaning. . . . When construing a statute, we must assign every word or phrase its plain and ordinary meaning unless the Legislature has provided specific definitions or has used technical terms that have acquired a peculiar and appropriate meaning in the law.
>
> Similarly, the goal of construction and interpretation of an ordinance is to discern and give effect to the intent of the legislative body. The most reliable evidence of that intent is the language of the ordinance itself, which must be given its plain and ordinary meaning. When the words used in a statute or an ordinance are clear and unambiguous, they express the intent of the legislative body and must be enforced as written. [*Sau-Tuk*, 316 Mich App at 136-137 (quotation marks, citations, and brackets omitted).]

MCL 125.3606 governs appeals to the circuit court by any party aggrieved by a decision of the ZBA. MCL 125.3606(1) specifies the circuit court's appellate task, in relevant part, as follows:

> The circuit court shall review the record and decision to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of the state.
>
> (b) Is based upon proper procedure.
>
> (c) Is supported by competent, material, and substantial evidence on the record.
>
> (d) Represents the reasonable exercise of discretion granted by law to the zoning board of appeals.

"The decision of a zoning board of appeals should be affirmed unless it is contrary to law, based on improper procedure, not supported by competent, material, and substantial evidence on the record, or an abuse of discretion." *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197, 201; 651 NW2d 464 (2002).

In this case, the circuit court had to interpret and analyze the ZBA's interpretation and application of § 50-15-31[5] of the Detroit City Code, which specifies conditions under which a nonconforming-use variance may be presumed abandoned and how that presumption may be overcome. Section 50-15-31 provides, in relevant part, as follows:

> Once abandoned, a nonconforming use shall not be re-established or resumed, except in accordance with

[5] The ZBA cited § 61-15-21 of the Detroit zoning ordinance as grounds for its decision, and the circuit court did the same when analyzing the abandonment issue. Two amendments of the Detroit City Code moved several of the pertinent sections of the zoning ordinance, and we cite herein the current version of the zoning ordinance.

Section 50-15-28 of this Code. Any subsequent use or occupancy of the structure or open land must comply with the regulations of the district where it is located and all other applicable requirements of this chapter:

(1) *Presumption of abandonment*. A nonconforming use shall be presumed abandoned and its land use rights extinguished where any one of the following has occurred:

a. The owner has indicated, in writing or by public statement, an intent to abandon the use; or

b. A conforming . . . use has replaced the nonconforming use; or

c. The building or structure that houses the nonconforming use has been removed; or

(2) *Evidence of abandonment*. Evidence that a use has been discontinued, vacant or inactive for a continuous period of at least six months, and thereby abandoned, may include any of the following:

a. The owner has physically changed the building or structure, or its permanent equipment, in a manner that clearly indicates a change in use or activity to something other than the nonconforming use; or

* * *

c. Any license, required by this Code, that is necessary for the operation of the nonconforming use:

1. Has not been renewed; or

2. Has been denied or revoked without a timely appeal having been filed;

3. Has been denied or revoked, and a timely appeal of the denial or the revocation did not result in the granting of the license.

(3) *Overcoming presumption of abandonment*. A presumption of abandonment based on the evidence of abandonment, as provided for in Subsection (2) of this section,

> may be rebutted upon a showing of all of the following, to the satisfaction of the Board of Zoning Appeals, that the owner:
>
> a. Has been maintaining the land and structure in accordance with all applicable regulations, including Chapter 8, Article II, of this Code, *Building Code*, and did not intend to discontinue the use;
>
> b. Has been maintaining all applicable licenses;
>
> c. Has filed all applicable tax documents; and
>
> d. In addition, the owner of the nonconforming use shall be required to demonstrate, to the satisfaction of the Board of Zoning Appeals, that during the period of inactivity or discontinuance the owner:
>
> 1. Has been actively and continuously marketing the land or structure for sale or lease; or
>
> 2. Has been engaged in other activities that would affirmatively prove there was no intent to abandon.

For purposes of interpreting and applying the City's zoning ordinance provisions, § 50-16-324 defines the term "owner," in relevant part, as "[t]he person having the right of legal title or beneficial interest in or a contractual right to purchase a parcel of land." Section 50-16-2 states: "All provisions, terms, phrases and expressions that are contained in this chapter shall be construed according to the purpose and intent which are set out in Section 50-1-4 and Section 50-1-5 of this Code." Section 50-16-8 requires as follows: "Words and phrases shall be construed according to the common and approved usage of English, but technical words and phrases that may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." Section 50-16-13, in relevant part, clarifies that "[u]nless the context clearly suggests the contrary, conjunctions shall be interpreted as follows: . . . The term 'or' indicates that one or more of

the connected items, conditions, provisions, or events may apply." Guided by these three sections of the Detroit City Code, one may address and determine the issue at bar.

Both parties agree that the abandonment analysis requires a determination of the owner of the property interest. The ZBA and the City argue that abandonment is determined by examining the conduct of the "dominant owner," a term they use but one that is neither stated in the subject ordinance nor defined under the City Code. Analysis of the definition of "owner" in § 50-16-324 reveals that the provision uses the conjunction "or" to differentiate three types of owners to whom the zoning ordinance provisions may apply depending on the circumstances: (1) the holder of legal title to the property, (2) the holder of a beneficial interest in the property, or (3) the holder of a contractual right to purchase a parcel of land. In defining "owner" in this manner, § 50-16-324 recognizes that property ownership conceptually encompasses a variety of rights that potentially may be held by different persons at the same time. This comports with longstanding Michigan law. In *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 348; 820 NW2d 242 (2012), this Court explained that rights in property can be analyzed by

> using the familiar analogy that real property consists of various rights with each right represented as a stick. A person having all possible rights incident to ownership of a parcel of property has the entire bundle of sticks or a fee simple title to the property. Important rights flowing from property ownership include the right to exclusive possession, the right to personal use and enjoyment, the right to manage its use by others, and the right to income derived from the property. Indeed, "title," is defined in Black's Law Dictionary (9th ed), as "[t]he union of all elements (as

> ownership, possession, and custody) constituting the legal right to control and dispose of property . . . ." [Citations omitted.]

In *Allard v Allard (On Remand)*, 318 Mich App 583, 594-595; 899 NW2d 420 (2017), this Court further explained that the "so-called bundle of property rights can include many diverse forms of property interests."[6]

This case involves the lease of a portion of the subject property to DMG. Michigan law has long held that a "lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own for a valuable consideration, granting thereby to the lessee the possession, use and enjoyment of the portion conveyed during the period stipulated." *Minnis v Newbro-Gallogly Co*, 174 Mich 635, 639; 140 NW 980 (1913). Our Supreme Court explained in *Grinnell Bros v Asiuliewicz*, 241 Mich 186, 188; 216 NW 388 (1927):

> There goes with every rental of premises the right of beneficial enjoyment by the tenant for the purpose for which the premises are rented, at least to the extent disclosed to the lessor at the making of the lease. Such enjoyment the landlord may not destroy or seriously interfere with in use by himself or permitted use by others of any part of the premises occupied in conjunction therewith.

This Court similarly has explained that a "lease is a conveyance by the owner of an estate of a portion of the interest therein to another for a term less than his own for a valuable consideration." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). "A

---

[6] Similarly, in *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 471 n 101; 952 NW2d 434 (2020), our Supreme Court referred to property rights as a "bundle of sticks" that "range from a property owner's right to use or enjoy the property, the right to eject others from the property, and the right to dispose of the property altogether."

lease gives the tenant the possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease." *Id*. Leasing one portion of a building grants the tenant possession of that portion of the building and no more. See *Forbes v Gorman*, 159 Mich 291, 294-296; 123 NW 1089 (1909) (holding that the lessor conveys to the lessee the absolute dominion over the premises leased for all purposes not inconsistent with the lease).

To properly interpret and apply § 50-15-31, we must determine to whom the term "owner" applies in this case. The record indicates that certain business entities, and ultimately, Motown Construction Partners, held legal title to the Broderick Tower at times relevant to this case. Around 2004, DMG's predecessor in interest and affiliate, US Outdoor Advertising, entered a lease with the building's owner for use of the Broderick Tower's east face for advertising space. With the owner's approval, US Outdoor Advertising applied for a variance, which the Detroit Buildings and Safety Engineering Department denied. US Outdoor Advertising then petitioned the ZBA and appealed that decision. The ZBA held a public meeting, after which it made findings and granted US Outdoor Advertising a nonconforming-use variance to use its leased portion of the Broderick Tower for changeable advertising graphics. The ZBA's decision and later amended decision unequivocally indicate that the ZBA granted the variance to US Outdoor Advertising, the lessee of the Broderick Tower's east face, for a nonconforming use as advertising space. The ZBA's 2004 decision granting the variance indicates that it properly recognized the distinction between the building owner's legal interest and the lessee's interest that had been conveyed to US Outdoor Advertising for whose benefit the ZBA granted the variance.

DMG took over the lease and, as explained previously, under Michigan law, it held absolute dominion over the leased portion of the Broderick Tower. By leasing the east wall portion of the property to DMG, the building owner conveyed its interest in possession and use to DMG for the period of the lease. The record reflects that DMG held its lease interest in that portion of the property continuously. The previous property owner extended the lease to 2019, and later, Motown Construction Partners further extended the lease term to 2032. Although DMG has not held legal title to the subject property, the record reflects that it owned a beneficial interest in the leased property with the right to exclusively possess, use, and enjoy it for advertising space under the nonconforming-use variance. Accordingly, DMG must be understood as an owner as defined by § 50-16-324 for purposes of interpreting and applying the City's zoning ordinance provisions set forth in § 50-15-31. The circuit court, therefore, did not err by concluding that DMG constituted an "owner" under § 50-16-324 and did not err by considering DMG's conduct for determination of the abandonment issue.

The ZBA's and the City's argument that abandonment is determined by only examining the conduct of the "dominant owner" lacks merit because it disregards the definitional distinctions of § 50-16-324 that must be understood and applied for proper analysis and application of § 50-15-31. Indeed, proper analysis leads to the conclusion that DMG constituted the dominant owner because the legal title owner had conveyed by lease to DMG the portion of the property over which DMG had the right to possess and exercise its dominion and control. The circuit court correctly ascertained that the ZBA based its reconsideration decision on a mistake of law because the ZBA failed to properly recognize that DMG constituted an owner

under § 50-16-324 whose conduct had to be considered for determination of the abandonment issue.[7]

The ZBA and the City argue further that the circuit court erred by considering DMG's conduct rather than solely considering the title owner's conduct in determining whether the presumption of abandonment had been rebutted. They assert that the title owner's conduct indicated an intent to abandon the variance because it accepted the historic-preservation tax credits and that alone signified the abandonment of the variance. They contend that the circuit court should have deferred to the ZBA's factual findings and that the circuit court erred by concluding that the ZBA's decision lacked support by competent, material, and substantial evidence in the record. We disagree.

Contrary to the ZBA's and the City's argument, analysis of the ZBA's reconsideration decision reveals that its mistake of law regarding the determination of the "owner" led to its misapplication of § 50-15-31. By adopting the City's mistaken "owner" analysis, the ZBA failed to consider the most relevant evidence and focused on only certain aspects of Motown Construction Partners' conduct when it should have considered the evidence of DMG's conduct.

Under § 50-15-31(1), a nonconforming use is "presumed abandoned and its land use rights extinguished" if, among other things, "[t]he owner has indicated, in writing or by public statement, an intent to abandon the use[.]" Under § 50-15-31(2), "[e]vidence that a use has been discontinued, vacant or inactive for

[7] The ZBA and the City assert without citation to any authority that it "would be legally impossible for the City to grant a use variance to anyone other than the property owner." This bald assertion lacks merit because it, too, fails to understand and disregards the significance of § 50-16-324's definitional distinctions.

a continuous period of at least six months" constitutes evidence of abandonment. Section 50-15-31(3), however, provides that the presumption of abandonment may be rebutted by the owner upon a showing that the owner maintained "the land and structure in accordance with all applicable regulations . . . and did not intend to discontinue the use," maintained all applicable licenses, filed all applicable tax documents, and demonstrates that during the period of inactivity the owner actively and continuously marketed the land or structure for sale or lease or engaged in other activities that would affirmatively prove it had no intent to abandon.

The record in this case indicates that DMG never indicated in writing or by public statement that it intended to abandon the variance. To the contrary, it indicated its intent to use and not abandon it. Nevertheless, evidence established that, for a period exceeding six months, DMG ceased using the Broderick Tower advertising space at the request of the building owner, Motown Construction Partners, for renovation of the building. From this evidence, the circuit court could determine that the presumption of abandonment applied. The circuit court did not err in this regard.

The circuit court then considered whether DMG rebutted that presumption. For determination of that issue, the circuit court reviewed and analyzed the record evidence. The evidence established that DMG held the lease and exercised its rights under the lease and the variance by installing and changing the advertising banners from 2006 to 2012 on the portion of the Broderick Tower that it leased. When asked by the building owner to not use the leased space for the period of renovation, DMG complied in October 2012. The record indicates that DMG became aware of the build-

ing owner's federal historic-preservation tax credit approval and recapture period in early 2013. The building owner advised DMG that it intended to appeal the NPS decision regarding nonuse of the building's wall for advertising. The record indicates that Motown Construction Partners filed an amendment of its application with the NPS for certified rehabilitation of its renovation project and requested that DMG be permitted to enjoy its lease and variance, but the NPS declined to grant the request.[8] Record evidence also established that, upon learning of the NPS decision, DMG communicated with the Detroit Buildings and Safety Engineering Department that its nonuse of the advertising space should not be construed as an abandonment of the variance or its permits and approvals, and DMG claimed the right to maintain its right to use the space on the Broderick Tower. In 2014, DMG also applied for, and the Detroit Buildings and Safety Engineering Department issued, licenses for advertising signage in downtown Detroit, including for the Broderick Tower.

The record reflects that, in 2015, the Detroit Buildings and Safety Engineering Department did not issue DMG licenses for any of its downtown Detroit locations. That prompted DMG through its attorneys to communicate with the City's Law Department, and DMG and its attorneys met with representatives of the Detroit Buildings and Safety Engineering Department and Law Department and later sent further correspondence all of which indicated that DMG did not intend to abandon the variance. In 2016, in response to DMG's inquiries, the Detroit Buildings and Safety Engineering Department sent DMG a zoning verification letter that

[8] This evidence also contradicts the City's and the ZBA's argument that the building's title holder intended the abandonment of the variance.

confirmed that the ZBA had granted DMG a nonconforming-use variance and entered an order that authorized DMG to use its lease at the Broderick Tower for advertising. Then, DMG negotiated an extension of the lease under which the building owner agreed that, upon termination of the NPS restrictions, DMG's rights to use the east wall of the Broderick Tower for advertising would automatically revive and extend to 2032.[9]

The circuit court observed that the evidence also established that DMG had maintained the land and structure for its intended use and never intended to discontinue the use. The circuit court noted that DMG had never been cited for violation of any regulations, DMG had made significant efforts to maintain the applicable licenses, DMG marketed the property for advertising-space leasing, and DMG engaged in other activities indicative of its intent not to abandon the variance. Under Michigan law, "[t]he necessary elements of 'abandonment' are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon." *Rudnik v Mayers*, 387 Mich 379, 384; 196 NW2d 770 (1972).

IV. CONCLUSION

The record evidence in this case supports the circuit court's analysis and conclusion that DMG rebutted the presumption of abandonment. The evidence does not establish that DMG intended by act or omission to voluntarily abandon the variance.

---

[9] This evidence also contradicts the City's and the ZBA's argument that the building's title holder intended the abandonment of the variance.

Proper analysis of the record evidence and the correct application of § 50-15-31 reveal the erroneous nature of the ZBA's reconsideration decision. The ZBA's mistake of law as to who constituted an owner led it to improperly consider the building owner's conduct to the exclusion of DMG's conduct. That error led the ZBA to the improper conclusion that the building owner had abandoned the variance and failed to rebut the presumption of abandonment. Because the ZBA engaged in misdirected analysis based upon a fundamental mistake of law, its conclusion lacked support by competent, material, and substantial evidence.

We hold that the circuit court correctly interpreted and applied the law and supported its decision with competent, material, and substantial evidence. The circuit court, therefore, did not err by reversing the ZBA's reconsideration decision. Accordingly, we affirm the circuit court's decision.

In its cross-appeal, DMG asserts that the circuit court erred by ruling that the ZBA did not deprive DMG of procedural due process when it reconsidered its ruling; that the estoppel doctrine did not apply to the City, precluding it from asserting that the variance had been abandoned; and that the City had not violated DMG's right to freedom of commercial speech. Because we affirm the circuit court's reversal of the ZBA's reconsideration decision, we decline to address the additional issues raised by DMG on the ground that our affirmance of the circuit court's decision renders moot any need to address those issues, the determination of which would not result in the granting of any further relief. Issues are rendered moot when they present nothing more than abstract questions of law, the determination of which would not lead

to the granting of relief. *In re Detmer*, 321 Mich App 49, 56; 910 NW2d 318 (2017). A court, nevertheless, may consider a moot issue if it presents an issue of public significance and disputes involving the issue are likely to recur, yet evade judicial review. *Id*. In this case, the record reflects that DMG raised these three issues as alternative grounds for reversing the ZBA's reconsideration decision. Those issues had no bearing on the determination of the primary issue of whether the variance had been abandoned. Because we have determined that the circuit court properly reversed the ZBA's reconsideration decision, determination of DMG's alternative grounds for reversing the ZBA's erroneous reconsideration ruling is unnecessary, and we are not convinced that the issues are of public significance requiring judicial review.

Affirmed.

CAVANAGH, P.J., and K. F. KELLY, J., concurred with REDFORD, J.

PEOPLE v HOFMAN

Docket No. 355838. Submitted July 8, 2021, at Grand Rapids. Decided September 23, 2021, at 9:05 a.m.

Lisa A. Hofman was charged in the 87th District Court with five counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*iv*) (sexual penetration of a child at least 13 but less than 16 years of age by a teacher, substitute teacher, or administrator of the school or school district in which the victim is enrolled), in connection with a sexual relationship she allegedly had from 2001 to 2004 with the complainant, a student at the school where defendant worked as a substitute teacher. The district court dismissed four of the charges following a preliminary examination because "substitute teachers" were not included as an actor under MCL 750.520b until the statute was amended by 2002 PA 714, effective April 1, 2003; the complainant's testimony did not support any possible charge under the pre-amendment version of the statute; and the complainant's testimony supported only one act of sexual penetration between the effective date of 2002 PA 714 and the date the relationship ended. The prosecution then amended the information, specifying that the remaining CSC-I count occurred on or about late 2003 to early 2004. In the Crawford Circuit Court, defendant moved to dismiss the remaining CSC-I charge, arguing that while she had been a substitute teacher at the complainant's school during the 2002–2003 school year, she had enrolled as a full-time student at a university in August 2003 and later worked as a substitute teacher at a different school during the winter 2004 semester. Defendant argued that because she had left her employment at complainant's school before the date of the alleged incident, she was not complainant's substitute teacher at that time and could not be charged under MCL 750.520b(1)(b)(*iv*) for the alleged conduct. The circuit court, George J. Mertz, J., denied defendant's motion, concluding that, under *People v Lewis*, 302 Mich App 338 (2013), defendant did not have to be acting as a substitute teacher when the charged offense occurred as long as her status as a substitute had allowed her access to the complainant to engage in sexual penetration. Defendant appealed.

The Court of Appeals *held*:

MCL 750.520b(1)(b)(*iv*) provides that a person is guilty of CSC-I if they engage in sexual penetration with another person, that other person is at least 13 but less than 16 years of age, and the actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled. In analyzing MCL 750.520d(1)(e), a statute with substantively identical language but concerning third-degree criminal sexual conduct, the *Lewis* Court concluded that there is no temporal requirement regarding the timing of the sexual penetration. Thus, if a defendant's occupation as a substitute teacher or contractual service provider allowed access to a student of the relevant age group in order for the defendant to engage in sexual penetration with the student, prosecution is not foreclosed by the fact that the sexual penetration occurred during nonschool hours; given the use of the word "is," the relevant focus is the defendant's status as a substitute teacher at the time of the offense, not the defendant's actions of performing the duties of a substitute teacher at the time of the offense. Therefore, prosecution is precluded if the sexual penetration occurred after the defendant no longer worked for the school district. In this case, defendant left her employment with the school district at the end of the 2002–2003 school year to attend a university, and she thereafter began working as a substitute teacher in a different school district. Defendant's status at the time of the alleged sexual penetration in late 2003 or early 2004 was therefore that of a former substitute teacher, which does not qualify as an actor under MCL 750.520b(1)(b)(*iv*) given the provision's use of the present tense. Accordingly, she could not be charged under MCL 750.520b(1)(b)(*iv*), and the circuit court erred by denying defendant's motion to dismiss.

Reversed and remanded for entry of an order dismissing the charge.

CRIMINAL LAW — FIRST-DEGREE CRIMINAL SEXUAL CONDUCT — FORMER SUBSTITUTE TEACHERS.

A defendant is guilty of first-degree criminal sexual conduct if they engage in sexual penetration with another person, that other person is at least 13 but less than 16 years of age, and the actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled; there is no temporal requirement regarding the timing of the sexual penetration; if a defendant's occupation as a substitute teacher allowed

> access to a student of the relevant age group in order for the defendant to engage in sexual penetration with the student, prosecution is not foreclosed by the fact that the sexual penetration occurred during nonschool hours, on a weekend, or during the summer vacation period; however, prosecution is precluded if the sexual penetration occurred after the defendant no longer worked for the school district (MCL 750.520b(1)(b)(*iv*)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Sierra R. Koch*, Prosecuting Attorney, and *Anthony M. Juillet*, Assistant Prosecuting Attorney, for the people.

Jason R. Thompson for defendant.

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

RONAYNE KRAUSE, P.J. Defendant appeals by leave granted[1] the circuit court's order denying her motion to dismiss her charge of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*iv*) (sexual penetration of a child at least 13 but less than 16 years of age by a teacher, substitute teacher, or administrator of the school or school district in which the victim is enrolled). We reverse and remand.

I. BACKGROUND

The facts pertinent to this appeal are not in dispute. Defendant, Lisa A. Hofman, was initially charged under MCL 750.520b(1)(b)(*iv*) with five counts of CSC-I arising from a sexual relationship she allegedly had from 2001 until 2004 with the complainant, a student at a school where defendant worked as a substitute teacher. However, "substitute teachers" were not in-

[1] *People v Hofman*, unpublished order of the Court of Appeals, entered March 18, 2021 (Docket No. 355838).

cluded as an actor under the statute until it was amended by 2002 PA 714, which became effective in 2003. After holding the preliminary examination, the district court concluded that the complainant's testimony did not support any possible charge under the pre-amendment version of MCL 750.520b, and the complainant's testimony only supported one act of sexual penetration between the effective date of 2002 PA 714 and the date the relationship ended. The district court therefore dismissed four of the charged counts and bound defendant over for trial on the single remaining count of CSC-I. The prosecutor filed an amended information, specifying that the single remaining count of CSC-I occurred "[o]n or about late 2003 — early 2004."

In the circuit court, defendant moved to dismiss the remaining charge. She argued that she had been a substitute teacher at the complainant's school during the 2002–2003 school year but that in August 2003, she had enrolled as a full-time student at a university and later worked as a substitute teacher at an entirely different school during the winter 2004 semester. She conceded that under *People v Lewis*, 302 Mich App 338, 344-346; 839 NW2d 37 (2013), the status of "substitute teacher" would ordinarily not lapse during a summer break, but she pointed out that, in contrast to *Lewis*, she had actually left her employment at the complainant's school before the date of the alleged incident. The prosecutor agreed that "[defendant] was no longer [the complainant's] substitute teacher." The prosecutor argued that, because the alleged relationship started while defendant was the complainant's substitute teacher, her status as his substitute teacher should be deemed to continue. The trial court denied defendant's motion. It ruled that, under *Lewis*, "there is no requirement that the Defendant be acting as a substitute

[teacher] when the charged assault occurred, so long as her status as a substitute allowed her access to the Complainant in order to engage in sexual penetration." This appeal followed.

II. STANDARD OF REVIEW AND PRINCIPLES OF LAW

A trial court's decision to deny a motion to dismiss is reviewed for an abuse of discretion, and a "trial court necessarily abuses its discretion when it makes an error of law." *People v Brown*, 330 Mich App 223, 229; 946 NW2d 852 (2019) (quotation marks and citation omitted). Legal questions, including "questions of statutory interpretation, are reviewed de novo." *Id*.

> This Court's primary goal in construing a statute is to determine and give effect to the intent of the Legislature, turning first to the statutory language to ascertain that intent. In construing a statute, we interpret defined terms in accordance with their statutory definitions and undefined terms in accordance with their ordinary and generally accepted meanings. When statutory language is unambiguous, judicial construction is not required or permitted because the Legislature is presumed to have intended the meaning it plainly expressed. [*People v Campbell*, 329 Mich App 185, 193-194; 942 NW2d 51 (2019) (quotation marks, citations, and brackets omitted).]

"Criminal statutes are to be strictly construed, and cannot be extended beyond their clear and obvious language." *Lewis*, 302 Mich App at 342 (quotation marks and citation omitted). Moreover, "when a term is not defined in a statute, the dictionary definition of the term may be consulted or examined." *Id*.

III. ANALYSIS

Defendant argues that the trial court erred by denying her motion to dismiss because she was no

longer a substitute teacher in the complainant's school district at the time of the alleged sexual penetration. Under the circumstances of this case, we agree.

Defendant was charged with CSC-I under MCL 750.520b, which provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (b) That other person is at least 13 but less than 16 years of age and any of the following:
>
> * * *
>
> (*iv*) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.

This Court addressed substantively identical language found in MCL 750.520d(1)(e)(*i*) (relating to third-degree sexual conduct), and particularly addressed the significance of the word "is" as used in the statute. *Lewis*, 302 Mich App at 343-347. This Court determined "that the Legislature intended to protect persons in a certain age group or with certain vulnerability who encounter an individual in a position of authority or supervision over those persons." *Id*. at 346. It determined that the word "is" indicated that a defendant must hold the status of, in relevant part, a substitute teacher, but need not specifically be performing the role of substitute teaching at the time of the offense. *Id*. at 345-346. Thus, this Court concluded that there was no "temporal requirement regarding the timing of the sexual penetration." *Id*. at 345.

> Consequently, if a sexual penetration by a substitute teacher occurs before school or after the school bell rings at the end of the day, or on a weekend, or during the summer, prosecution pursuant to MCL 750.520d(1)(e)(*i*) is not foreclosed. Rather, if the actor's occupation as a substitute teacher allowed the actor access to the student of the relevant age group in order to engage in sexual penetration, the Legislature intended to punish that conduct. [*Id*. at 347.]

Because MCL 750.520d(1)(e)(*i*) and MCL 750.520b(1)(b)(*iv*) clearly address the same subject or share a common purpose, they should be read together as a whole. *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). Therefore, the *Lewis* Court's analysis is applicable to the language of the statute now at issue.

We conclude that the trial court was misled by the seemingly broad language used in *Lewis* without appropriately considering the context of that language. See *New Prod Corp v Harbor Shores BHBT Land Dev LLC*, 331 Mich App 614, 632-633; 953 NW2d 476 (2019). In *Lewis*, the evidence was somewhat vague regarding the defendant's employment status, but it was seemingly undisputed that the defendant continued to be a substitute teacher at the complainants' school when the sexual penetrations occurred. *Lewis*, 302 Mich App at 344-345 & n 4. The issue was specifically whether the elements of MCL 750.520d(1)(e)(*i*) could be satisfied if "the alleged acts occurred in the summer when defendant was not acting as the complainants' substitute teacher or contractual service provider." *Id*. at 345. Importantly, the *Lewis* Court clearly focused on the distinction between *being* a substitute teacher and *acting as* a substitute teacher. *Id*. at 345-346. The Court's references to hypothetical

acts occurring after school hours or over weekends renders that context unambiguous. See *id*. at 347.

We conclude that defendant's construction of *Lewis* was correct and that the trial court's construction was wrong: *Lewis* holds that a defendant must have held the status of being the complainant's substitute teacher at the time of the alleged acts, irrespective of whether the defendant was actively performing that role at the time. The evidence here indicates that defendant left her employment with the school district at the end of the 2002–2003 school year to attend a university, and she then took up substitute teaching at another school. The situation in *Lewis* therefore does not apply because after the end of the 2002–2003 school year, defendant was no longer a substitute teacher at the complainant's school. Under *Lewis*, the touchstone is the defendant's status, and at the time of the alleged sexual penetration in "late 2003 — early 2004," defendant held the status of *former* substitute teacher. Because the word "is" in MCL 750.520b(1)(b)(*iv*) unambiguously connotes present tense, the trial court erred by denying defendant's motion to dismiss.

We reverse the circuit court's denial of defendant's motion to dismiss and remand for entry of an order dismissing the current charge against defendant, without prejudice to the possibility of refiling appropriate charges should the prosecutor choose to do so. We do not retain jurisdiction.

BECKERING and BOONSTRA, JJ., concurred with RONAYNE KRAUSE, P.J.

FORTON v ST CLAIR COUNTY PUBLIC GUARDIAN

Docket No. 354825. Submitted September 14, 2021, at Detroit. Decided September 23, 2021, at 9:10 a.m.

Leonard M. Forton, Sr., brought an action in the St. Clair Circuit Court against multiple defendants, including Ann Maire Daniels-Hillman, an employee of St. Clair County Community Mental Health, and Amanda Seals, an employee of the St. Clair County Public Guardian, for negligent and intentional infliction of emotional distress, malicious prosecution, abuse of process, concert of action, and civil conspiracy. Defendants had been apprised that a legally incapacitated court ward was advising other residents at her residential treatment facility that she had been sexually abused by plaintiff, who was the husband of her legal guardian. Plaintiff's claims were based on actions defendants took in response to the allegations. Specifically, defendants took measures to protect the court ward: (1) by requesting the removal of the legal guardian, (2) by seeking a personal protection order to prevent plaintiff's contact with the court ward, (3) by referring the matter to investigating agencies, and (4) by seeking the appointment of individuals to act for the court ward's benefit. While fulfilling their responsibilities to protect the court ward, defendants prepared documents and made statements before the probate court. Both Daniels-Hillman and Seals stated during guardianship proceedings that plaintiff violated a no-contact order regarding the legally incapacitated ward. In the circuit court, defendants moved for summary disposition, alleging that they were entitled to quasi-judicial immunity because their statements and the actions they took to protect the ward were an integral part of the guardianship proceedings. Plaintiff argued that defendants were not entitled to any governmental immunity because they offered expert testimony in the guardianship proceedings. The circuit court, Michael West, J., granted summary disposition pursuant to MCR 2.116(C)(7) in favor of defendants Daniels-Hillman and Seals and their employers based on governmental immunity. Plaintiff appealed.

The Court of Appeals *held*:

Quasi-judicial immunity is an extension of absolute judicial immunity to nonjudicial officers that has developed into distinct branches, including one that focuses on the nature of the job-related duties of the person claiming immunity and another that focuses on the fact that the person claiming immunity made statements or submissions in an underlying judicial proceeding. Witnesses who are an integral part of the judicial process are wholly immune from liability for the consequences of their testimony or related evaluations. Statements made during judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. Courts have repeatedly extended this immunity to participants in court proceedings. Seals and Daniels-Hillman fulfilled their roles to act in the interests of the legally incapacitated ward. All the claims asserted by plaintiff against Seals and Daniels-Hillman regarded either their statements made in the guardianship proceedings or the actions that they took while acting as an arm of the court to safeguard the interests of the legally incapacitated ward. Because these actions were an integral part of the guardianship proceedings, the trial court did not err by holding that both defendants were immune from suit under the doctrine of quasi-judicial immunity and thus were entitled to summary disposition under MCR 2.116(C)(7). While expert witnesses are not absolutely immunized under the doctrine of quasi-judicial immunity from professional-malpractice claims that relate to something other than their in-court testimony, plaintiff asserted no claims for professional malpractice. Moreover, Daniels-Hillman and Seals were never qualified as expert witnesses in the probate court; they offered only factual testimony in the probate proceedings, not any expert-opinion testimony as defined by MRE 702. Thus, the expert-witness exception to quasi-judicial immunity was inapplicable. Additionally, the trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint. Because summary disposition was granted under MCR 2.116(C)(7) on the basis of immunity granted by law, plaintiff was not entitled to amend his complaint pursuant to MCR 2.116(I)(5) and given that amendment would have been futile.

Affirmed.

Leonard M. Forton, Sr., *in propria persona*.

Cummings, McClorey, Davis & Acho, PLC (by *Douglas J. Curlew*) for St. Clair Community Mental Health and Ann Marie Daniels-Hillman.

Fletcher Fealko Shoudy & Francis, PC (by *Todd J. Shoudy*) for St. Clair County Public Guardian and Amanda Seals.

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

PER CURIAM. In this action related to a guardianship proceeding, plaintiff appeals as of right the trial court's orders granting summary disposition under MCR 2.116(C)(7) to defendants Ann Marie Daniels-Hillman, an employee of defendant St. Clair County Community Mental Health (SCC Community Mental Health), and Amanda Seals, an employee of defendant St. Clair County Public Guardian (the Public Guardian).[1] Specifically, defendants were apprised that a legally incapacitated court ward was advising other residents at her residential treatment facility that she was subject to sexual abuse by her legal guardian's husband, plaintiff. Consequently, defendants took measures to protect the court ward: (1) by requesting the removal of the legal guardian; (2) by seeking a personal protection order to prevent plaintiff's contact with the court ward; (3) by referring the matter to investigating agencies; and (4) by seeking the appointment of individuals to act for the court ward's benefit. Thus, in the course of fulfilling their responsibilities to protect the court ward, defendants prepared documents and made statements before the probate court. When it was reported to defendant Seals that plaintiff was present in a hospital room with the court ward, she apprised the probate court, and it issued a show cause for plaintiff's

[1] Plaintiff filed a claim of appeal following the order stipulating to dismiss the last defendant Purauy for lack of service. However, plaintiff only challenges the underlying orders granting summary disposition to defendants Seals and Daniels-Hillman.

alleged violation of a no-contact provision. However, the show cause was dismissed once it was learned that recorded evidence of the violation was lacking and that the court ward was hospitalized and confused. Although a criminal investigation occurred, the police did not pursue criminal charges against plaintiff. Thereafter, plaintiff, acting *in propria persona*, filed a multicount complaint against defendants seemingly contending that defendants conspired and raised false allegations against him. The trial court properly granted summary disposition in favor of defendants. Defendants were entitled to quasi-judicial immunity because their statements, made during the course of judicial proceedings, are absolutely privileged. The statements were relevant, material, or pertinent to the issue being tried, the need for a suitable legal guardian to supervise and protect the court ward. The fact that recorded evidence did not exist to support defendants' statements did not abrogate the privilege; rather, the privilege must be liberally construed to allow participants in judicial proceedings to be free to express themselves without fear of retaliation. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case arises out of the related probate proceeding concerning the guardianship of a legally incapacitated nonparty (NK). Plaintiff alleged that he met NK at a bus stop years earlier, the pair bonded, and he allowed NK to live in a trailer on his property. In May 2016, plaintiff's wife, Lynne Forton, petitioned to be named as NK's guardian. Forton alleged that NK was legally incapacitated as a result of both mental illness and chronic intoxication. The probate court granted the petition, finding that NK was "totally"

incapacitated as a result of the alleged conditions, and the court appointed Forton as NK's full guardian. The probate court also appointed a guardian ad litem (GAL) to represent NK.

Following a review hearing in May 2017, the probate court ordered NK to "make arrangements to live at Vision Quest," which is a residential treatment facility for substance abuse, "until further order of the court." In July 2017, defendant Daniels-Hillman completed a "Contact Note" documenting a telephone call that she had received in the course of her employment with defendant SCC Community Mental Health from the "Vision Quest Home Manager," defendant Ann Purauy.[2] According to the note, Purauy expressed concerns for NK because NK had advised the residents of Vision Quest that she performed sexual favors for plaintiff in exchange for money. NK reportedly went to plaintiff's home on a daily basis, would not return to Vision Quest "until bed time," consumed alcohol at plaintiff's home, and brought alcohol back with her to Vision Quest. In response to the report, Daniels-Hillman contacted Adult Protective Services (APS) and the probate court's liaison, to whom she reported Purauy's allegations. Later that day, Daniels-Hillman met with the court liaison and defendant Seals at the probate court.

As a result of that meeting, Daniels-Hillman filed a petition with the probate court to modify NK's guardianship by appointing the Public Guardian as NK's guardian in lieu of Forton. In support, Daniels-Hillman indicated that she had received allegations from Vision Quest staff and others that plaintiff and

[2] In her brief on appeal, Daniels-Hillman contends that the manager's last name was "Parway," not "Purauy," and that she died before this litigation commenced.

Forton were possibly purchasing alcohol for NK and that plaintiff "was asking for sexual favors in exchange for money[.]" Daniels-Hillman also filed a "Notification of Noncompliance" with the probate court, again repeating Purauy's report that NK was not complying with her court-ordered substance abuse treatment.

On August 3, 2017, Daniels-Hillman filed a petition in the probate court requesting an emergency guardianship hearing. In support, she relayed Purauy's concerns that plaintiff had contact with NK while she was hospitalized, including his presence while NK was changing clothes. Purauy had also reported that plaintiff had given NK "Benadryl," which resulted in NK being hospitalized again because it caused her difficulty with breathing and swallowing. Daniels-Hillman expressed concern that Forton, as NK's guardian, was not available during NK's last two hospitalizations because Forton had "medical issues of her own." Indeed, when transportation was necessary for NK, it was provided by plaintiff, not Forton. At the ensuing hearing, which the probate court held that same day, it questioned Daniels-Hillman concerning Purauy's allegations. After considering the matter, the probate court removed Forton as guardian, appointed the Public Guardian as NK's temporary guardian, and ordered "no contact" between NK and plaintiff (or Forton) outside the presence of either "hospital staff" or a representative of the Public Guardian.

The allegations against plaintiff were subsequently investigated by both APS and the police. NK eventually admitted to her GAL and an APS caseworker that, before Forton was appointed as NK's guardian, NK and plaintiff had engaged in a "consensual" sexual relationship, about which Forton was aware. According to NK, plaintiff indicated that Forton had medical conditions

that left her unable to "perform sexually," and he asked NK to "give him his needs." In return for having sex with plaintiff, NK received alcohol, cigarettes, and prescription drugs (including opiates) from plaintiff and Forton. NK advised that plaintiff used Viagra and condoms during their sexual encounters that occurred either in a trailer or plaintiff's bed. Although NK was "disgusted" by her sexual relationship with plaintiff and "didn't feel comfortable doing it," she nevertheless consented to it. Their quid-pro-quo sexual relationship continued after Forton was appointed as NK's guardian, and plaintiff and Forton continued to supply NK with drugs and alcohol after Forton's appointment as guardian.

When interviewed by the police, plaintiff admitted that he gave NK alcohol, cigarettes, and fast food. He denied giving NK any opiates but claimed that he gave NK "aspirin type pills." When questioned about a sexual relationship, plaintiff stated that NK once told him that the pair had sex, but he could not remember it. Plaintiff explained that his lack of recollection occurred because "he smoked lots of marijuana." Plaintiff presented documentation listing medications that he took for a degenerative disc condition and chronic pain and indicated that he had erectile dysfunction. Plaintiff declined to admit to any sexual relationship with NK despite being advised that NK reported any sexual acts were consensual. He also advised that he was a paralegal. When walking out of the interview, plaintiff reportedly told the interviewing officer, "Honestly, I didn't think you'd believe me," to which the officer responded, "I don't." Nonetheless, charges were not pursued in light of NK's mental and medical issues, her admission to consensual sex and occasional manipulation of plaintiff, Forton's removal as guardian, and the court's order that plaintiff not have contact with NK.

In August 2017, Seals, who was performing as NK's guardian on behalf of the Public Guardian's office, informed Daniels-Hillman that she was planning to seek a personal protection order against plaintiff on NK's behalf. Seals explained that she had received a report that plaintiff had visited NK in the hospital "over the weekend," though it was unclear whether he did so in violation of the probate court's "no contact" order because Seals did not know whether hospital staff had been present during the visit.

At an ensuing review hearing, the probate court asked Seals to inform the court about what had "been happening with [NK]" since the Public Guardian's appointment in this matter. As relevant here, Seals answered:

> So [NK] was hospitalized since the last hearing, after she had violated her substance abuse order. [Plaintiff] was at the hospital, they have him on security footage, even though there is, was in the last order that there should be no contact without CMH or adults present. He was in the room alone with, with [NK]. She couldn't, when I talked to her about it, she couldn't really remember that happening. She was very incoherent at times in the hospital. She's very confused.

As a result of Seals's report, the probate court issued an order for plaintiff to appear and show cause why he should not be held in contempt for violating the court's no-contact order. At the ensuing show-cause hearing, which plaintiff attended with counsel, the court indicated that the parties had met in chambers to discuss the anticipated proofs. In out-of-court statements, NK had indicated that plaintiff had, in fact, violated the no-contact order at the hospital, but plaintiff denied having done so. Because there was "no video" or "other objective proof" concerning the alleged contumacious conduct, and given

that NK was not available to testify in court because she remained hospitalized, Seals and NK's GAL both agreed that the contempt charge against plaintiff should be dismissed for lack of proof. After dismissing the contempt charge, the probate court admonished plaintiff "to get on with [his] life" and avoid any further violations—or near violations—of the no-contact order.

In February 2019, plaintiff, acting *in propria persona*, filed a complaint against defendants, which included the following six counts: (1) intentional infliction of emotional distress, (2) malicious prosecution, (3) abuse of process, (4) negligent infliction of emotional distress, (5) concert of action, and (6) civil conspiracy.[3] Defendants moved for summary disposition premised on immunity, and the trial court granted summary disposition under MCR 2.116(C)(7). This appeal followed.

II. ANALYSIS[4]

Plaintiff contends that the trial court erred by granting summary disposition under MCR 2.116(C)(7) to defendants Daniels-Hillman and Seals and by denying his motion to amend his complaint. We disagree.

---

[3] Although plaintiff identified six counts in his complaint, he did not delineate the actions of each defendant within the claims raised and primarily used the singular "defendant" in his allegations.

[4] On appeal, plaintiff contends that application of immunity does not comport with the due-process demands of the 14th Amendment. However, this issue was never raised in the trial court and is not preserved for appellate review. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). The failure to raise this issue in the trial court results in the waiver of review of the issue on appeal. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Deviation from this general rule is unwarranted in light of plaintiff's deficient pleadings and briefing of the issues.

A trial court's decision concerning a motion to amend pleadings is reviewed for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 320; 900 NW2d 680 (2017) (quotation marks and citation omitted). A trial court's ruling regarding a motion for summary disposition is reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). Summary disposition is appropriate pursuant to MCR 2.116(C)(7) when the moving party is entitled to "immunity granted by law." When reviewing a motion for summary disposition premised on immunity, this Court examines the affidavits, depositions, admissions, and other documentary evidence to determine whether the moving party is entitled to immunity as a matter of law. *Margaris v Genesee Co*, 324 Mich App 111, 115; 919 NW2d 659 (2018). If documentary evidence is submitted, it must be admissible in evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

"Quasi-judicial immunity is an extension of absolute judicial immunity to non-judicial officers[.]" *Serven v Health Quest Chiropractic, PC*, 319 Mich App 245, 254; 900 NW2d 671 (2017) (quotation marks and citation omitted). "The doctrine of quasi-judicial immunity as developed by the common law has at least two somewhat distinct branches[.]" *Denhof v Challa*, 311 Mich App 499, 511; 876 NW2d 266 (2015). "[O]ne branch focuses on the nature of the job-related duties, roles, or functions of the person claiming immunity, and one branch focuses on the fact that the person claiming immunity made statements or submissions in an un-

derlying judicial proceeding." *Id*. As our Supreme Court explained in *Maiden*, 461 Mich at 134:

> [W]itnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as those persons other than judges without whom the judicial process could not function. Witnesses who are an integral part of the judicial process are wholly immune from liability for the consequences of their testimony or related evaluations. Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried. Falsity or malice on the part of the witness does not abrogate the privilege. The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation. [Quotation marks and citations omitted.]

Courts have repeatedly extended this immunity to participants in court proceedings. See, e.g., *Diehl v Danuloff*, 242 Mich App 120, 128-133; 618 NW2d 83 (2000) (holding that a court-appointed psychologist "ordered to conduct a psychological evaluation and submit a recommendation to the trial court in a custody proceeding [wa]s entitled to absolute quasi-judicial immunity" in a subsequent lawsuit, given that the allegations against the psychologist were related to his "role in the custody proceeding," in which he "served as an arm of the court and performed a function integral to the judicial process") (quotation marks and citation omitted); see also *Denhof*, 311 Mich App at 511 (holding that immunity applied to statements made and actions taken by a county Friend of the Court during child support proceedings with regard to claims alleged by a child support obligor); *JP Silverton Indus LP v Sohm*, 243 Fed Appx 82, 89 (CA 6, 2007) (holding that quasi-judicial immunity applied to "a master commissioner conducting a foreclosure sale"

pursuant to a court order); *Kolley v Adult Protective Servs*, 786 F Supp 2d 1277, 1299 (ED Mich, 2011) (holding that immunity applied to a GAL in guardianship proceedings involving a legally incapacitated adult).

The purpose and legal effect of guardianships is set forth by statute, *Univ Ctr, Inc v Ann Arbor Pub Sch*, 386 Mich 210, 217; 191 NW2d 302 (1971), and guardianships of legally incapacitated individuals are a mechanism that the Legislature intended to protect the interests of incapacitated wards, i.e., "a means of providing continuing care and supervision of the incapacitated individual," MCL 700.5306(1). In this case, Seals and Daniels-Hillman fulfilled their roles to act in the interests of NK, as an incapacitated individual. Indeed, it is undisputed that NK reported to residents and the manager of Vision Quest that she was being sexually exploited by plaintiff. Once this information was relayed to Daniels-Hillman, she took steps to protect NK while an investigation occurred by seeking the removal of Forton, NK's guardian, and the report of abuse caused Seals to become involved. Additionally, Forton's ability to serve as NK's guardian was questioned in light of her own recent medical issues and the fact that plaintiff provided transportation and other assistance to NK during NK's hospitalizations. Thus, all of the claims asserted by plaintiff against Seals and Daniels-Hillman regarded either their testimony[5] or statements made in the guardianship proceedings or actions that they took, while acting as an "arm" of the court, to safeguard the interests of the legally incapaci-

[5] Although the statement made by Seals was characterized as "testimony," there was no indication on the record that she was sworn prior to addressing the probate court. Nonetheless, her statements are protected. *Maiden*, 461 Mich at 134.

tated ward, NK. Such actions were an integral part of the guardianship proceedings. Therefore, the trial court did not err by holding that both Seals and Daniels-Hillman were absolutely immune from suit under the doctrine of quasi-judicial immunity and thus were entitled to summary disposition under MCR 2.116(C)(7). See *Maiden*, 461 Mich at 134 ("The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation."); *Diehl*, 242 Mich App at 128-133.[6]

Additionally, the trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint. Because summary disposition was granted under MCR 2.116(C)(7) on the basis of immunity granted by law, plaintiff was not entitled to amend his complaint pursuant to MCR 2.116(I)(5). See *Nowacki v State Employees' Retirement Sys*, 485 Mich 1037 (2010). Further, the probate court did not abuse its discretion by refusing to allow plaintiff to amend his complaint because amendment was futile. *Ormsby*, 471 Mich at 60.

[6] We reject plaintiff's contention that defendants Seals and Daniels-Hillman were not entitled to quasi-judicial witness immunity because they offered "expert" opinion testimony in the probate proceedings, citing *Estate of Voutsaras v Bender*, 326 Mich App 667, 675; 929 NW2d 809 (2019). In *Estate of Voutsaras*, this Court held that expert witnesses "are not absolutely immunized" under the doctrine of quasi-judicial immunity from "professional-malpractice claims" that relate to something other than the expert witnesses' in-court testimony. In this case, however, plaintiff asserted no claims for professional malpractice, and there is no evidence that he was ever a client to whom either Seals or Daniels-Hillman owed any professional duty that might support a claim for malpractice. Moreover, Seals and Daniels-Hillman were never qualified as expert witnesses in the probate court, and they offered only factual testimony in the probate proceedings, not any expert-opinion testimony as defined by MRE 702. Thus, the expert-witness exception to quasi-judicial immunity set forth in *Estate of Voutsaras* is inapplicable here.

The proposed minor amendments merely added additional allegations concerning testimony that Seals and Daniels-Hillman offered in the probate proceedings or actions that they took, while acting as an "arm" of the court, to safeguard NK's interests.

Affirmed. As the prevailing parties, defendants Seal and Daniels-Hillman may tax costs.

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

OSHTEMO CHARTER TOWNSHIP v KALAMAZOO COUNTY

Docket No. 355634. Submitted September 15, 2021, at Lansing. Decided September 30, 2021, at 9:00 a.m.

Petitioner, Oshtemo Charter Township, appealed in the Michigan Tax Tribunal (the MTT) the Kalamazoo County Board of Commissioners' denial of petitioner's request to levy an additional 0.5 mills for general tax purposes and petitioner's request for a proposed road millage levy of 0.5 mills. The board relied on an opinion from the Attorney General, OAG, 1985-1986, No. 6,285, p 46 (April 17, 1985), concluding that charter townships that were incorporated after the Headlee Amendment was ratified remain limited to the millage rate for general-law townships as provided by the Property Tax Limitation Act, MCL 211.201 *et seq*., unless a higher tax rate was approved by a vote of the township electors. When Headlee was adopted, petitioner was a general-law township, but in 1979 it became a charter township by resolution of the township board. Petitioner appealed the board's denial in the MTT, seeking a ruling that it could levy up to five mills for general tax purposes pursuant to MCL 42.27(2) of the Charter Township Act, MCL 42.1 *et seq*. The MTT, relying primarily on the Attorney General opinion, rejected petitioner's arguments. However, the MTT held that the proposed road millage was authorized by law pursuant to MCL 247.670. Petitioner appealed only the request to levy additional mills for general tax purposes; it did not appeal the decision pertaining to the proposed road millage.

The Court of Appeals *held*:

The Headlee Amendment added §§ 25 through 34 to Article 9 of the 1963 Michigan Constitution. Section 31 of the Headlee Amendment provides, in relevant part, that a local unit of government may not levy a tax without voter approval unless the tax was authorized at the time of Headlee's ratification in 1978. The plain language of § 31 excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified. Accordingly, the question in this case was whether petitioner remained limited to the tax rate for general-law townships because it was a general-law township at the time

Headlee was adopted or whether, having later become a charter township, the relevant limit on its taxing authority was the limit applicable to charter townships at the time Headlee was adopted. *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352 (2000), which was decided after the Attorney General opinion on which the MTT relied in this case, approved a line of § 31 cases from the Court of Appeals that stood for the proposition that the Headlee exemption of taxes authorized by law when § 31 was ratified permits the levying of previously authorized taxes even when they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date. This case fell squarely within this formulation of the "authorized by law" exemption. Changes in circumstances after the ratification of Headlee have been found to make a levy of taxes constitutional when, without those changed circumstances, the increases would have been forbidden. This case was analogous to *Saginaw Co v Buena Vista Sch Dist*, 196 Mich App 363 (1993), in which the tax in question was authorized by law when Headlee was ratified and the necessary change in circumstances for the petitioner to levy the disputed tax did not occur until after 1978. However, when that change occurred, the charter township millage rate was not a "new" tax but a previously authorized one that the petitioner was then eligible to levy. The MTT did not adequately explain its conclusion that this case was distinguishable. The MTT's decision created an arbitrary standard to determine whether the requirement of voter approval applies in these types of § 31 cases. More importantly, the MTT deviated from the clear standard established by *American Axle* that a tax is exempt from the requirement of voter approval if there was pre-Headlee authority for the tax and the local unit of government is eligible to levy the tax because of a post-Headlee change in circumstances. Any other consideration is not relevant to whether the tax was authorized by law when Headlee was ratified, which is all that the exemption requires. The Attorney General opinion was not followed because *American Axle* was binding precedent that postdated the Attorney General opinion and because the Attorney General opinion seemed to presume that any post-Headlee tax increase required voter approval, which ignored the plain language of § 31. The fact that the disputed tax would result in increased taxes was not dispositive; it first must be examined whether the tax was "authorized by law" when Headlee was ratified, which the Attorney General failed to adequately consider. Finally, the Attorney General's conclusion that charter townships like petitioner remain general-law townships for taxing purposes was inconsistent with the statutory acts governing township taxing authority.

There was no statutory basis for a charter township to continue as a general-law township for taxing purposes. Accordingly, the MTT erred by concluding that petitioner may not levy a charter millage.

Reversed and remanded.

CONSTITUTIONAL LAW — TAXATION — HEADLEE AMENDMENT — LIMIT ON A TOWNSHIP'S TAXING AUTHORITY.

The Headlee Amendment added §§ 25 through 34 to Article 9 of the 1963 Michigan Constitution; Section 31 of the Headlee Amendment provides that a local unit of government may not levy a tax without voter approval unless the tax was authorized at the time of the Headlee Amendment's ratification in 1978; the relevant limit on a township's taxing authority for a township that was a general-law township at the time the Headlee Amendment was adopted but later became a charter township is the limit applicable to charter townships at the time the Headlee Amendment was adopted.

James W. Porter and *Emily E. Westervelt* for Oshtemo Charter Township.

Cohl, Stoker & Toskey, PC (by *Timothy M. Perrone*) for Kalamazoo County and the Kalamazoo County Board of Commissioners.

Amicus Curiae:

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

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

SHAPIRO, J. The Headlee Amendment provides that a local unit of government may not levy a tax without voter approval unless the tax was authorized at the time of Headlee's ratification in 1978. At that time, Michigan law permitted general-law townships to levy property taxes at a rate not greater than one mill, while charter townships were permitted to levy prop-

erty taxes up to five mills.[1] When Headlee was adopted, petitioner was a general-law township, but in 1979 it became a charter township by resolution of the township board.[2]

In 2019, petitioner determined that its property tax rate, which was 0.9703 mills, was insufficient to service the needs of its 24,000 residents, and its board passed a resolution requesting that the Kalamazoo County Board of Commissioners allow it to levy an additional 0.5 mills for general tax purposes.[3] The Board of Commissioners denied the request, relying on an opinion from the Attorney General, OAG, 1985-1986, No. 6,285, p 46 (April 17, 1985), concluding that charter townships that were incorporated after the Headlee Amendment was ratified remain limited to the millage rate for general-law townships as provided by the Property Tax Limitation Act, MCL 211.201 *et seq*., unless a higher tax rate was approved by a vote of the township electors. Petitioner appealed to the Michigan Tax Tribunal (the MTT), seeking a ruling that it could levy up to five mills for general tax purposes pursuant

[1] See MCL 211.211(d), as amended by 1978 PA 359 (governing general-law townships); MCL 42.27, as amended by 1976 PA 90 (governing charter townships). These statutory limitations have not been changed to date. See MCL 211.211(4); MCL 42.27(2).

[2] A township having a population of 2,000 or more may incorporate as a charter township. See MCL 42.1(2). Eligible townships may incorporate by a majority vote of the electors. MCL 42.2. In 1976, the Charter Township Act was amended to allow the township board to adopt a resolution of intent to approve incorporation, subject to the electors' right of referendum. See MCL 42.3a(2)(b), as enacted by 1976 PA 90.

[3] Petitioner also requested a proposed road millage levy of 0.5 mills, which was also denied by the Board of Commissioners. The MTT reversed this decision, holding that the proposed road millage was authorized by law pursuant to MCL 247.670. Respondents did not cross-appeal that decision, and therefore the road millage will not be further addressed.

to MCL 42.27(2) of the Charter Township Act, MCL 42.1 *et seq*. The MTT, relying primarily on the Attorney General opinion, rejected petitioner's arguments, and petitioner appealed in this Court.[4]

The question before us, therefore, is whether petitioner remains limited to the tax rate for general-law townships because it was a general-law township at the time Headlee was adopted or whether, having later become a charter township, the relevant limit on its taxing authority is the limit applicable to charter townships at the time Headlee was adopted. We conclude that the Attorney General opinion is inconsistent with later-decided caselaw from the Michigan Supreme Court and that petitioner may levy the charter township millage rate. Accordingly, we conclude that the MTT made an error of law and reverse its judgment.[5]

I. ANALYSIS

The primary objective when interpreting constitutional provisions "is to realize the intent of the people by whom and for whom the constitution was ratified." *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008) (quotation marks and citation omitted). The "common understanding" of a constitutional provision is typically discerned "by applying each term's plain meaning at the time of ratification." *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684

[4] The Michigan Townships Association has filed an amicus brief in support of petitioner's position on appeal.

[5] If fraud is not alleged, the MTT's decision is reviewed "for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). This Court reviews de novo questions of law. *Foster v Van Buren Co*, 332 Mich App 273, 280; 956 NW2d 554 (2020).

NW2d 765 (2004). Courts "may also consider the circumstances surrounding the adoption of the provision and the purpose sought to be accomplished by the provision." *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 61; 972 NW2d 738 (2021).

"The Headlee Amendment added §§ 25 through 34 to Article 9 of the Michigan Constitution." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 208 n 3; 934 NW2d 713 (2019). This case specifically concerns § 31 of the Headlee Amendment, which provides, in relevant part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. [Const 1963, art 9, § 31.]

"The plain language of art 9, § 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." *American Axle & Mfg, Inc v Hamtramck*, 461 Mich 352, 362; 604 NW2d 330 (2000).

In *American Axle*, 461 Mich at 357, the Supreme Court approved a line of § 31 cases from this Court standing for the proposition "that the Headlee exemption of taxes authorized by law when the section was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee was ratified and even though the circumstances making the tax or rate applicable did not exist before that date." Petitioner argues that this case falls squarely within this formulation of the "authorized by law" exemption. We agree.

American Axle observed that "[i]n several cases, changes in circumstances after the ratification of Headlee have been found to make levy of taxes constitutional where, without those changed circumstances, the increases would have been forbidden." *Id*. For our purposes, the most instructive case is *Saginaw Co v Buena Vista Sch Dist*, 196 Mich App 363; 493 NW2d 437 (1993). In that case, the county voters had approved property tax limitations in 1974 generally limiting school districts to 9.05 mills but allowing districts located entirely within one city or charter township to levy an additional mill. *Id*. at 364. In 1990, the defendant school district redrew its borders so that it was located entirely within one charter township. *Id*. at 364-365. This Court held that the district could levy the higher millage without voter approval:

> The Headlee Amendment requires voter approval only if a unit of local government wants to impose taxes at a rate higher than that authorized by law at the time of its adoption. Const 1963, art 9, § 31. In 1978, school districts in Saginaw County located entirely within a charter township were authorized by law to levy taxes at a rate of 10.05 mills. We find that, because it is now located entirely within Buena Vista Charter Township, defendant's tax rate of 10.05 mills is not above the rate authorized by law at the time the Headlee Amendment was ratified. The category of school district into which defendant now fits existed in 1978, the tax in question was authorized by law (it was not a new kind of tax), and the rate (10.05 mills) was an authorized rate. *When defendant's geographical configuration changed, it then became eligible to tax according to the applicable preexisting tax structure*. Furthermore, before the Headlee Amendment, a simple rearrangement of boundaries would have empowered the defendant to increase the tax from 9.05 to 10.05 mills. That is all that occurred post-Headlee. Therefore, no voter approval was required for defendant to raise its millage to 10.05 mills.

[*Id*. at 366 (emphasis added), quoted in *American Axle*, 461 Mich at 358-359.]

We agree with petitioner that *Saginaw Co* is highly analogous to the instant case. As in *Saginaw Co*, the tax in question was authorized by law when Headlee was ratified. Further, townships were able to incorporate as charter townships by resolution in 1978, and had petitioner's resolution to incorporate become final before Headlee was ratified, it could have levied a charter millage without voter approval. But, like *Saginaw Co*, the necessary change in circumstances for petitioner to levy the disputed tax did not occur until after 1978. When that change occurred, the charter township millage rate was not a "new" tax but a previously authorized one that petitioner was now eligible to levy.

Respondents argue that *Saginaw Co* does not control the outcome here because there is a difference between changing the boundaries of a school district (which authorized an additional mill in taxes) and a change of structure from a general-law township to a charter township (which allows a tax increase of about four mills). Respondents fail to explain, however, why these are *material* distinctions such that a different result is warranted.[6] The question is simply whether the tax was authorized by law when Headlee was ratified; the amount of the tax and the nature of the changed circumstances making it applicable are not relevant to that inquiry.

---

[6] Respondents also argue that *Saginaw Co* is distinguishable because the voters in that case had approved the property tax rates and "so Headlee's requirement of voter approval had been met." But *Saginaw Co* did not hold that the electorate's approval of the tax rates satisfied Headlee's voter-approval requirement. Rather, this Court held that the disputed tax did not require voter approval. *Saginaw Co*, 196 Mich App at 366.

Similarly, the MTT did not adequately explain its conclusion that this case is distinguishable because a township incorporating as a charter township by resolution is not a "mere" change in circumstances. We agree with the amicus brief that this creates an arbitrary standard to determine whether the requirement of voter approval applies in these types of § 31 cases. More importantly, it deviates from the clear standard established by *American Axle* that a tax is exempt from the requirement of voter approval if there was pre-Headlee authority for the tax and the local unit of government is eligible to levy the tax because of a post-Headlee change in circumstances. See *American Axle*, 461 Mich at 357. Any other consideration is not relevant to whether the tax was authorized by law when Headlee was ratified, which is all that the exemption requires.

The MTT also relied on the fact that *Saginaw Co* distinguished that case from the Attorney General opinion addressing the question at issue in this case:

> The two opinions of the Attorney General plaintiff cites, OAG, 1985-1986, No 6285, p 46 (April 17, 1985), and OAG, 1989-1990, No 6588, p 149 (June 16, 1989),[7] deal with a quite different situation, the effect of a township becoming a charter township. Such a change exposes property owners to a new category of taxes. [*Saginaw Co*, 196 Mich App at 365.]

As the MTT recognized, this statement is nonbinding dicta because it was not necessary to this Court's resolution of the question before it. See *Auto-Owners Ins Co v All Star Lawn Specialists Plus, Inc*, 497 Mich 13,

[7] In OAG, 1989-1900, No. 6,588, p 149, the Attorney General addressed a derivative question based on the conclusion in OAG, 1985-1986, No. 6,285, p 46, that charter townships like petitioner are limited to the general-township millage rate. But only OAG, 1985-1986, No. 6,285, p 46, substantively addressed the question currently before this Court.

21 & n 15; 857 NW2d 520 (2014). Nor was this statement referenced or adopted in *American Axle*. See *American Axle*, 461 Mich at 358-359. Nonetheless, the MTT was persuaded that a change from a general-law township to a charter township allows a township to levy "new taxes." But no explanation has been offered for why the tax in this case should be considered "new," while the one in *Saginaw Co* should not. In both cases, the local unit of government "became eligible to tax according to the applicable preexisting tax structure" after a post-Headlee change in circumstances. *Saginaw Co*, 196 Mich App at 366. The increased millage rate in *Saginaw Co* was not a "new kind of tax" because it was authorized by law at the time of Headlee's ratification. See *id*. The same is true of the charter township millage rate.[8]

As for the opinion of the Attorney General, we decline to follow it for several reasons.[9] See *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich

[8] *American Axle* also approved of our decision in *Smith v Scio Twp*, 173 Mich App 381; 433 NW2d 855 (1988), in which the township electorate passed two proposals: one to incorporate as a charter township, and a second to limit its millage authority to the level of a general-law township. *Id*. at 383-384. This Court held that specific voter approval for the charter township millage rate was not required and that the electorate could not limit the charter township's taxing authority. *Id*. at 388-391. Although this case concerned a related subject matter, it did not address—either directly or by analogy—the question before us, which concerns the application of Headlee when the charter township incorporates by resolution rather than by vote of the electorate. Thus, both parties' reliance on this case is misplaced. See *People v Seewald*, 499 Mich 111, 121 n 26; 879 NW2d 237 (2016) (explaining that to derive a rule of law from the facts of a case "when the question was not raised and no legal ruling on it was rendered, is to build a syllogism upon a conjecture").

[9] Petitioner's argument that the MTT improperly relied on extrinsic evidence by considering the Attorney General opinion is without merit. Extrinsic evidence may not be considered when a constitutional provision is unambiguous. *Nat'l Pride at Work, Inc v Governor*, 481 Mich 56, 80; 748

App 432, 441; 616 NW2d 234 (2000) ("[O]pinions by attorneys general do not constitute binding authority . . . ."). First, *American Axle* is binding precedent that postdates OAG, 1985-1986, No. 6,285, p 46. *American Axle* did not address the precise question at issue in this case, but for the reasons discussed in this opinion, its adoption of caselaw from this Court and its guidance on when the "authorized by law" exemption applies controls the outcome here. Second, while it was appropriate for the Attorney General to consider that Headlee arose from a "tax revolt" and that a constitutional provision should be interpreted in a way that effectuates its purpose, see *Lockwood v Comm'r of Revenue*, 357 Mich 517, 557; 98 NW2d 753 (1959), the Attorney General seemed to presume that any post-Headlee tax increase requires voter approval. See OAG, 1985-1986, No. 6,285, at 49. This ignores, however, that "[t]he plain language of art 9, § 31, excludes from its scope the levying of a tax, or an increased rate of an existing tax, that was authorized by law when that section was ratified." *American Axle*, 461 Mich at 362. In other words, the fact that the disputed tax will result in increased taxes is not dispositive; it first must be examined whether the tax was "authorized by law" when Headlee was ratified, which the Attorney General failed to adequately consider.

Finally, the Attorney General's conclusion that charter townships like petitioner remain general-law townships for taxing purposes is inconsistent with the statutory acts governing township taxing authority. The Charter Township Act provides the millage rates for charter townships, MCL 42.27(2); *Bailey v Charter Twp*

NW2d 524 (2008). But an opinion of the Attorney General is not extrinsic evidence; it is an opinion on a question of law that is properly considered by courts.

of Pontiac (On Remand), 138 Mich App 742, 743-744; 360 NW2d 621 (1984), and the Property Tax Limitation Act controls the millage rate for general-law townships, MCL 211.211(4). The Property Tax Limitation Act specifically excludes charter townships from its scope: "The [county tax allocation] board shall approve minimum tax rates . . . for townships *other than charter townships*, of 1 mill[.]" MCL 211.211(4) (emphasis added). Accordingly, there is no statutory basis for a charter township to continue as a general-law township for taxing purposes. In contrast, our holding that petitioner may levy a charter millage has the benefit of harmonizing Headlee with the statutory acts because the taxing authority for all charter townships will be governed by the Charter Township Act.[10]

II. CONCLUSION

The MTT erred by concluding that petitioner may not levy a charter millage. Binding caselaw from the Supreme Court establishes that the tax at issue in this case falls within the "authorized by law" exemption in § 31. We decline to follow the nonbinding Attorney General opinion that predated the Supreme Court caselaw.

Reversed and remanded for further proceedings that are consistent with this opinion. We do not retain jurisdiction. No taxable costs because a public question is involved.

BECKERING, P.J., and SWARTZLE, J., concurred with SHAPIRO, J.

---

[10] We note that MCL 42.27(2) does not require charter townships to levy the full charter millage of five mills but rather limits the township to that rate without voter approval. And if a township board chooses to increase its millage rate, the township voters can express their approval or disapproval at the next election.

PEOPLE v HUGHES (ON REMAND)

Docket No. 338030. Submitted January 19, 2021, at Lansing. Decided September 30, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 867 (2022).

Kristopher A. Hughes was convicted following a jury trial in the Oakland Circuit Court, Hala Jarbou, J., of armed robbery, MCL 750.529, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 25 to 60 years in prison. Two prior trials on the armed-robbery charge had resulted in mistrials due to hung juries. After his conviction, defendant appealed, arguing that his phone records should have been excluded from the trial because the warrant that authorized the search of his phone's data permitted officers to search for evidence of drug trafficking, not armed robbery. Defendant also argued that trial counsel was ineffective for failing to object to the admission of the data on Fourth Amendment grounds. The Court of Appeals rejected those arguments and affirmed defendant's conviction in an unpublished per curiam opinion. Defendant sought leave to appeal in the Supreme Court, which reversed and held that the search of defendant's cell phone for evidence specifically related to the robbery violated defendant's Fourth Amendment rights because the warrant only authorized a search of the phone for evidence related to the drug offenses. The Supreme Court remanded the case to the Court of Appeals, directing the Court of Appeals to address whether trial counsel was ineffective for failing to raise a Fourth Amendment challenge. 505 Mich 855 (2019).

On remand, the Court of Appeals *held*:

1. To establish an ineffective-assistance-of-counsel claim, a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. Trial counsel's failure at defendant's third trial to object on Fourth Amendment grounds to admission of the evidence obtained from defendant's cell phone constituted deficient performance. Trial counsel had three opportunities to move to suppress defendant's cell phone data on the ground that it violated the Fourth Amendment and failed to do so. No objection was made before or during the first two trials, but at the third trial, defendant's trial counsel

objected, arguing that the data was not relevant or was stale. Thus, trial counsel realized at the third trial that there was something improper about the prosecutor using the data obtained from the search warrant in the drug-trafficking case but could not articulate the proper objection—even though a motion to suppress based on Fourth Amendment protections is one of the most common pretrial motions brought on behalf of criminal defendants. And such professional error could not be excused on the basis that there was no authority directly addressing the Fourth Amendment question at issue in the case when there were well-established broader principles to draw from that would have strongly supported a motion to suppress based on Fourth Amendment grounds. Moreover, because defendant's trial counsel represented defendant in both the drug-trafficking and armed-robbery cases, his trial counsel knew that defendant's phone was confiscated and submitted to forensics pursuant to the search warrant in the drug-trafficking case and that the prosecution introduced data obtained from the forensic report in all three trials for armed robbery. Under those circumstances, trial counsel's delay in realizing that the prosecutor's use of this data was out of bounds and trial counsel's failure to articulate an argument that the scope of the search warrant issued in the drug case had been exceeded supported the conclusion that trial counsel rendered deficient performance.

2. For purposes of an ineffective-assistance-of-counsel claim, prejudice is established if, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. Considering that the prosecutor heavily relied on the cell phone data and that the first two trials resulted in a hung jury, if this data had been excluded from defendant's armed-robbery trial there is a reasonable probability of a different outcome. Further, evidence obtained in violation of the Fourth Amendment is generally inadmissible at trial under the exclusionary rule unless one of the few established exceptions applies, and none applied in this case. The good-faith exception, which renders evidence seized pursuant to an invalid search warrant admissible if the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid, was inapplicable because the search of the cell phone data for evidence related to the armed robbery was not authorized by the warrant and, therefore, the searching officer was not relying on the magistrate's finding of probable cause. Nor did the binding-precedent exception, under which the evidence might have been admissible if the officer was relying on binding precedent specifically authorizing the search, apply because the prosecutor did not identify any preexisting

> caselaw suggesting that the officer's actions in this case were lawful at the time the search was conducted. Finally, the prosecutor's argument that there was no police misconduct worthy of deterrence—because at the time of the search no court had held that a second search warrant is necessary under the circumstances of this case and, thus, the searching officer did not knowingly violate the law—was without merit. Such a holding would allow an officer or the prosecution, when the law is unsettled, to make an independent conclusion concerning the legality of a search or seizure, and even if a court subsequently disagreed with that conclusion, the illegally obtained evidence would not be suppressed. This would be inconsistent with the exclusionary rule's sole purpose, which is to deter future Fourth Amendment violations. The data obtained in violation of the Fourth Amendment in this case had to be suppressed.
>
> Reversed and remanded.
>
> TUKEL, P.J., did not participate.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Karen D. McDonald*, Prosecuting Attorney, *Marilyn J. Day*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender Office (by *Jason R. Eggert*) for defendant.

ON REMAND

Before: TUKEL, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. This case returns on remand for us to decide whether trial counsel was ineffective for failing to challenge the admission of evidence discovered on defendant's cellular telephone in a search that the Michigan Supreme Court has deemed unconstitutional. We conclude that defendant was denied his constitutional right to effective assistance of counsel. Trial counsel's failure to object to the evidence on Fourth Amendment grounds was objectively unreason-

able, and defendant was prejudiced by this error because the evidence would have been barred by the exclusionary rule. Accordingly, we reverse and remand for a new trial.

I. BACKGROUND

Defendant faced two separate criminal prosecutions, "one related to drug trafficking and the other related to armed robbery." *People v Hughes*, 506 Mich 512, 517; 958 NW2d 98 (2020). The facts of the armed robbery are as follows:

> On August 6, 2016, [Ronald] Stites was going for a walk when he met Lisa Weber. The two talked, and Stites invited Weber back to his home. At Stites's residence, Weber offered to stay with Stites all night and to perform sexual acts in exchange for $50. Stites agreed, and Weber followed him into his bedroom, where he opened a safe containing $4,200 in cash and other items and pulled out a $50 bill that he agreed to give her after the night was over. Stites then performed oral sex on Weber. Afterward, Weber went to the store to get something to drink. Approximately 15-20 minutes later, she called a drug dealer, who went by the name of "K-1" or "Killer," and asked that he come over and sell drugs to her and Stites. Sometime thereafter, a man arrived at Stites's home, sold Weber and Stites crack cocaine, and then departed. Weber and Stites consumed some of the drugs and continued their sexual activities. Later in the evening, the man who had sold the drugs returned to the home with a gun and stole Stites's safe at gunpoint. Stites testified that Weber assisted in the robbery and departed the home with the robber, while Weber asserted that she did not assist in the robbery and only complied with the robber's demands to avoid being harmed. Weber identified defendant as the perpetrator, while Stites could not identify defendant as the perpetrator. [*Id*. at 518.]

The issue in this appeal concerns a search of data extracted from defendant's cell phone. Detective Matthew Gorman obtained a warrant to search defen-

dant's personal belongings, including any cell phones. The warrant sought information related only to the drug-trafficking charge; it did not authorize a search for evidence related to the armed robbery. *Id*. at 519. While executing the warrant, police officers recovered a cell phone from defendant's person on August 12, 2016. *Id*. at 520. Defendant was arraigned on the robbery charge on August 17, 2016. *Id*.

On August 23, 2016, Detective Edward Wagrowski performed a forensic examination of defendant's cell phone. He used a software program, "Cellebrite," to extract digital data. *Id*. That program "separated and sorted the device's data into relevant categories by, for example, placing all of the photographs together in a single location." *Id*. The examination resulted in a 600-page report, which "included more than 2,000 call logs, more than 2,900 text messages, and more than 1,000 photographs." *Id*. Defendant later pleaded guilty to various charges in the drug-trafficking case.

A month after this first data extraction, and at the request of the prosecutor in the armed-robbery case, Detective Wagrowski conducted a second search, this time searching for: "(a) contacts with the phone numbers of Weber and Stites and (b) the name 'Lisa,' variations on the word 'killer' (defendant's nickname), and the name 'Kris/Kristopher' (defendant's actual name)." *Id*. at 521.

> These searches uncovered 19 calls between defendant and Weber on the night of the robbery and 15 text messages between defendant and Weber between August 5, 2016 and August 10, 2016. Weber's texts to defendant leading up to the robbery included communications indicating where Stites's home was located, that the home was unlocked, and that there was a flat screen TV in the home. Defendant sent texts to Weber on the night of the robbery asking her to "[t]ext me or call me" and to "open the doo[r]." None of the

> text messages with the words "killer" or "Kris" were from Weber's number. . . . [T]he results of these searches served as evidence at defendant's armed-robbery trials. Defense counsel objected to the admission of this evidence, arguing that it was "not relevant" and "stale," but the trial court overruled his objection. [*Id*.]

"Defendant's first two trials on the armed-robbery charge resulted in mistrials due to hung juries." *Id*. At the third trial, which resulted in defendant's conviction, the prosecutor acknowledged that the jury might have concerns regarding Weber's credibility as a "disputed accomplice" to the crime but "argued during both opening and closing statements that the text messages and phone calls discovered on defendant's cell phone bolstered her testimony and established a link between defendant and the armed robbery." *Id*. at 522.

On appeal, defendant argued that the cell phone records should have been excluded from his armed-robbery trial because "the warrant supporting a search of the data only authorized a search for evidence of drug trafficking and not armed robbery" and that trial counsel was ineffective for failing to raise an argument under the Fourth Amendment for suppression of the cell phone data. *Id*. at 522. We rejected those arguments and affirmed defendant's conviction. *People v Hughes*, unpublished per curiam opinion of the Court of Appeals, issued September 25, 2018 (Docket No. 338030).

In a unanimous opinion, the Supreme Court reversed our decision. It held that the search of defendant's cell phone for evidence specifically related to the robbery violated defendant's Fourth Amendment rights because the warrant only authorized a search of the phone for evidence related to the drug offenses. *Hughes*, 506 Mich at 552-553. The Court's decision rested on the Fourth Amendment's particularity requirement as well as a 2014 decision from the United States Supreme Court:

> We conclude—in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed2d 430 (2014) (addressing the "sensitive" nature of cell-phone data)—that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. [*Id*. at 516.]

The Court declined to reach the question whether trial counsel was ineffective for failing to raise a Fourth Amendment challenge and instead remanded to this Court to decide the issue. *Id*. at 551-552.

We now consider defendant's ineffective-assistance-of-counsel claim in light of the Supreme Court's opinion and after consideration of the parties' supplemental briefing.

II. ANALYSIS

"We review de novo the constitutional question whether an attorney's ineffective assistance deprived a defendant of his or her Sixth Amendment right to counsel." *People v Fyda*, 288 Mich App 446, 449-450; 793 NW2d 712 (2010). Where the trial court has not conducted an evidentiary hearing, this Court's review "is limited to mistakes apparent on the record." *Id*. at 450.

"To establish a claim of ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *Id*. at 450. Trial counsel's performance is deficient when it falls below an objective standard of professional reasonableness. *Id*. "When reviewing defense counsel's performance, the reviewing court must first objectively 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of profes-

sionally competent assistance.' " *People v Jackson (On Reconsideration)*, 313 Mich App 409, 431; 884 NW2d 297 (2015), quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Prejudice is established if, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *Fyda*, 288 Mich App at 450. Defendant bears the burden of establishing both prongs. *People v Crews*, 299 Mich App 381, 400; 829 NW2d 898 (2013).

A. DEFICIENT PERFORMANCE

We begin with the fact that trial counsel had three opportunities to move to suppress defendant's cell phone data on the ground that the search violated the Fourth Amendment and failed to do so. At each of defendant's three trials for armed robbery, the prosecutor introduced evidence of phone logs obtained pursuant to the search warrant for the drug-trafficking case. No objection was made before or during the first two trials. Before the third trial, the prosecutor informed trial counsel that he intended to introduce "additional documents from the forensic report" of defendant's phone.[1] Trial counsel now objected, arguing that the additional documents were not relevant because "a lot of that file is in reference to the drug case" and because the phone records were "stale." The trial court denied the objection, and later when the records were introduced, trial counsel again unsuccessfully argued that the data was not relevant to the armed-robbery case.

Thus, despite a prolonged period of time to consider that the police had searched defendant's phone for

[1] At the third trial, the prosecutor introduced, for the first time, search results for variations of the word "killer" and "Kris/Kristopher" from defendant's cell phone data.

evidence of a different crime than what the search warrant was issued for, trial counsel never raised a Fourth Amendment challenge. This was not a strategic decision, to which we generally defer. Trial counsel realized at the third trial that there was *something* improper about the prosecutor using the data obtained from a search warrant in the drug case, but he could not articulate the appropriate objection, i.e., that the search of defendant's phone for evidence of armed robbery exceeded the scope of the search warrant. Instead, he argued that the cell phone data was not relevant to the armed-robbery case, even though it plainly was, and that it was stale, even though it plainly was not.[2] It is safe to say that a motion to suppress based on Fourth Amendment protections is one of the most common pretrial motions brought by criminal defendants. Counsel's failure to raise any argument regarding the scope of the search warrant over the course of three trials shows a professional error. See *Hinton v Alabama*, 571 US 263, 274; 134 S Ct 1081; 188 L Ed 2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *Bullock v Carver*, 297 F3d 1036, 1050 (CA 10, 2002) ("In many cases, a lawyer's unawareness of relevant law will . . . result in a finding that counsel performed in an objectively deficient manner.").

---

[2] Trial counsel was apparently arguing that it had been too long since the initial search to introduce new records from the forensic report, but staleness refers to whether the information supporting the affidavit is recent enough so that "probable cause is sufficiently fresh to presume that the sought items remain on the premises." *People v Gillam*, 93 Mich App 548, 553; 286 NW2d 890 (1979).

The prosecutor argues that trial counsel's failure to raise a Fourth Amendment challenge was reasonable because counsel was not required to anticipate future developments in the law. However, although *Hughes* decided an issue of first impression, it was based on "two *fundamental* sources of relevant law: (a) the Fourth Amendment's 'particularity' requirement, which limits an officer's discretion when conducting a search pursuant to a warrant and (b) *Riley*'s recognition of the extensive privacy interests in cellular data." *Hughes*, 506 Mich at 538 (emphasis added). Per the Fourth Amendment's "particularity requirement," the scope of a warrant must be confined to a specific crime. See *id*. at 540 ("[T]he state exceeds the scope of a warrant where a search is not reasonably directed at uncovering evidence related to the criminal activity identified in the warrant, but rather is designed to uncover evidence of criminal activity *not* identified in the warrant."). For example, "a warrant authorizing police to search a home for evidence of a stolen television set would not permit officers to search desk drawers for evidence of drug possession." *Id*. at 539. And in *Riley*, the United States Supreme Court made clear that "general Fourth Amendment principles[, including the particularity requirement,] apply with equal force to the digital contents of a cell phone." *Id*. at 527. Accordingly, in what it characterized as a "simple and straightforward" holding, *Hughes* concluded that "a warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant." *Id*. at 553.[3]

[3] Relying primarily on *Riley*, the Court also rejected the prosecutor's argument that the warrant to seize and search defendant's phone extinguished defendant's reasonable expectation of privacy. *Hughes*, 506 Mich at 528-537.

Thus, while there was no authority directly addressing the Fourth Amendment question at issue in this case, there were well-established broader principles to draw from and caselaw to analogize—as defendant's appointed appellate counsel did in a timely submitted brief to this Court and as attorneys generally do on a regular basis. Because there was existing precedent that would have strongly supported a motion to suppress, trial counsel's failure to raise the Fourth Amendment challenge cannot be excused for not foreseeing a change in the law.[4] See *United States v Morris*, 917 F3d 818, 824 (CA 4, 2019) ("Even where the law is unsettled, . . . counsel must raise a material objection or argument if there is relevant authority strongly suggesting that it is warranted.") (quotation marks and citation omitted); *United States v Palacios*, 982 F3d 920, 924 (CA 4, 2020) ("[W]hile counsel need not predict every new development in the law, they are obliged to make arguments that are sufficiently foreshadowed in existing case law.") (quotation marks and citation omitted).

To be clear, we do not hold that trial counsel was required to make an argument precisely mirroring the analysis set forth in *Hughes*. But, based on the existing authority discussed in *Hughes*, it is objectively reasonable to have expected trial counsel to raise a Fourth Amendment argument and, at the very least, preserve this issue for appeal. Further, our conclusion that trial counsel rendered deficient performance is based, in part, on the particular circumstances of this case. Trial

[4] In arguing that trial counsel did not commit professional error by not raising a Fourth Amendment challenge, the prosecutor notes our prior erroneous decision in this case. But there is a significant difference between not raising an issue and wrongly deciding one, and trial counsel could not have been relying on that decision because it had not yet been rendered.

counsel represented defendant in both the drug-trafficking and armed-robbery cases; counsel knew that defendant's phone was confiscated and submitted to forensics pursuant to the search warrant for the drug case; and at all three trials for armed robbery, the prosecution introduced data obtained from the forensic report. Nonetheless, it was not until the third trial that trial counsel began to realize that the prosecutor's use of the cell phone data was out of bounds, but he was unable to articulate an argument that the police had exceeded the scope of the search warrant issued in the drug case. Under these circumstances, we conclude that trial counsel rendered deficient performance by not raising a Fourth Amendment challenge.

B. PREJUDICE

The next question is whether defendant was prejudiced by trial counsel's failure to move for suppression on the appropriate ground. Considering that the prosecutor heavily relied on the cell phone data and that the first two trials resulted in a hung jury, there is no dispute that if this evidence would have been excluded from defendant's trial then a reasonable probability of a different outcome exists. Accordingly, the prejudice prong in this case turns on whether the illegally obtained evidence would have been suppressed under the exclusionary rule.

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. "[S]earches or seizures conducted without a warrant are presumptively unreasonable and, therefore, unconstitutional." *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). Generally, evidence obtained in violation of the Fourth Amendment is inadmissible at trial. *People v Moorman*, 331 Mich App

481, 485; 952 NW3d 597 (2020). Known as the exclusionary rule, this judicially created doctrine serves to deter violations of the Fourth Amendment. *Utah v Strieff*, 579 US 232, 237; 136 S Ct 2056; 195 L Ed 2d 400 (2016). See also *United States v Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 561 (1974) ("[T]he [exclusionary] rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . .").

There are a few established exceptions to the exclusionary rule, but none is applicable here. Among the various exceptions is the good-faith exception, which "renders evidence seized pursuant to an invalid search warrant admissible as substantive evidence in criminal proceedings where the police acted in reasonable reliance on a presumptively valid search warrant that was later declared invalid." *People v Hellstrom*, 264 Mich App 187, 193; 690 NW2d 293 (2004), citing *United States v Leon*, 468 US 897, 905; 104 S Ct 3405; 82 L Ed 2d 677 (1984). In those cases, it is the magistrate rather than the officer who made an error, and therefore excluding the evidence does not further the deterrence rationale behind the exclusionary rule:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations. [*Leon*, 468 US at 921.]

The Michigan Supreme Court adopted the good-faith exception in *People v Goldston*, 470 Mich 523, 526; 682 NW2d 479 (2004).

The prosecutor argues that this exception applies in this case because Detective Wagrowski was acting in objective good-faith on the warrant. However, the search of the cell phone data for evidence of armed robbery was not authorized by the warrant, and therefore the officer was not relying on the magistrate's finding of probable cause. Instead, the search was conducted at the request of the prosecutor, who erroneously determined that a second search warrant was not necessary. But unlike a magistrate, the prosecutor is not a neutral and detached decision-maker but rather is part of the "law enforcement team." See *Leon*, 468 US at 917. See also *Coolidge v New Hampshire*, 403 US 443, 450; 91 S Ct 2022; 29 L Ed 2d 564 (1971) (holding that law enforcement officials are per se disqualified from issuing search warrants because "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations . . . ."). Because the unlawful search was not attributable to an error made by a neutral and detached magistrate, the rationale underlying the good-faith exception does not apply in this case.

The prosecutor also relies on *Davis v United States*, 564 US 229, 241; 131 S Ct 2419; 180 L Ed 2d 285 (2011), which held that an officer's illegal search will not require exclusion of the evidence so long as the officer was relying on "binding appellate precedent specifically [authorizing the] particular police practice" that is later overruled. In these cases, exclusion is not warranted because it is objectively reasonable for an officer to rely on binding caselaw authorizing the police practice:

> [W]hen binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no

> more than act as a reasonable officer would and should act under the circumstances. [*Id*. at 241, quoting *Leon*, 468 US at 920 (quotation marks, citation, and brackets omitted).]

See also *People v Mungo (On Second Remand)*, 295 Mich App 537, 556; 813 NW2d 796 (2012) (holding that exclusion of the illegally obtained evidence was not required "[b]ecause the search was constitutional under existing law at the time of the search").

The prosecutor does not identify binding precedent that specifically authorized the warrantless search in this case. In fact, the prosecutor does not identify any preexisting caselaw suggesting that the officer's actions in this case were lawful at the time the search was conducted. As discussed, *Hughes* reached the contrary conclusion on the basis of "fundamental" Fourth Amendment law, *Hughes*, 506 Mich at 538, and there was no need to abrogate or overrule any caselaw. In any event, *Davis* did not address the question here, which is whether the exclusionary rule applies in the *absence* of binding appellate precedent addressing the police practice at issue. Accordingly, the prosecutor's reliance on *Davis* is misplaced.

Although this case does not implicate any of the recognized exceptions to the exclusionary rule, the prosecutor nonetheless maintains that the evidence should not be barred because suppression will not further the deterrent purpose of the exclusionary rule. The prosecutor is correct that "[w]here suppression would fail to yield any appreciable deterrence, exclusion of the evidence is unwarranted." *People v Hammerlund*, 337 Mich App 598, 607; 977 NW2d 148 (2021). However, we disagree that application of the exclusionary rule in this case would serve no deterrent function.

The prosecutor argues that there is no police misconduct worthy of deterrence because at the time of the search no court had held that a second search warrant is necessary under the circumstances of this case and thus Detective Wagrowski did not knowingly violate the law. Were we to agree with this argument, however, we would effectively be holding that when the law is unsettled, an officer or the prosecutor is free to make an independent conclusion concerning the legality of a search or seizure, and even if a court subsequently disagrees with that conclusion, the illegally obtained evidence will not be suppressed. Under this approach, an officer would have an incentive *not* to seek a warrant when caselaw is unclear because the request might be denied. On the other hand, if the officer simply decides in "good faith" what the law is, then his or her determination will control at the time a motion to suppress is brought. And "[i]f police have little incentive to obtain a warrant, they will not do so. The law must provide that incentive; otherwise, the warrant requirement of the Fourth Amendment will become a dead letter." *United States v Ogbuh*, 982 F2d 1000, 1004 (CA 6, 1993). Further, there will undoubtedly be more cases where the officer or the prosecutor, who "simply cannot be asked to maintain . . . neutrality with regard to their own investigations," *Coolidge*, 403 US at 450, erroneously concludes that a search warrant is not necessary. Thus, allowing the admission of illegally obtained evidence in these types of cases is not consistent with Fourth Amendment jurisprudence as it invites, rather than deters, future unlawful searches and seizures. See *Davis*, 564 US at 236-237 ("The [exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations.").

The question in this case is *who* is authorized to decide whether a warrant is necessary in the absence of binding appellate precedent specifically authorizing the search. The good-faith exception as it exists encourages officers to seek approval from magistrates, who have the "responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment." *Leon*, 468 US at 921. Allowing admission of the illegally obtained evidence in this case would upend this framework, however, because officers would have no incentive to seek a warrant. Suppressing the evidence, on the other hand, will encourage officers to seek review of the legality of a search by a neutral magistrate *before* the search is conducted and will therefore deter future Fourth Amendment violations in cases where the law is unsettled.

For these reasons, we decline to create a new exception to the exclusionary rule,[5] and instead hold that the evidence obtained in violation of the Fourth Amendment in this case must be suppressed.

III. CONCLUSION

Defendant was denied his constitutional right to effective assistance of counsel. Trial counsel's failure to move for suppression of the cell phone data on Fourth Amendment grounds was objectively unreasonable. Defendant was prejudiced by this professional error because the motion would have resulted in suppression of the cell phone data, and there is a reasonable probability that the result at trial would have been

[5] The prosecutor does not identify any caselaw applying the good-faith exception when there was an absence of binding judicial precedent addressing the police practice that was later held to be unconstitutional.

different absent this evidence. We reverse defendant's conviction and remand for a new trial at which the fruits of the unconstitutional search may not be admitted. We do not retain jurisdiction.

BECKERING, J., concurred with SHAPIRO, J.

TUKEL, P.J., did not participate.

VECTREN INFRASTRUCTURE SERVICES CORPORATION v DEPARTMENT OF TREASURY (ON REMAND)

Docket No. 345462. Submitted January 12, 2021, at Lansing. Decided September 30, 2021, at 9:10 a.m. Leave to appeal sought.

Vectren Infrastructure Services Corporation, the successor in interest to Minnesota Limited, Inc. (MLI), sued the Department of Treasury in the Court of Claims, alleging that the Department had improperly assessed a tax deficiency against MLI after auditing MLI's Michigan Business Tax (MBT) returns for 2010 and part of 2011. In 2010, a Michigan company retained MLI, a Minnesota-based company, to assist in the cleanup of a severe oil spill in Kalamazoo. MLI rented most of the equipment it used on the Kalamazoo project and hired Michigan union employees to perform the work. In March 2011, while the Kalamazoo project was ongoing, MLI sold all of its assets to plaintiff for $80 million. MLI treated the sale for tax purposes as a sale of its assets under the federal tax code. MLI timely filed its MBT returns for 2010 and for the period in 2011 before the sale, January 1, 2011 to March 31, 2011 (the Short Year). To accurately tax only Michigan business activity, the Michigan Business Tax Act (the MBTA), MCL 208.1101 *et seq*., employs an apportionment formula. For a taxpayer whose business activities are subject to tax within and outside Michigan, its tax base is apportioned to Michigan by multiplying its tax base by the sales factor calculated under MCL 208.1303. The sales factor is a fraction, in which the numerator is total sales in the state during the tax year and the denominator is total sales of the taxpayer everywhere during the tax year. In its MBT return for the Short Year, MLI included the sale of its assets in the denominator of its sales factor. Following the audit, defendant determined that MLI had improperly included its gain from the sale of its assets in the sales-factor denominator, resulting in an overstatement of its total sales and the reduction of its Michigan tax liability. The auditor excluded MLI's sale of assets from the sales factor and included it in MLI's preapportioned tax base, which increased MLI's sales factor from 14.9860% to 69.9761% and consequently increased its tax liability. MLI asked defendant for an alternative apportionment for the Short Year, but defendant denied MLI's request and determined

that MLI had not overcome the presumption that the statutory apportionment fairly represented MLI's business activity in Michigan for the Short Year. Plaintiff filed suit in the Court of Claims, arguing, in part, that defendant's formulation of the sales factor for the Short Year resulted in a grossly distortive tax that violated the Equal Protection, Due Process, and Commerce Clauses of the United States Constitution. Both parties moved for summary disposition, and the court, COLLEEN A. O'BRIEN, J., granted summary disposition to defendant. According to the court, defendant had properly included MLI's gain from the sale of its assets in MLI's tax base because the sale qualified as "business income" within the meaning of the MBTA. The court further concluded that MLI was not entitled to an alternative apportionment because its dispute did not concern the constitutionality of the apportionment formula as applied to its MBT but rather concerned the inclusion of the gain from the sale of its assets in its tax base. Plaintiff appealed. The Court of Appeals, TUKEL, P.J., and SAWYER and RIORDAN, JJ., reversed the decision of the Court of Claims, vacated the tax assessment and penalty, and remanded the case to the Court of Claims for it to determine an alternative method of apportionment. 331 Mich App 568 (2020). Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave, the Supreme Court vacated the Court of Appeals judgment and remanded the case to the Court of Appeals to address plaintiff's arguments regarding the proper method for calculating the business tax due under the statutory formula, concluding that the proper method for calculating the business tax had to be addressed before determining that MCL 208.1309 requires application of an alternative method of apportionment. 506 Mich 964 (2020). Having determined that the Court of Claims never ruled on Count I of plaintiff's first amended complaint and that the issue had been properly preserved, the Court of Appeals remanded the case to the Court of Claims for it to consider that issue. The Court of Claims, COLLEEN A. O'BRIEN, J., held that the definition of "sale" under MCL 208.1115(1)(a) did not include the sale of MLI. After an extensive analysis, the Court of Claims concluded that the sale of an entire business would not be equivalent to the sale of inventory. In particular, the Court of Claims noted that the sale of the assets of MLI included equipment for which there was a depreciation allowance under the Internal Revenue Code, which MCL 208.1111(4)(e)(*ii*) excludes from the definition of "inventory." Accordingly, the Court of Claims rejected plaintiff's argument that the sale of MLI constituted "a sale of stock in trade or inventory" and concluded that it could not be included in the sales-factor denominator. The Court

of Claims also addressed plaintiff's argument that the sale must be included in the sales-factor denominator because it is included in the calculation of plaintiff's business activity; the court determined that this argument failed because of the differing definitions employed in the statute. The case then returned to the Court of Appeals, which had retained jurisdiction.

On remand, the Court of Appeals *held*:

The Court of Claims correctly determined that the proper interpretation of the relevant statutes supported defendant's application of the statutory formula. Accordingly, the conclusion reached in the original Court of Appeals opinion was reaffirmed: the application of the statutory formula to this case was a constitutional violation. To apply the statutory formula, as defendant did, to the circumstances of this case would result in the imposition of a tax in violation of the Commerce Clause. The analysis in the original Court of Appeals opinion regarding the constitutional defect present in applying the statutory formula under the facts of this case to calculate the tax owed was adopted. The United States Supreme Court has held that the Due Process and Commerce Clauses do not require the use of a particular apportionment formula; rather, the Constitution requires only that the formula be fair, in that it must fairly determine the portion of income that can be fairly attributed to in-state activities. Fairness also requires that the choice of factors used in the formula actually reflect a reasonable sense of how the income was generated. A formula is not fair when the taxpayer proves by clear and cogent evidence that the income attributed to the state was out of all appropriate proportion to the business transacted in that state or has led to a grossly distorted result. Plaintiff presented clear and cogent evidence that the statutory formula, as applied by defendant, attributed business activity to Michigan that was out of all appropriate proportion to the actual business activity transacted in the state, contrary to MCL 208.1309(3). Much of the activity and assets involved in the sale did not have any connection to Michigan, but because the sale occurred during the Short Year, when an unusually large percentage of MLI's business activity took place in Michigan, an unreasonably large portion of the sale was attributed to Michigan and taxed under the MBT. Therefore, the apportionment formula was unconstitutional as applied to MLI under the circumstances, and an alternative method of apportionment had to be determined. Accordingly, the tax assessment and penalty were again vacated, and the case was remanded to the Court of Claims with directions

to determine an appropriate alternative apportionment method if the parties cannot agree on one.

Reversed and remanded.

TUKEL, P.J., did not participate.

TAXATION — MICHIGAN BUSINESS TAX ACT — OUT-OF-STATE BUSINESS ACTIVITY — INCOME APPORTIONMENT.

The apportionment formula used to calculate the amount of tax attributable to the state by an out-of-state company that is also liable to another state for tax on its business activity must be fair under the federal Constitution; that is, the formula must fairly determine the portion of income that can be fairly attributed to in-state activity, and the factors used in the formula must actually reflect a sense of how the income was generated; a formula is not fair when the taxpayer proves by clear and cogent evidence that the income attributed to the state was out of all appropriate proportion to the business transacted in the state or when it has led to a grossly distortive result.

Foley & Lardner LLP (by *Lynn A. Gandhi* and *Maxwell A. Czerniawski*) for Vectren Infrastructure Services Corporation.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *David W. Thompson* and *Justin R. Call*, Assistant Attorneys General, for the Department of Treasury.

ON REMAND

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

PER CURIAM. This matter is again before us following a remand by the Supreme Court. The facts of this case are set out in our original opinion and need not be repeated here. *Vectren Infrastructure Servs Corp v Dep't of Treasury*, 331 Mich App 568, 570-576; 953 NW2d 213 (2020), vacated 506 Mich 964 (2020). Following the Supreme Court's remand, we determined that in order to fully comply with the Supreme Court's

directions on remand, we ourselves first had to remand the matter to the trial court. We did so, and the trial court fully addressed the issue on remand.

In our original opinion, we concluded:

> Application of the statutory formula in this case runs afoul of the Due Process and Commerce Clauses, incorporated in the statute, because it does not fairly determine the portion of income from the Sale that is reasonably attributed to in-state activities. Fairness, in part, requires that the choice of "factors used in the apportionment formula must actually reflect a reasonable sense of how [the business activity] is generated." *Container Corp of America* [*v Franchise Tax Bd*, 463 US 159, 169; 103 S Ct 2933; 77 L Ed 2d 545 (1983)]. Looking only at the Short Year does not actually and reasonably reflect how the income from the Sale was generated. As in *Hans Rees' Sons*[, *Inc v North Carolina*, 283 US 123, 134; 51 S Ct 385; 75 L Ed 879 (1931)], the statutory formula when applied in this case operates "so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." [*Vectren*, 331 Mich App at 583-584 (first alteration in original).]

Defendant sought leave to appeal in the Supreme Court, and in lieu of granting leave, the Supreme Court vacated our judgment and remanded the matter to this Court "to address the plaintiff's arguments regarding the proper method for calculating the business tax due under the statutory formula." *Vectren Infrastructure Servs Corp v Dep't of Treasury*, 506 Mich 964, 964 (2020). The Court concluded that this "foundational issue must be addressed before determining that MCL 208.1309 requires application of an alternative method of apportionment." *Id*.

We directed the trial court in our remand order to address Count I of plaintiff's first amended complaint. In a nutshell, the trial court's task on remand was to

answer the question posed by the Supreme Court's remand order—namely, what is the proper method under the statutory formula to calculate the tax due? More specifically, the key question the trial court addressed on remand was whether the sale of the business should have been included in the sales factor of the statutory formula. Under MCL 208.1303(1), the sales factor is "a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year."

In a detailed analysis, the trial court determined that the definition of "sale" under MCL 208.1115(1)(a) would not include the sale of the business, Minnesota Limited, Inc. (MLI).[1] The trial court particularly drew attention to the use of the word "inventory" in the statute. After an extensive analysis, the trial court concluded that the sale of an entire business would not be equivalent to the sale of inventory. In particular, the trial court noted that the sale of the assets of MLI included equipment for which there was a depreciation allowance under the Internal Revenue Code, which MCL 208.1111(4)(e)(*ii*) excludes from the definition of "inventory."[2] Thus, the trial court rejected plaintiff's argument that the sale of MLI constituted "a sale of stock

---

[1] MCL 208.1115(1)(a) provides, in pertinent part:

> The transfer of title to, or possession of, property that is stock in trade or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. For intangible property, the amounts received shall be limited to any gain received from the disposition of that property.

[2] Indeed, the trial court noted "the overwhelming majority of the assets sold were depreciable assets."

in trade or inventory" and concluded that it could not be included in the sales-factor denominator.

The trial court then addressed plaintiff's argument that the sale must be included in the sales-factor denominator because it is included in the calculation of plaintiff's business activity. While this would seem to be a very logical and compelling argument, it fails, as the trial court pointed out, because of the differing definitions employed in the statute.[3] Simply put, the definition of "business activity" under MCL 208.1105 is broader than the definition of the sales-factor denominator. Indeed, we made brief reference to this in our original opinion, and that is what lead us to conclude that applying the statutory formula to this case resulted in a constitutional violation:

> We do note, however, that we do not necessarily disagree with the Department's basic position on how to calculate the tax under the statutory formula. Its position is reasonable in light of the differing definitions of "business activity," "business income," and "sales" and how those terms are employed in calculating the tax base and applying the sales factor to apportion the sales to Michigan. But, for the reasons discussed below, we conclude that to apply the statutory formula, as the Department did, to the circumstances of this case would result in the imposition of a tax in violation of the Commerce Clause. Accordingly, allowing

[3] The trial court did not delve deeply into this issue, quite properly, because it was outside the scope of the remand. In any event, the definition of "business activity" under MCL 208.1105(1), which includes "a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible," is sufficiently broad so as to include the sale of the business; therefore, the sale of MLI would be included in plaintiff's business activity and business income for the determination of the tax. As for plaintiff's additional argument that including the sale of the business in the tax base, but not in the sales factor, is impermissibly inconsistent, that is a large contributing factor, at least in the context of this case, to our conclusion that this represents a constitutional violation.

> for an alternate formula, as plaintiff requested, is necessary to avoid the constitutional violation. [*Vectren*, 331 Mich App at 576.]

With the trial court now having fully addressed this fundamental issue, we conclude that the trial court correctly determined that the proper interpretation of the relevant statutes supports defendant's application of the statutory formula, and like the trial court, we reject plaintiff's challenges to it. Having resolved the question posed to us by the Supreme Court, that brings us back to our conclusion in our original opinion. Our original opinion was essentially based on the assumption that plaintiff's challenges to the determination of the proper calculation of the tax under the statutory formula were without merit. We have now rejected plaintiff's challenges to the proper method of calculating the tax under the statutory formula.

This reaffirms the conclusion that we reached in our original opinion: the application of the statutory formula to this case constitutes a constitutional violation. We adopt the analysis in our original opinion regarding the constitutional defect present in the case in applying the statutory formula under the facts of this case to calculate the tax owed. An alternative method of apportionment must be adopted. We again vacate the tax assessment and penalty in this case. We remand the case to the trial court with directions to determine an appropriate alternative apportionment method if the parties are unable to agree on one.

Reversed and remanded for further proceedings that are consistent with this opinion and our original opinion. We do not retain jurisdiction. No costs.

SAWYER and RIORDAN, JJ., concurred.

TUKEL, P.J., did not participate.

PEOPLE v WARNER

Docket No. 351791. Submitted May 12, 2021, at Lansing. Decided October 7, 2021, at 9:00 a.m. Leave to appeal sought.

Damon E. Warner was charged in 2016 in the Eaton Circuit Court with first- and second-degree criminal sexual conduct (CSC-I and -II), MCL 750.520b(1)(b)(*i*) and MCL 750.520c, for allegedly sexually assaulting his minor stepdaughter. A jury found him guilty of CSC-II but was unable to reach a verdict regarding the CSC-I charge. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 10 to 30 years' imprisonment. After sentencing, the prosecutor moved to dismiss the CSC-I charge by entry of a *nolle prosequi* order. On August 14, 2017, the trial court granted the prosecutor's motion and dismissed the CSC-I charge without prejudice. The Court of Appeals, SWARTZLE, P.J., and MARKEY, J. (RONAYNE KRAUSE, J., dissenting), in an unpublished per curiam opinion issued March 21, 2019 (Docket No. 340272), granted defendant a new trial after he successfully appealed his CSC-II conviction. After the trial date was scheduled, the prosecutor moved the trial court to amend the information to reinstate the CSC-I charge that had been dismissed. The trial court, Janice K. Cunningham, J., granted the motion over defendant's objections. Before trial, the prosecutor provided notice that she had retained an expert on child sexual abuse. Defendant moved the trial court to provide him with an expert on false confessions and to conduct an *in camera* inspection of the victim's medical and psychological records. The court denied both motions. After the trial, a jury found defendant not guilty of CSC-II but guilty of CSC-I. The guidelines minimum sentence range for defendant's CSC-I conviction was 51 to 127 months' imprisonment. The trial court departed from the advisory sentencing guidelines range and sentenced defendant to 20 to 40 years' imprisonment. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting the prosecutor's motion to reinstate the CSC-I charge that had been dismissed after defendant's first trial. MCL 767.29 provides, in relevant part, that a prosecutor may not enter a *nolle prosequi* or discon-

tinue or abandon an indictment without stating the reasons for doing so on the record and without leave of the court. In *People v Curtis*, 389 Mich 698 (1973), the Supreme Court interpreted a prior version of MCL 767.29 to mean that a prosecuting attorney who secures a *nolle prosequi* after an indictment must obtain a new indictment and begin proceedings anew in order to reinstate the original charge. The *Curtis* Court further stated that, under the statute, a prosecutor was not permitted to retract a *nolle prosequi* and immediately proceed to trial on the same indictment. In this case, the prosecutor did not begin the proceedings anew by filing a new indictment in district court but instead successfully moved to amend the information in circuit court under MCR 6.112(H), which allows the court to permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. MCR 6.112(H) also allows an information to be amended to charge a new crime. The language of MCL 767.29 and MCR 6.112(H) do not conflict. While MCL 767.29 requires that before a *nolle prosequi* is authorized, a prosecutor must state their reasons for the discontinuance or abandonment of an indictment on the record and obtain permission from the court, the statute does not specify what procedure is required when a prosecutor wishes to reinstate a charge that was voluntarily dismissed without prejudice. In *Curtis*, the Court indicated that proceedings must begin anew after a *nolle prosequi* is entered. However, this statement was dictum. The issue before the *Curtis* Court was not whether a circuit court could reinstate a felony charge after entry of a *nolle prosequi* order but rather whether a felony *nolle prosequi* order could be entered by a district court. Although this dictum was followed in *People v Ostafin*, 112 Mich App 712 (1982), that decision was neither binding nor persuasive. Because the amendment did not result in unfair surprise or prejudice to defendant, the trial court did not abuse its discretion by allowing amendment of the information under MCR 6.112(H) to reinstate the CSC-I charge.

2. The trial court did not violate defendant's due-process right to present a defense by denying his motion for appointment of an expert on false confessions or by refusing to conduct an *in camera* inspection of the victim's medical and psychological records. To determine when an indigent defendant is entitled to the appointment of an expert, a court considers the private interest that will be affected, the governmental interest that will be affected if the safeguard is provided, 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 safe-

guards are not provided. To be entitled to expert-witness funds, a defendant must demonstrate a reasonable probability that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. Although the trial court erred by concluding that expert testimony on false confessions was categorically inadmissible under *People v Kowalski*, 492 Mich 106 (2012), it did not abuse its discretion by denying defendant's motion because defendant did not show that he would be unable to present a false-confession defense without an expert witness. The trial court also did not abuse its discretion by denying defendant's motion to review the victim's confidential records because defendant merely offered generalized assertions that the record might contain useful evidence, as opposed to offering any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense. Further, these records were not necessary for defendant to present a defense that the victim had fabricated the allegations against him.

3. Defendant's 20- to 40-year sentence for CSC-I was not unreasonable. A sentence that departs from the applicable guidelines range is reasonable if it adheres to the principle of proportionality set forth in *People v Milbourn* (1990). To determine whether a departure sentence is proportional, a court may consider the seriousness of the offense, factors that were inadequately considered by the guidelines, and factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. In this case, the trial court noted the severe impact the sentencing offense had on the victim's life, expressed concern that an adult would try to justify his criminal sexual misconduct to the police by describing how the victim was sexually aroused by him, observed that defendant blamed the victim and had a "nonchalant" demeanor at trial, and noted that while the guidelines already considered defendant's prior felony convictions, they did not account for how similar defendant's prior conviction was to the sentencing offense. The trial court explained that defendant's predilection to prey on vulnerable children reflected that defendant was unlikely to be reformed and underscored the need for the trial court's sentence to protect society. Although the trial court noted that defendant blamed the victim, there was no indication that the trial court improperly attempted to force defendant to admit his guilt or improperly punished him for failing to do so. Instead, the trial court's observations reflect that it considered defendant's statement to the police that his criminal conduct was somehow

justified or excused because the victim was the sexual aggressor. The trial court properly considered defendant's statement to the police because defendant's justification for his conduct suggested to the trial court that defendant had a low potential for rehabilitation and an unreasonable risk of reoffending. Defendant's assertion that there was no reasonable explanation for his sentence was not supported by the record.

4. The trial court's minimum sentence of 20 years for defendant's CSC-I conviction was not an unlawful vindictive sentence that punished him for successfully exercising his right to appeal. In *North Carolina v Pearce*, 395 US 711 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 US 794 (1989), the United States Supreme Court recognized that a sentence that punishes a defendant for successfully appealing a conviction is vindictive and therefore violates a defendant's due-process rights. The *Pearce* Court held that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear in the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. The United States Supreme Court has since limited the applicability of *Pearce* to circumstances in which there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Under Michigan caselaw, when the same judge resentences a defendant and increases the sentence, the increased sentence is presumptively vindictive. In this case, assuming the *Pearce* presumption of vindictiveness applied, it was overcome. Defendant was convicted of CSC-I after his second trial, which is punishable by life imprisonment, whereas defendant's first trial resulted in a conviction for CSC-II, an offense punishable by up to 15 years' imprisonment. Accordingly, defendant's sentence was different because the guidelines minimum sentence range was increased, as was the maximum potential sentence. These circumstances, not judicial vindictiveness, supported the trial court's imposition of a more severe sentence that better accounts for the severity of the sentencing offense.

Affirmed.

BORRELLO, J., concurring in the result, wrote separately to express his strong disagreement with the majority's characterization of the rule from *People v Curtis*, 389 Mich 698 (1973), as "dictum." He explained that it was clear from the Supreme Court's opinion in *Curtis* that the issue of how a prosecutor was to reinstate a charge that had been previously dismissed by a *nolle prosequi* order was intentionally taken up and decided by the

Court, and it was also clear from the opinion that this issue was necessary to the decision or, at a minimum, germane to the controversy. Accordingly, the rule that a prosecutor in this situation must begin proceedings anew was not dictum but instead was a binding decision by a superior court. This conclusion was further bolstered by the fact that the Michigan Supreme Court has since cited *Curtis* for this same rule. Additionally, although the majority relied on MCR 6.112(H) to reach its conclusion, that rule is silent regarding the procedure when the prosecution seeks to reinstate a charge that has previously been dismissed by an order of *nolle prosequi*. Thus, the circumstances at issue in this case were squarely controlled by *Curtis*, and the court rule was inapplicable. However, the practical effect of this error was merely to deny defendant a new preliminary examination before the CSC-I charge was reinstated, and because the failure to conduct a preliminary examination was harmless in light of his subsequent conviction, reversal was not required.

CRIMINAL LAW — INDICTMENTS — ORDERS OF *NOLLE PROSEQUI* — REINSTATEMENT OF CHARGES.

Under MCL 767.29, a prosecutor may not enter a *nolle prosequi* or discontinue or abandon an indictment without stating the reasons for doing so on the record and without leave of the court; under MCR 6.112(H), a court may permit the prosecutor to amend the information to reinstate a charge that was voluntarily dismissed without prejudice unless the proposed amendment would unfairly surprise or prejudice the defendant; the statement in *People v Curtis*, 389 Mich 698 (1973), that a prosecutor must obtain a new indictment and begin proceedings anew after a *nolle prosequi* is entered in order to reinstate the original charge was dictum.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Douglas R. Lloyd*, Prosecuting Attorney, and *Brent E. Morton*, Senior Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

CAMERON, P.J. Defendant, Damon Earl Warner, appeals his jury-trial conviction of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b)(*i*). Defen-

dant was sentenced as a third-offense habitual offender, MCL 769.11, to 20 to 40 years' imprisonment. We affirm.

I. BACKGROUND

Defendant was convicted of CSC-I for assaulting his 13-year-old stepdaughter. According to the victim, defendant first assaulted her sometime in 2011 while she was sitting on her bed. She testified that defendant "pulled down [her] pants and tried sticking his penis into [her] vagina." The victim was unable to remember certain details, but she was clear that defendant did not penetrate her vagina with his penis during this assault. A few months later, the victim alleged that defendant assaulted her again, this time in the dining room. During this assault, defendant approached the victim from behind and put his hand in her pants. Defendant digitally penetrated the victim when his hand went "up into [her] vagina."

In December 2015, the victim told her mother that defendant had sexually assaulted her. The disclosure occurred during an argument, and the victim's mother did not believe the victim. The victim's mother called the victim's father and told him to come pick up the victim. When the victim's father arrived, the victim and her mother were standing outside. The victim was upset and did not want to go with her father. At some point, defendant came outside and threatened the victim, informing her that he was going to slit her throat. The victim eventually left with her father and, from that point forward, the victim lived with her father full time.

Three days later, the victim told her father and her stepmother that defendant had sexually assaulted her. However, law enforcement was not notified until early January 2016, after the victim reported the assaults to her guidance counselor at school. Detective James

Maltby was assigned to the investigation and arranged for defendant to be interviewed by Detective Sergeant Derrick Jordan. During that interview, defendant admitted to penetrating the victim's vagina with four of his fingers. Defendant explained that he did so at the urging of the victim and only after she placed his hand in her pants while they were "wrestling around[.]" Defendant was not arrested at that time. Several days later, Detective Maltby interviewed defendant.

In August 2016, defendant was arrested and charged with CSC-I and second-degree criminal sexual conduct (CSC-II), MCL 750.520c, for his alleged conduct in the bedroom and the dining room. In defendant's first jury trial, he was convicted of CSC-II. The jury was unable to reach a verdict as to the charge of CSC-I. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to 10 to 30 years' imprisonment for CSC-II. After sentencing, the prosecutor decided not to retry defendant for CSC-I; therefore, the prosecutor moved to dismiss, or *nolle prosequi*, the CSC-I charge. On August 14, 2017, the trial court granted the prosecutor's motion and dismissed the CSC-I charge without prejudice.

Several years later, this Court granted defendant a new trial after he successfully appealed his CSC-II conviction. *People v Warner*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2019 (Docket No. 340272), p 6.[1] We therefore remanded the CSC-II charge to the trial court to schedule a new trial. *Id*.

After defendant's new trial date was scheduled, the prosecutor moved the trial court to amend the infor-

[1] This Court granted defendant a new trial on the ground that he had been denied the effective assistance of counsel because counsel failed to request a specific unanimity instruction. *Warner*, unpub op at 4, 6.

mation to reinstate the CSC-I charge that had been dismissed. The prosecutor explained that she had only sought dismissal of the CSC-I charge "[b]ased on the sentence imposed by [the trial court]" and "in consultation with the victim . . . ."[2] The trial court granted the motion to amend the information, and the CSC-I charge was reinstated over defendant's objections.

The parties also addressed several pretrial issues relevant to this appeal. The prosecutor provided notice that she had retained Thomas Cottrell, an expert in the dynamics of child sexual abuse, to "explain delayed report[ing] of child sexual abuse victims, the process of child sexual abuse disclosure, and perpetrator grooming behavior." The prosecutor provided defendant a summary of Cottrell's expected testimony. Defendant moved the trial court to appoint him an expert concerning false confessions and to conduct an *in camera* inspection of the victim's medical and psychological records. The trial court denied both of defendant's motions.

Defendant fared worse at his second jury trial. Specifically, he was convicted of CSC-I and acquitted of CSC-II. The guidelines minimum sentence range for defendant's CSC-I conviction was 51 to 127 months' imprisonment. The trial court departed from the advisory sentencing guidelines range and sentenced defendant to 20 to 40 years' imprisonment. This appeal followed.

II. REINSTATEMENT OF THE CSC-I CHARGE

Defendant first argues that the trial court erred by granting the prosecutor's motion to reinstate the CSC-I

[2] Defendant agrees on appeal that the prosecutor sought to dismiss the CSC-I charge because the victim was satisfied with a prison sentence of "at least ten years in prison" for CSC-II and because the prosecutor did not want to "put [the victim] through a second trial . . . ."

charge that had been dismissed after his first trial. Defendant argues that after a charge is dismissed at the prosecutor's request, that charge can only be reinstated by the prosecutor's filing a new indictment in district court. Because the prosecutor did not follow this procedure, defendant asserts that he is entitled to another new trial. We disagree. The trial court properly granted the prosecutor's motion to amend the information.

"The interpretation of either a statute or a court rule is a question of law subject to review de novo. A trial court's decision to grant or deny a motion to amend an information is reviewed for an abuse of discretion." *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003) (citations omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

In this case, defendant's first jury convicted him of CSC-II. After defendant was sentenced to prison for CSC-II, the prosecutor moved to dismiss the CSC-I charge that was still pending and the trial court entered the prosecutor's proposed *nolle prosequi* order of dismissal. Thereafter, this Court reversed defendant's CSC-II conviction and remanded the CSC-II charge for a new trial. *Warner*, unpub op at 6. Before trial, the prosecutor moved the trial court to amend the information to include the charge of CSC-I pursuant to MCR 6.112(H). The trial court granted the motion over defendant's objection, concluding that the court could properly amend the information and reinstate the CSC-I count.

Defendant does not directly address the prosecution's argument that the amendment to the information was

proper under MCR 6.112(H). Instead, defendant relies on MCL 767.29 and related caselaw to support his argument that after a *nolle prosequi* is sought and entered, the dismissed charge can only be reinstated through a new indictment in district court, not by amendment. MCL 767.29 provides, in relevant part:

> A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes.

Defendant's argument relies heavily on *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973), in which our Supreme Court considered the language of a prior version of MCL 767.29[3] and indicated that a prosecuting attorney who secures a *nolle prosequi* after an indictment must "obtain a new indictment and begin proceedings anew if [the prosecutor] wish[es] to reinstate the original charge." The *Curtis* Court further stated that, under the statute, a prosecutor is not permitted "to retract a nolle prosequi and immediately proceed to trial on the same indictment." *Id*. This procedure was later recognized by this Court in *People v Ostafin*, 112 Mich App 712, 716; 317 NW2d 235 (1982), in which we held that "the prosecution must begin proceedings anew after entry of an order of nolle prosequi, and may not merely seek to reinstate a previous indictment or conviction." The holding in *Ostafin* was based on *Curtis*. *Id*.

In this case, the prosecutor did not begin the proceedings anew by filing a new indictment in district court. Instead, the prosecutor successfully moved to

---

[3] Although MCL 767.29 was amended by 1988 PA 90 after *Curtis* was decided, the statute was not materially changed by the amendment.

amend the information in circuit court under MCR 6.112(H). MCR 6.112(H) provides that "[t]he court before, during, or after trial may permit the prosecutor to amend the information . . . unless the proposed amendment would unfairly surprise or prejudice the defendant." Importantly, under MCR 6.112(H), an information can be amended to charge a new crime. *McGee*, 258 Mich App at 689-690.[4] Therefore, the question presented is which procedure must be followed when a prosecutor decides to reinstate a charge that was dismissed without prejudice pursuant to an order of *nolle prosequi*.

"Under our Constitution, the Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature." *People v Parrott*, 335 Mich App 648, 667; 968 NW2d 548 (2020) (quotation marks and citation omitted). Our Supreme Court's authority to determine rules of practice and procedure in the courts of this state is evidenced by MCR 6.001(E), which provides:

> The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.

We conclude that the language of MCL 767.29 and MCR 6.112(H) do not conflict. Indeed, the language of MCL 767.29 merely requires that before a *nolle prosequi* is authorized, a prosecutor must state his or her "reasons for the discontinuance or abandonment" of an

[4] We acknowledge that, in *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), this Court held that "[a]n information may be amended . . . as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime." However, in so holding, the *Higuera* Court cited MCL 767.76. *Id*. Importantly, MCL 767.76 is superseded by MCR 6.112(H). *McGee*, 258 Mich App at 689.

indictment on the record and obtain permission for the dismissal from the court that has jurisdiction to try the offense charged. But the statute does not speak to the procedure that is required when a prosecutor wishes to reinstate a charge that was voluntarily dismissed without prejudice. Nevertheless, as defendant noted, in *Curtis*, 389 Mich at 706, our Supreme Court considered the language of a similar statute that preceded the current version of MCL 767.29 and stated that the "statute has the effect of requiring a prosecuting attorney who entered a nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if [the prosecutor] wished to reinstate the original charge." In order to understand this statement, it is necessary to take a closer look at *Curtis*.

In *Curtis*, 389 Mich at 701, the defendant was charged with sale of marijuana. As part of a plea bargain reached in district court, the prosecutor "moved to amend the original complaint by adding a second count charging [the] defendant with unlawful possession." *Id*. The prosecutor then moved to *nolle prosequi* the more serious sale-of-marijuana charge. *Id*. The district court granted both motions; therefore, only the possession charge was bound over to circuit court. *Id*. at 701-702. But after bindover, the circuit court judge expressed doubt about whether the district court judge had authority to dismiss a felony charge. *Id*. at 702. Later, the circuit court sua sponte "issued an order of superintending control to the district court requiring that an examination be held by that court as to the charge of sale [of marijuana] . . . ." *Id*. Importantly, the circuit court also concluded that the order of *nolle prosequi* entered by the district court judge was "null and void" because circuit courts alone have authority to enter a *nolle prosequi* for felonies. *Id*.

Ultimately, our Supreme Court granted leave in *Curtis* to answer the question "whether or not a district court judge may grant an order of nolle prosequi of any felony charge before [the judge], upon motion of the prosecuting attorney, or whether that discretion is reserved to circuit court." *Curtis*, 389 Mich at 703. After concluding that neither the text of MCL 767.29 nor the parties' arguments "answer[ed] the question presented," the Court determined that it was proper to review the "history of the statute involved and the term 'nolle prosequi' itself . . . for an understanding of what the people of this state attempted to accomplish by first enacting this statute in 1846." *Id*. at 704. After considering the common law that was in place before the "forerunner" of MCL 767.29 was enacted in 1846, *id*. at 705, our Supreme Court stated:

> A . . . review of the common law reveals that the nolle prosequi at that time could be retracted at any time, and must have become a *matter of record* to prevent a revival of proceedings on the original indictment. It thus appears clear to the Court that the forerunner of the present statute in question was enacted to protect the interests of the criminal defendant. This it did by requiring that thereafter all nolle prosequi would be entered on the record. This statute then had the effect of requiring a prosecuting attorney who entered a nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if he wished to reinstate the original charge. It thus effectively overruled the old common-law rules permitting a prosecutor to retract a nolle prosequi and immediately proceed to trial on the same indictment. . . . Today, as long as jeopardy has not attached, or the statute of limitations not run, our law permits a prosecutor to reinstate the original charge on the basis of obtaining a new indictment and thus beginning the process anew.
>
> It does not appear, therefore, that the Legislature in any way attempted to restrict the use of nolle prosequi in those circumstances where the prosecutor could not, solely

> at his discretion, reinstate the case for immediate trial. In situations akin to the one before us, this could not be done in any event as no indictment nor information had yet been filed with the trial court. The defendant still retained the right to a grand jury proceeding or a preliminary examination.
>
> We thus hold that [MCL 767.29] applies only to proceedings held in circuit court after the indictment or information is filed with that court. [*Id*. at 706-707.]

From this analysis, our Supreme Court concluded that MCL 767.29 did not establish that only circuit courts have authority to dismiss felony charges. *Id*. at 707. The *Curtis* Court then continued with its analysis, ultimately holding that the district court had authority to dismiss the felony charge. *Id*. at 707-711.

While the *Curtis* Court did indicate that proceedings must begin anew after a *nolle prosequi* is entered, we conclude that the statement is dictum. "[O]biter dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive)." *Higuera*, 244 Mich App at 437 (second alteration in original; quotation marks and citation omitted).

The issue before the *Curtis* Court was whether the district court had authority to dismiss a felony charge by way of an order of *nolle prosequi*. *Curtis*, 389 Mich at 703. In the Court's analysis of whether MCL 767.29 resolved that issue, the Court considered why that statute's predecessor was enacted and then opined about the effects of the statute's enactment. *Id*. at 704-706. The issue before the *Curtis* Court was not whether the prosecutor could reinstate a felony charge in circuit court after entry of the *nolle prosequi*. Indeed, there is no indication that the prosecutor in *Curtis* even wanted to pursue the charge that it had moved to

dismiss as part of a plea agreement; rather, it was the circuit court judge who sua sponte concluded that the *nolle prosequi* was null and void. *Id*. at 702. Therefore, the Court's statements concerning the effect of former MCL 767.29 were commentary that was offered to explain that the statute did not restrict a district court's authority to enter a felony *nolle prosequi* order of dismissal. Respectfully, contrary to the conclusion reached by the concurrence, the question of what procedure a prosecutor must comply with to reinstate a charge that was dismissed via a *nolle prosequi* was not germane to the controversy at issue in *Curtis*, but rather the central issue was whether the discretion to grant or deny a motion for *nolle prosequi* was reserved solely to a circuit court. See *Higuera*, 244 Mich App at 437.

Additionally, the language of the opinion indicates that the *Curtis* Court was well aware that its comment did not originate from the plain text of the statute that existed at the time it was deciding the case. Indeed, the Court merely opined that the *effect* of that statute was to require prosecutors to start proceedings anew after successfully moving for an order of *nolle prosequi*. *Curtis*, 389 Mich at 706. While the *Curtis* Court offered this comment, there is no indication that the *Curtis* Court read words into the plain language of the statute, which is prohibited. See *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 411; 809 NW2d 669 (2011). Thus, the statements in *Curtis* are not precedential or persuasive. See *Higuera*, 244 Mich App at 437.

Although in *Ostafin*, 112 Mich App at 716, this Court held that "the prosecution must begin proceedings anew after entry of an order of nolle prosequi, and may not merely seek to reinstate a previous indictment or

conviction," *Ostafin* is not binding on this Court, see *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019). More importantly, we conclude that *Ostafin* is also unpersuasive because its holding relies entirely on the dictum expressed in *Curtis*.

The concurrence notes that, in *People v Richmond*, 486 Mich 29; 782 NW2d 187 (2010), our Supreme Court cited *Curtis* in what appears to be a favorable manner. However, the *Richmond* Court did not specifically address whether MCL 767.29 actually applied to the facts of that case and did not engage in any sort of in-depth analysis of that statute or of *Curtis*'s interpretation of it. Indeed, the *Richmond* Court concluded that it was unnecessary to address whether MCL 767.29 applied because "that dispute" did not affect the analysis of the issue that was before the Court, i.e., whether the prosecutor's actions rendered the issue of whether the trial court improperly suppressed certain evidence moot. *Richmond*, 486 Mich at 33 n 1. The *Richmond* Court merely commented that the prosecutor had the option of beginning the proceedings anew. *Id*. at 36 n 3. See also *People v Richmond (On Rehearing)*, 486 Mich 1041 (2010), amended 784 NW2d 204 (2010).

At no point did the Courts in *Curtis*, *Ostafin*, or *Richmond* address the interplay between MCL 767.29 and MCR 6.112(H). Indeed, there is no indication that MCR 6.112(H) or a similar rule existed at the time *Curtis* and *Ostafin* were decided. It is also difficult to fathom how a discussion of MCR 6.112(H) would have been relevant in *Ostafin* or *Richmond*. In both cases, the prosecutors successfully moved to dismiss the charges that were pending before the trial courts. *Ostafin*, 112 Mich App at 715; *Richmond*, 486 Mich at 33. In this case, however, all charges were not dis-

missed. Indeed, the CSC-II charge was still pending before the trial court when the prosecutor moved to reinstate the CSC-I charge. Neither the parties nor this Court has found any authority that would permit amendment of an information under MCR 6.112(H) after all charges have been dismissed and the trial court is divested of jurisdiction.

Having decided that *Curtis*, *Ostafin*, and *Richmond* are not controlling and having concluded that MCL 767.29 does not describe the proper procedure for reinstating a charge that was previously dismissed pursuant to a *nolle prosequi*, we turn to the court rule applied by the trial court when it amended the information and reinstated the CSC-I charge and consider whether, under that rule, the amendment unfairly surprised or prejudiced defendant. See MCR 6.112(H). Because the amendment did not result in unfair surprise or prejudice to defendant, we conclude that the trial court properly amended the information under MCR 6.112(H) to reinstate the CSC-I charge.

Understandably, defendant does not assert on appeal that the amendment resulted in unfair surprise. Such a claim would be difficult to make in this case. When defendant was charged in 2016, he was notified at his arraignment that he was charged with CSC-I. During his preliminary examination and at his first trial, defendant successfully defended himself against allegations that he digitally penetrated the victim in the dining room. There is no dispute that the reinstated CSC-I charge was for the same CSC-I allegations that defendant had previously defended himself against. Therefore, the amendment reinstating the same CSC-I allegation in 2019 could not have surprised, let alone unfairly surprised, defendant. Defendant's argument on appeal is that the prosecutor used

the wrong procedure to reinstate the CSC-I count, not that reprosecution for that offense was unfair or prohibited.

Defendant's argument for a procedure that requires reindictment also fails to explain what he would have gained had the CSC-I charge been refiled in district court. Nor does he explain how the amendment reinstating the CSC-I charge in circuit court resulted in unfair prejudice under MCR 6.112(H). But defendant's preference for reindictment was explained to the trial court. Specifically, defendant explained that reindictment for CSC-I was preferable because this procedure would entitle him to another preliminary examination at which he could call new witnesses. When the trial court pressed defendant to explain, he asserted that there were two new witnesses: the victim's then-husband[5] who would testify that the victim "gave him a different version of events," and one of the victim's brothers, who would testify that the victim lied during a forensic interview.

The trial court was not persuaded that these new witnesses entitled defendant to a second preliminary examination. The trial court concluded that these witnesses would not, "in any way, affect or result in any different outcome as to the preliminary examination" because "they would be impeachment witnesses." We agree with the trial court's assessment.[6] While district courts "must consider . . . the credibility of the wit-

[5] The victim and her husband were in the process of divorcing during the time leading up to the second trial.

[6] We further note that defendant did not call the victim's then-husband at the second trial. Defendant did call the victim's oldest brother, who was present when the victim's father retrieved the victim from her mother's home in December 2015. The victim's oldest brother testified that he did not recall defendant threatening to slit the victim's throat or having to restrain defendant.

nesses," a "district court cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a defendant's guilt because this presents an issue for the trier of fact." *People v Redden*, 290 Mich App 65, 84; 799 NW2d 184 (2010). Thus, even if the new witnesses' testimony conflicted with that of the victim at a preliminary examination, the testimony would not have prevented the district court from binding that matter over because matters of credibility would ultimately be an issue for the jury. See *id*. Furthermore, although the trial court offered to arraign defendant on the CSC-I charge, defendant waived formal arraignment for that count.

Because defendant did not establish unfair surprise or prejudice, the trial court did not abuse its discretion by permitting amendment of the information under MCR 6.112(H). See *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998) (holding that "[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of . . . a sufficient opportunity to defend at trial").

We caution that our conclusion that the trial court properly amended the information under MCR 6.112(H) is based on our very specific set of facts—none of which were present in *Curtis*, *Ostafin*, or *Richmond*. Under different circumstances, such as those at issue in *Richmond* and *Ostafin*, we may have concluded that the prosecutor in this case was required to begin the proceedings anew. Additionally, while it is arguable that the prosecutor could have filed a motion to set aside the order granting the prosecutor's request for *nolle prosequi*, the prosecutor in this case did not move the trial court for relief from the August 14, 2017 order under MCR 2.612(C). Because a motion for relief from

the August 14, 2017 order was not before the trial court, we pass no judgment as to whether it would have been appropriate for the trial court to grant such a motion.

III. DUE PROCESS

Defendant argues that his due-process right to present a defense was violated by the trial court's improperly denying his motion for appointment of an expert on false confessions and by the trial court's refusal to conduct an *in camera* inspection of the victim's medical and psychological records.

A. STANDARDS OF REVIEW AND RELEVANT AUTHORITY

"This Court reviews de novo whether [a] defendant suffered a deprivation of his constitutional right to present a defense." *People v Propp*, 330 Mich App 151, 166; 946 NW2d 786 (2019), lv gtd 506 Mich 939 (2020). We review a trial court's decision on whether to appoint an expert for an indigent defendant for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). "A trial court's decision to conduct or deny an in camera review of records in a criminal prosecution is [also] reviewed for an abuse of discretion." *People v Davis-Christian*, 316 Mich App 204, 207; 891 NW2d 250 (2016).

As this Court noted in *Parrott*, 335 Mich App at 658:

> "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (quotation marks and citation omitted). Specifically, "[a] criminal defendant must be provided a meaningful opportunity to present evidence in his or her own defense." *People v Bosca*, 310 Mich App 1, 47; 871 NW2d 307 (2015). However, a defendant's right to present

> a complete defense "is not unlimited and is subject to reasonable restrictions." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). A defendant's "right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. (quotation marks and citation omitted).

B. ANALYSIS

1. MOTION FOR APPOINTMENT OF AN EXPERT WITNESS

Defendant argues that the trial court violated his right to due process by improperly denying his motion to appoint a false-confession expert.[7] We disagree.

Our Supreme Court has recognized that "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense[.]" *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (quotation marks and citation omitted). In *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985), the United States Supreme Court outlined the framework for determining when an indigent defendant is entitled to the appointment of an expert. The *Ake* Court stated:

> Three factors are relevant to this determination. The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is 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*.]

In *People v Kennedy*, 502 Mich 206, 210; 917 NW2d 355 (2018), our Supreme Court held that the United

---

[7] Defendant also argues that his right to equal protection was violated. However, because he fails to explain or rationalize this argument or provide any supporting authority, the argument is abandoned. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

States Supreme Court's decision in *Ake* "is the controlling law" on matters involving an indigent criminal defendant's request for "expert assistance[.]" The *Kennedy* Court adopted the "reasonable probability" standard set forth in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), to help a trial court determine whether a defendant established that he or she was entitled to expert assistance under *Ake*. *Kennedy*, 502 Mich at 226-228. The *Kennedy* Court indicated that, in order to be entitled to funds, a defendant is required to "demonstrate something more than a mere possibility of assistance from a requested expert[.]" *Id*. at 227 (quotation marks and citation omitted). "Rather . . . 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." *Id*. (quotation marks and citation omitted). "In addition, the defendant should inform the court why the particular expert is necessary." *Id*. (quotation marks and citation omitted). The *Kennedy* Court further indicated that a "defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert[.]" *Id*. at 226 (citation omitted).

In this case, defendant moved the trial court to appoint a false-confession expert. After oral argument, the trial court denied defendant's motion after concluding that such evidence would be inadmissible under *Kowalski*. The trial court also explained that, under *Kowalski*, "it was proper to exclude literature of false confessions."

Defendant argues that the trial court improperly denied his motion because it misinterpreted *Kowalski*, and we agree, given that *Kowalski* did not create a categorical ban on false-confession testimony and lit-

erature. Rather, in *Kowalski*, the trial court held a *Daubert*[8] hearing to determine whether the proposed experts' testimony would be admissible under MRE 702. *Kowalski*, 492 Mich at 112. The trial court ultimately excluded the proposed experts' testimony. *Id*. at 115-117. On appeal, our Supreme Court considered whether the trial court properly excluded the proposed testimony, ultimately affirming in part and reversing in part. *Id*. at 118-119, 144. Thus, because *Kowalski* concerned whether a trial court properly applied the rules of evidence following a *Daubert* hearing and did not hold as a matter of law that false-confession testimony is universally inadmissible, the trial court in this case erred by concluding that expert testimony regarding false confessions was not permitted under *Kowalski*.

Nonetheless, we conclude that the trial court did not abuse its discretion by denying the motion because defendant did not show that a reasonable probability existed "that denial of expert assistance would result in a fundamentally unfair trial." *Kennedy*, 502 Mich at 227 (quotation marks and citation omitted). While defendant sought expert testimony to support his defense, defendant did not argue that he would be unable to present a false-confession defense without an expert witness. Indeed, defendant indicated that the proposed false-confession experts "would speak not to the fact that the defendant made a false confession but instead would speak to the attributes associated with false confessions and the interviewer bias of Det. Derrick Jordan." At the motion hearing, defense counsel indicated that proposed expert Dr. Brian Cutler would not testify "to the ultimate issue of whether there was a

[8] *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

false confession" but would instead testify "to the psychology of whether the attributes of a false confession are present."

Additionally, although defendant argued in the trial court that denying him an expert would be fundamentally unfair because the prosecutor had retained Cottrell, Cottrell was not retained to testify about the reliability of defendant's confession. Rather, Cottrell was retained to explain delayed reporting by child victims and the "grooming" rituals in which sexual predators often engage. The prosecutor's notice of Cottrell's proposed testimony specifically indicated that Cottrell would not testify regarding the veracity of the victim's claims or whether defendant was guilty. We fail to see how the prosecutor's retention of Cottrell to present generalized testimony about a different issue demonstrates that the denial of a false-confession expert resulted in a fundamentally unfair trial for defendant. In sum, the trial court did not abuse its discretion by denying defendant's motion. See *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998) ("This Court will affirm a lower court's ruling when the court reaches the right result, albeit for the wrong reason.").[9]

Even without expert testimony, defendant was able to present evidence and argument that his confession was false. Defense counsel explained during his opening statement that defendant had been interviewed three times by law enforcement and suggested that defendant's statement to Detective Sergeant Jordan was not a real confession. Defense counsel also told the jury that they should put themselves "in [defendant's] position in

[9] Given this holding, we need not address defendant's argument that a hearing is required to determine whether he was indigent at the time of the motion hearing.

these interviews" and "to very carefully listen to the officer's behavior and questions and how he acts."[10]

Detective Sergeant Jordan testified on direct examination that he had used certain "strategies," which included blaming the victim, during the interrogation. Jordan noted that he had done so in order to get defendant to "open up." Jordan acknowledged that he did not know whether certain statements that he made to defendant were accurate. A portion of Jordan's interview with defendant was played at trial, and defendant's statement that was written by Jordan was admitted into evidence. Defense counsel cross-examined Jordan about the techniques that he used during the interview, and Jordan testified that he had interviewed defendant for a "[c]ouple of hours" and that defendant had confessed to penetrating the victim's vagina "closer to the end" of the interview. Defense counsel also asked Jordan about his level of education, as compared to defendant's level of education. During cross-examination of Detective Maltby, who had watched defendant's interview with Jordan from a different room, defense counsel elicited favorable testimony that Jordan was more aggressive than defendant during the interview.

Defense counsel argued during his closing that defendant's statement to the police was coerced. Defense counsel pointed out that Detective Sergeant Jordan testified that *he* wrote the statement that defendant had signed. Defense counsel argued as follows: "Detective Jordan gave [defendant] the story that he wanted to hear. And you know why? Because the police had already interviewed [the victim] and got a version of what she said. So, this was a script." Defense counsel

[10] It appears that "the officer" defense counsel was referring to was Detective Sergeant Jordan.

further argued that defendant would have been arrested immediately had the police believed that the confession was valid. Consequently, even though the trial court denied defendant's motion for appointment of an expert, defendant was not deprived of a meaningful opportunity to present a false-confession defense.

2. MOTION FOR *IN CAMERA* REVIEW OF THE VICTIM'S RECORDS

Defendant argues that he was denied his due-process right to present a defense because the trial court improperly denied his motion for an *in camera* review of the victim's confidential records. We disagree.

"The right to present a defense . . . 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." *Propp*, 330 Mich App at 167 (quotation marks and citation omitted). "Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense. Nevertheless, defendants generally have no right to discover privileged records absent certain special procedures, such as an in camera review of the privileged information conducted by the trial court." *Davis-Christian*, 316 Mich App at 207-208 (quotation marks and citation omitted).

In *People v Stanaway*, 446 Mich 643, 649; 521 NW2d 557 (1994), our Supreme Court balanced the opposing interests of protecting the confidentiality of privileged records with a criminal defendant's right to obtain evidence necessary to his defense. The *Stanaway* Court held that "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted

to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id*. at 649-650. The Court further held, however, that a defendant's "generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id*. at 650.

Defendant does not dispute that the victim's records contain privileged information. Thus, defendant was only entitled to have the trial court conduct an *in camera* review of the victim's records if he could "establish a reasonable probability that the privileged records [were] likely to contain material information necessary to his defense . . . ." *Stanaway*, 446 Mich at 649. Defendant did not do so. In defendant's motion, he alleged that review of the victim's records was necessary because (1) the victim was going through certain family issues, including a divorce; (2) evidence supported that the victim had "trouble with consequential thinking," anxiety, depression, "ADHD and trouble concentrating"; (3) the victim's younger half-brother has a genetic issue that the victim might also have; and (4) the victim and members of her family engage in dysfunctional behavior. For these reasons, defendant argued that the victim "may have emotional issues that need to be explored to test" her credibility. At oral argument on the motion, defendant added that the victim was receiving mental health treatment before she made the allegations and that she had been in trouble at school.

The trial court properly concluded that defendant merely offered generalized assertions that the record might contain useful evidence, as opposed to offering

"any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense." *Stanaway*, 446 Mich at 681. At most, defendant's arguments merely suggested that the victim's records *might* reveal evidence to support defendant's theory that the victim had fabricated the allegations against him. Because defendant's "request falls short of the specific justification necessary to overcome the privilege" and essentially amounted to an attempt to "fish" for evidence that might have enhanced his defense, the trial court did not abuse its discretion by denying defendant's motion. *Id*. at 681-682.

We further note that the victim's medical records were not necessary for defendant's defense that the victim had fabricated the allegations against him. During opening statements, defense counsel implored the jury to "listen to inconsistencies and contradictions in [the victim's] story." Defense counsel emphasized at trial that the victim's mother did not believe that the victim was being truthful about the assaults and that other members of the victim's family did not report the assaults after the victim disclosed them. During cross-examination of the victim, defense counsel successfully impeached the victim and elicited testimony that she could not recall certain details regarding the assaults. Defense counsel also elicited testimony from the victim's stepmother that, at the time of the 2016 investigation, she had questioned the victim's mental stability. Testimony was elicited from the victim's older half-brother that he had not spent much time with the victim in the past few years because of a "loss of respect for her character." Defense counsel also elicited favorable testimony from the prosecution's expert, Cottrell, that he had heard of false reports, that he had never

met the victim, and that the testimony that he offered concerning the dynamics of sexual abuse may not apply in this case.

During closing arguments, defense counsel argued that the victim was not credible because she had provided inconsistent statements concerning the alleged assaults and because her behavior following the alleged assaults was not consistent with someone who had been assaulted. Defense counsel also pointed out that the victim's family did not believe her and suggested that law enforcement did not believe the victim considering that the victim was interviewed twice by the police and given that defendant was not immediately arrested even though he had allegedly "confessed" to the police. Defendant's acquittal of CSC-II suggests that defendant's defense of undermining the victim's credibility had some success. Therefore, defendant was not denied the right to present a meaningful defense as a result of the trial court's decision to deny his motion for *in camera* review of the victim's privileged records.

IV. SENTENCING

A. REASONABLENESS OF SENTENCE

Defendant argues that his 20- to 40-year sentence for CSC-I was unreasonable. We disagree.

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). The standard of review when determining whether a departure sentence was reasonable is abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its discretion when it applies a minimum sen-

tence that violates the principle of proportionality, which occurs when the trial court "fail[s] to provide adequate reasons for the extent of the departure sentence imposed . . . ." *Id*. at 476.

"[A] sentence is reasonable under *Lockridge* if it adheres to the principle of proportionality set forth in [*People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990)]." *People v Lampe*, 327 Mich App 104, 126; 933 NW2d 314 (2019) (quotation marks and citation omitted). Factors that a trial court may consider under the proportionality standard include the following:

> (1) the seriousness of the offense; (2) factors that were inadequately considered by the guidelines; and (3) factors not considered by the guidelines, such as the relationship between the victim and the aggressor, the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. [*Id*. (quotation marks and citation omitted).]

In this case, defendant was convicted of CSC-I, and his guidelines minimum sentence range was 51 to 127 months' imprisonment. During sentencing, the trial court identified a number of factors it considered when sentencing defendant. The trial court first noted the severe impact the sentencing offense had on the victim's life, stating that the assault had destroyed the victim's life and the girl "she would have been." The court also expressed deep concern that a grown man would sexually assault a child and then try to justify his criminal sexual misconduct to the police by providing extensive detail about how the victim was sexually aroused by him—something the trial court described as "absolutely disgusting." The trial court further stated that throughout the proceeding, defendant "blame[d] the victim" and had a "nonchalant" demeanor that "was very striking during the trial." And

perhaps most importantly, the trial court noted that while the guidelines already considered defendant's prior felony convictions, the guidelines did not account for how similar defendant's prior CSC-III conviction was to the sentencing offense, given that both defendant's prior conviction and the sentencing offense involved the sexual assault of an adolescent girl. The trial court explained that defendant's predilection to prey on vulnerable children reflected that defendant was unlikely to be reformed and underscored the need for the trial court's sentence to protect society.

Rather than address each of these proper sentencing considerations, defendant argues that the trial court's sentence improperly punished him for blaming the victim at trial. Defendant argues that this was improper because maintaining one's innocence in a criminal sexual conduct case necessarily requires a defendant to accuse a victim of lying. While "[a] sentencing court may not base a sentence, even in part, on a defendant's failure to admit guilt," a court may consider a defendant's lack of remorse. *People v Carlson*, 332 Mich App 663, 675; 958 NW2d 278 (2020).

> To determine whether sentencing was improperly influenced by the defendant's failure to admit guilt, we focus on three factors: (1) the defendant's maintenance of innocence after conviction; (2) the judge's attempt to get the defendant to admit guilt; and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. [*Id*. (quotation marks and citation omitted).]

In this case, the trial court noted at sentencing that defendant continued to maintain his innocence. But there is no indication that the trial court improperly attempted to force defendant to admit his guilt or improperly punish defendant for failing to do so. To the

contrary, the trial court noted that a defendant has an "absolute right" to maintain innocence, but "without revictimizing the victim." The trial court's statements at sentencing do not suggest that defendant was punished for maintaining his innocence or claiming that the victim was lying. Rather, the trial court's statements reflect that it considered defendant's statement to the police that his criminal conduct was somehow justified or excused because the victim was the sexual aggressor. The trial court properly considered defendant's unscripted statement to the police because defendant's justification for his conduct suggested to the trial court that defendant had a low potential for rehabilitation and an unreasonable risk of reoffending.

Defendant next argues that there was no reasonable explanation for his sentence, which exceeded the guidelines minimum sentence range. However, this argument is not supported by the record, which establishes that the trial court provided a detailed and well-reasoned explanation as to why it concluded that a 20-year minimum sentence was "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Steanhouse*, 500 Mich at 474 (quotation marks and citation omitted). Consequently, the trial court did not abuse its discretion.

B. VINDICTIVE SENTENCING

Defendant next argues that the trial court's minimum sentence of 20 years for his CSC-I conviction was an unlawful vindictive sentence because the sentence punished him for successfully exercising his right to appeal. We disagree.

A claim that a sentence is vindictive implicates a defendant's constitutional rights. *Michigan v Payne*, 412 US 47, 50; 93 S Ct 1966; 36 L Ed 2d 736 (1973).

"This Court reviews de novo a question of constitutional law." *Kennedy*, 502 Mich at 213.

In *North Carolina v Pearce*, 395 US 711, 723-724; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other grounds by *Alabama v Smith*, 490 US 794 (1989), the United States Supreme Court recognized that a sentence that punishes a defendant for successfully appealing a conviction is vindictive and therefore violates a defendant's due-process rights. The *Pearce* Court held that such vindictive considerations "must play no part in the sentence [a defendant] receives after a new trial." *Pearce*, 395 US at 725. The Court further held that, "[i]n order to assure the absence of such a motivation, . . . whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Id*. at 726. "[T]he factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id*. The standard established in *Pearce* was broad and far-reaching.

But the United States Supreme Court has since clarified that "[t]he *Pearce* requirements . . . do not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas v McCullough*, 475 US 134, 138; 106 S Ct 976; 89 L Ed 2d 104 (1986). This is because "the evil the [*Pearce*] Court sought to prevent" was not the imposition of "enlarged sentences after a new trial," but the "vindictiveness of a sentencing judge . . . ." *Id*. The Court has further recognized that because "the severity" of applying an inflexible presumption "may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct," *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982),

the Supreme Court has "limited its application . . . to circumstances where its objectives are thought most efficaciously served," *Smith*, 490 US at 799 (quotation marks and citations omitted). "Such circumstances are those in which there is a 'reasonable likelihood' that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id.*, quoting *Goodwin*, 457 US at 373. But when the possibility of judicial vindictiveness is only speculative, a presumption of vindictiveness does not apply and "the burden remains upon the defendant to prove actual vindictiveness[.]" *Smith*, 490 US at 799-800 (quotation marks and citations omitted). Thus, the once broad presumption of vindictiveness established in *Pearce* is now limited to circumstances in which there is a reasonable likelihood that a sentence improperly punishes a defendant for exercising the right to appeal a conviction, while the mere speculation of vindictiveness will not invoke the *Pearce* presumption.

Appellate courts have declined to apply the *Pearce* presumption of vindictiveness when the reasons for the harsher sentence after a successful appeal are apparent from the surrounding circumstances. For example, the United States Supreme Court has rejected the argument that the *Pearce* presumption applies whenever a defendant's sentence is increased following retrial, regardless of whether the sentence was imposed by the same "sentencer." See *Colten v Kentucky*, 407 US 104, 116-118; 92 S Ct 1953; 32 L Ed 2d 584 (1972) (declining to apply the presumption when the second court in a two-tier trial system imposed a longer sentence); *Chaffin v Stynchcombe*, 412 US 17, 26-27; 93 S Ct 1977; 36 L Ed 2d 714 (1973) (declining to apply the presumption where a jury imposed the increased sentence on retrial). In such circumstances, there is no reason to assume that the second sentencer held a

grudge against the defendant and was motivated by actual vindictiveness. Similarly, judicial vindictiveness is unlikely to have occurred when a defendant receives a higher sentence after proceeding to trial following a previous guilty plea being vacated on appeal. *Smith*, 490 US at 794, 801. This is the case because "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Id*. at 801. The United States Supreme Court also declined to apply the presumption of vindictiveness in a case where the trial court granted the defendant's motion for a new trial on the basis of prosecutorial misconduct. *McCullough*, 475 US at 138-139. The Court concluded that, in such a case, there is "no realistic motive for vindictive sentencing . . . ." *Id*. at 139.

Our Supreme Court has recognized that, when the same judge resentences a defendant and increases the sentence, the increased sentence is presumptively vindictive. See *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987) (opinion by BRICKLEY, J.); *id*. at 37 (LEVIN and CAVANAGH, JJ., concurring); *People v Lyons (After Remand)*, 222 Mich App 319, 323; 564 NW2d 114 (1997). And like the federal courts, Michigan appellate courts have not invoked a presumption of vindictiveness when the reason for the imposition of a greater sentence is apparent. See *Mazzie*, 429 Mich at 33 (opinion by BRICKLEY, J.) ("[W]here a second sentence is imposed by a judge other than the judge who imposed the original sentence, we should not invoke a presumption of vindictiveness.").

In this case, we conclude that the *Pearce* presumption of vindictiveness does not apply. We recognize that the same trial judge presided over both trials and imposed a

harsher sentence after defendant successfully appealed. But under *Pearce* and its progeny, this is only the first step of the analysis. Before the *Pearce* presumption can be invoked, an appellate court must examine the surrounding circumstances to determine whether there is a reasonable likelihood that the defendant was punished for successfully appealing his conviction. The facts here do not support invoking the presumption.

First, defendant was convicted of CSC-I after his second trial, whereas defendant's first trial resulted in a conviction for CSC-II, an offense punishable by up to 15 years' imprisonment. MCL 750.520c(2)(a). After defendant's successful appeal, he was convicted of CSC-I, an offense punishable by "imprisonment for life or for any term of years." MCL 750.520b(2)(a). Under Michigan's guidelines scheme, CSC-I is categorized as belonging to crime class "A," which is reserved for the most serious felony offenses, while the guidelines categorize CSC-II in crime class "C," thereby designating it a less-serious offense. MCL 777.16y. Because of this, defendant's CSC-I conviction was scored in a higher sentencing grid, resulting in a higher minimum prison sentence for CSC-I.[11] Accordingly, defendant's sentence was different because the guidelines minimum sentence range was increased, as was the maximum potential sentence. These circumstances, not judicial vindictiveness, support the trial court's imposition of a more severe sentence that better accounts for the severity of the sentencing offense. Indeed, the trial court's sentence was a "legitimate response to criminal conduct[.]" *Goodwin*, 457 US at 373.

---

[11] The minimum guidelines sentence range with respect to the CSC-II conviction was 12 to 36 months' imprisonment. The minimum guidelines sentence range with respect to the CSC-I conviction was 51 to 127 months' imprisonment.

Because the possibility of judicial vindictiveness is only speculative and the presumption does not apply, "the burden remains upon . . . defendant to prove actual vindictiveness[.]" *Smith*, 490 US at 799. The record contains no indication of actual vindictiveness on the part of the trial court. Indeed, the record is absent of any expressed hostility that suggests that the trial court deliberately penalized defendant for successfully exercising his right to appeal his previous conviction and sentence. Because defendant has failed to make a showing of actual vindictiveness, he is not entitled to the relief he seeks.

Furthermore, even if we were to conclude that the presumption of vindictiveness applied, the presumption would be overcome. The presumption of vindictiveness is rebutted when "events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities" arise. *Pearce*, 395 US at 723 (quotation marks and citation omitted). Similarly, "the presumption may be overcome where the judge at resentencing possessed information which was unavailable to [the judge] at the initial sentencing, even where that information does not concern conduct of the defendant occurring *after* the first trial." *Mazzie*, 429 Mich at 35-36 (opinion by BRICKLEY, J.). "[T]he presumption of vindictiveness may be overcome only when the extent of the increase in the sentence bears a reasonable relationship to the new information." *Id*. at 36.

As explained by the trial court, CSC-I is a particularly serious offense. The court stated:

> [I]n this case, a jury of [defendant's] peers found him guilty of CSC first, and I agree with the comments by [the prosecutor]. Murder is always the crime that we think of as the absolute worst thing. And, I guess, in almost every way

> it is because the person is gone. But, in a case of CSC first, with a 13 year old girl, [the victim's] gone too. At least the girl she would have been but for the intervening acts of the Defendant that the jury found were, in fact, committed.

Although defendant appears to argue that the conduct underlying the CSC-I charge was not new information because the trial court could have considered the conduct underlying the CSC-I charge at his original sentencing for CSC-II, there is no indication that the trial court did so. Although the trial court did mention the conduct underlying the CSC-I charge, it stated:

> [Defendant] didn't have to blame the victim. He didn't have to accuse a 13 year old of allegedly grabbing his hand and putting it down his pants. The jury didn't believe him, I don't believe him, and it's really a revictimization. By saying those things he is revictimizing this young girl.[12]

Thus, the trial court merely indicated that it found defendant's *statements* about that offense to be relevant. The trial court did not state that it was sentencing defendant on the basis of the conduct underlying the CSC-I charge. We conclude that it is irrelevant that the trial court *could* have considered the conduct underlying the CSC-I charge when there is no indication that the trial court actually did so in relation to the 2017 sentencing.

Additionally, defendant's updated presentence investigation report (PSIR) indicates that personal protection orders (PPOs) were obtained for the minor children of defendant and the victim's mother. The trial court noted that it was concerning that the PPOs were obtained *after* defendant's parental rights regarding those children were terminated. At defendant's 2017 sentencing,

---

[12] Defendant testified at the first trial that he did not touch the victim inappropriately and that he had lied to law enforcement. Defendant did not testify at the second trial.

there was no mention of PPOs, although defendant's counsel at the time indicated that defendant's parental rights had been terminated. In addition, the victim was not present at the 2017 sentencing hearing. Rather, the victim's aunt spoke on the victim's behalf, and the victim's statement was included in the original PSIR. The victim's statements at the 2019 sentencing hearing included new information. Specifically, at defendant's 2019 sentencing, the victim reported that defendant had damaged many of her relationships with family members, including her relationships with her mother and older brother. In the victim's 2017 statement, she merely asked for the "maximum sentence possible," but at the 2019 sentencing she specifically asked the trial court to sentence defendant to 20 to 40 years' imprisonment.

Additionally, we conclude that the increase of a 10-year minimum to a 20-year minimum bore a reasonable relationship to the new information, which was unavailable at defendant's original sentencing. See *Mazzie*, 429 Mich at 36 (opinion by BRICKLEY, J.). Indeed, the trial court did not rely on minor information that had no relevance to a fair or appropriate sentence. See *id*. Instead, the trial court appropriately relied on the seriousness of a CSC-I offense, the impact that defendant's crime had on the victim's life, and defendant's behavior following the termination of his parental rights, which is relevant to defendant's "habits, conduct, and mental and moral propensities." *Pearce*, 395 US at 723 (quotation marks and citation omitted). In sum, the trial court provided an appropriate on-the-record, wholly logical, nonvindictive reason for the sentence. See *id*. at 726.

Affirmed.

REDFORD, J., concurred with CAMERON, P.J.

BORRELLO, J. (*concurring in result*). I concur in the result reached by the majority but write separately to express my strong disagreement with the majority's attempt to overturn law set forth by a superior court under the guise of labeling a holding by our Supreme Court "dictum." Here, the majority seeks to cast aside prior decisions of our Supreme Court and this Court which held that following entry of an order of *nolle prosequi*, the prosecution was required to begin the proceedings anew. In its opinion, the majority concludes that it was proper for the trial court to allow the prosecution to reinstate the CSC-I charge against defendant by amending the information and without remanding to the district court for a new preliminary examination. The majority arrives at its result by erroneously concluding that the procedure to be undertaken in such cases as previously set forth in *People v Curtis*, 389 Mich 698; 209 NW2d 243 (1973), was mere dictum. It is here where I take issue with my colleagues. It is no small detail for an inferior court to begin labeling the holdings of a superior court dicta, especially in cases, where, like here, the superior court has reaffirmed the very holding now labeled dictum by an inferior court. As will be discussed later in this opinion, our Supreme Court reaffirmed its holding in *Curtis* in 2010. Following their affirmance, this Court published a case based on that very "dictum." Unfortunately, because the majority's precepts of what constitutes "dicta" are erroneous, the entirety of their analysis on this issue is rife with error. Unlike the majority, I do not believe we need to conjure an opinion from a blank slate, nor do I see a legal or policy basis to casually dismantle a half century of legal precedent set forth by a superior court. Therefore, contrary to the analysis employed by the majority, I conclude that binding precedent from our Supreme Court dictates

that the procedure employed here by the trial court was erroneous. Nonetheless, I further conclude that the error was harmless and would affirm the result on that basis.

Our Supreme Court held in *Curtis*, 389 Mich at 706, that the forerunner to MCL 767.29[1] "was enacted to protect the interests of the criminal defendant" and "effectively overruled the old common-law rules permitting a prosecutor to retract a nolle prosequi and immediately proceed to trial on the same indictment." The *Curtis* Court further held that "[t]his statute then had the effect of requiring a prosecuting attorney who entered a nolle prosequi after indictment to obtain a new indictment and begin proceedings anew if he wished to reinstate the original charge." *Curtis*, 389 Mich at 706.

In this case, the trial court permitted the prosecution to avoid following this procedure by allowing the prosecution to amend the information to reinstate the CSC-I charge that had previously been dismissed by a *nolle prosequi* order. Under *Curtis*, the prosecution should have been required "to obtain a new indictment and begin proceedings anew" in order to reinstate the original CSC-I charge. *Id*. The failure to follow this procedure was error. *Id*.

The majority avoids this result by concluding that this rule from *Curtis*, which requires a prosecutor to "begin proceedings anew" in order to reinstate a charge that had been dismissed by *nolle prosequi* after indictment, was dictum. The majority is wrong. "Obiter dictum" is " '[a] judicial comment made during the course of delivering a judicial opinion, but one that is

[1] The *Curtis* Court noted that this statute had "remained virtually unchanged since its first adoption in 1846." *Curtis*, 389 Mich at 704.

unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).' " *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001) (citation omitted). However, this Court has also recognized that "[t]he Michigan Supreme Court has declared . . . that [w]hen a court of last resort intentionally takes up, discusses and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." *Id*. (quotation marks and citations omitted; second alteration in original).

In *Curtis*, the Court's pronouncement of the rule requiring prosecutors to begin anew when reinstating a charge that had been dismissed by *nolle prosequi* was made in the context of the Court's analysis of the history of MCL 767.29 and the common law applicable to *nolle prosequi* before that statutory provision was enacted. *Curtis*, 389 Mich at 704-706. The Court was required to construe MCL 767.29 because the "appellee, and the honorable circuit court judge, by means of his order of superintending control, [took] the position that the matter is determined by MCLA 767.29 . . . ." *Curtis*, 389 Mich at 703.

The *Curtis* Court explained that in order to answer the question presented—i.e., "whether or not a district court judge may grant an order of nolle prosequi of any felony charge before him, upon motion of the prosecuting attorney, or whether that discretion is reserved to circuit court"—a "review of the history of the statute involved and the term 'nolle prosequi' itself is necessary for an understanding of what the people of this state attempted to accomplish by first enacting this statute in 1846." *Curtis*, 389 Mich at

703-704. In the context of this analysis, the Court determined that the statute changed the prior existing common law regarding *nolle prosequi*[2] by requiring all *nolle prosequi* to be entered on the record and further requiring prosecutors to "obtain a new indictment and begin proceedings anew" before reinstating any charge that had been previously dismissed by an order of *nolle prosequi* after indictment. *Id*. at 706. After making this determination, the *Curtis* Court further concluded:

> It does not appear . . . that the Legislature in any way attempted to restrict the use of nolle prosequi in those circumstances where the prosecutor could not, solely at his discretion, reinstate the case for immediate trial. In situations akin to the one before us, this could not be done in any event as no indictment nor information had yet been filed with the trial court. The defendant still retained the right to a grand jury proceeding or a preliminary examination.
>
> We thus hold that MCLA 767.29; MSA 28.969 applies only to proceedings held in circuit court after the indictment or information is filed with that court. [*Id*. at 706-707.]

Our Supreme Court in *Curtis* proceeded to analyze other subissues before ultimately holding that "the circuit court, in this situation, committed error in issuing its order of superintending control requiring that an examination be held on the higher charge. As to that count, the prosecuting attorney had already entered a nolle prosequi, with leave of the district

---

[2] The *Curtis* Court summarized the common law applicable to *nolle prosequi* as it existed before the enactment of the statutory provision at issue as follows: "A further review of the common law reveals that the nolle prosequi at that time could be retracted at any time, and must have become a *matter of record* to prevent a revival of proceedings on the original indictment." *Curtis*, 389 Mich at 705-706.

court. We now state that such an action was within the discretion of the district court judge." *Id*. at 710-711.

It is thus clear from the Supreme Court's opinion in *Curtis* that the issue of how a prosecutor was to reinstate a charge that had been previously dismissed by a *nolle prosequi* order was intentionally taken up and decided by the Court, and it is also clear from the opinion that this issue was necessary to the decision or, at a minimum, germane to the controversy. Contrary to the view taken by the majority, our Supreme Court in *Curtis* expressed in no uncertain terms that this issue was necessary and germane to its analysis. Accordingly, the rule that a prosecutor in this situation must "begin proceedings anew" is not dictum but is instead a binding decision by a superior court. See *Higuera*, 244 Mich App at 437. This conclusion is further bolstered by the fact that our Supreme Court has cited *Curtis* for this same rule. See *People v Richmond*, 486 Mich 29, 36 n 3; 782 NW2d 187 (2010), amended 784 NW2d 204 (2010) ("If the prosecution's voluntary dismissal was a *nolle prosequi* under MCL 767.29, the prosecution could have reinstated the 'original charge on the basis of obtaining a new indictment . . . .' *People v Curtis*, 389 Mich 698, 706; 209 NW2d 243 (1973).").

The majority does not stop at its pronouncement that our Supreme Court's rule announced in *Curtis* was dictum; it goes further by criticizing the soundness of our Supreme Court's decision in *Curtis*, characterizing our Supreme Court's construction of the statute as a comment that is not precedential or persuasive because (although the majority attempts to deny that this is its reason) the Supreme Court effectively read additional language into the statute. However, our Supreme Court has been abundantly

clear in stating that "[i]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 192-193; 880 NW2d 765 (2016) (quotation marks and citation omitted).

Additionally, the majority relies on MCR 6.112(H), which provides that the "court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant." However, this court rule is silent regarding the procedure when the prosecution seeks to reinstate a charge that has previously been dismissed by an order of *nolle prosequi* such as occurred in the instant case. Thus, the circumstances at issue in this case are squarely controlled by our Supreme Court's holding in *Curtis*, and the court rule is inapplicable.

Having concluded that the procedure followed in this case was erroneous does not, however, end the analysis. The practical effect of this error was to deny defendant a new preliminary examination before the CSC-I charge was reinstated. As this Court concluded in *People v McGee*, 258 Mich App 683, 685; 672 NW2d 191 (2003), "in light of defendant's subsequent conviction, any error in failing to conduct a preliminary examination does not warrant reversal because defendant has not shown that the alleged error affected the trial." The same is true in this case. Defendant was subsequently convicted of CSC-I following his jury trial. Thus, the failure to conduct a preliminary examination as a result of the improper procedure followed

for reinstating the CSC-I charge was harmless. *Id*. For that reason, I would conclude that reversal is not required on this ground.

SP v BEK

Docket Nos. 353984 and 353992. Submitted May 4, 2021, at Lansing. Decided October 7, 2021, at 9:05 a.m.

Respondent moved in the Ionia Circuit Court to terminate ex parte personal protection orders (PPOs) entered against him on behalf of two minor children. Respondent and petitioner were previously married and had two minor children during the marriage, HP and RP. Respondent was acquitted of five counts of criminal sexual conduct related to allegations that he had abused HP and RP, but child protective proceedings were initiated on the basis of the allegations. In 2018, respondent's parental rights to the minor children were terminated. In February 2020, petitioner sought two ex parte PPOs against respondent on behalf of the minor children. The PPO petitions alleged that respondent had attended four of HP's basketball games and had tried to intimidate HP during the games. Petitioner asserted that the children exhibited mental distress after seeing respondent at the games. The trial court entered ex parte PPOs against respondent on behalf of HP and RP. Respondent moved to terminate the PPOs, arguing that the court had entered them in violation of MCL 600.2950(26)(b) and that the allegations in the petitions were insufficient to support the issuance of the PPOs. The trial court, Ronald Schafer, J., denied respondent's motion and concluded that MCL 600.2950(26)(b) did not preclude the court from entering the PPOs because respondent's parental rights had been terminated. Respondent appealed.

The Court of Appeals *held*:

1. MCL 600.2950(26)(b) prohibits a court from issuing a PPO that enjoins the respondent from engaging in the conduct described in Subsection (1) of the statute if the person on whose behalf the PPO would be issued is the unemancipated minor child of the respondent. Although respondent's parental rights were terminated, he argued that, because he is the natural father of the minor children, as defined by MCL 722.1(b), the trial court issued the PPOs in violation of MCL 600.2950(26)(b). "Minor" and "emancipated" are not defined by MCL 600.2950, but MCL 722.1 defines "minor" as a person under the age of 18 years and "emancipation"

as termination of the rights of the parents to the custody, control, services, and earnings of a minor. MCL 722.1(b) also defines "parents" as, among other things, the natural parents of a minor if they were married prior or subsequent to the minor's birth. According to respondent, because MCL 722.1(c) states that emancipation means termination of the rights of the "parents," a minor child must be emancipated from both parents, i.e., the parental rights of both parents must be terminated in order for a PPO to be issued under MCL 600.2950 regarding the minor child. However, caselaw and statutory law establish that a plural term may include the singular, and a singular term may be extended to include the plural. Therefore, under MCL 722.1, "emancipated minor," as it relates to MCL 600.2950(26)(b), applies to a minor child when the parental rights of one or both parents have been terminated. It was undisputed that respondent's parental rights were terminated, and under MCL 722.1, the minor children were emancipated minors as to respondent. Therefore, the trial court did not err by issuing the PPOs, and it was not precluded from doing so under MCL 600.2950(26)(b).

2. Under MCL 600.2950(4), the trial court is required to issue a PPO if it determines that there is reasonable cause to believe that the respondent may commit one or more of the acts listed in MCL 600.2950(1), including stalking, pursuant to MCL 750.411h. An ex parte PPO may be entered by the court if it clearly appears from specific facts that immediate and irreparable injury will result from the delay required to give notice or that giving notice will precipitate adverse action before a PPO can be issued. MCL 750.411h defines "stalking" as a course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person and that actually causes the victim to feel frightened, intimidated, or harassed. The allegations in the petition were sufficient to support the issuance of the ex parte PPOs as well as the court's decision to deny respondent's motion to terminate the PPOs. Respondent did not dispute that he attended four of HP's basketball games, and the petition alleged that there were four instances of contact between the children and respondent. Petitioner testified that respondent stood up in the stands during games so that HP would see him, and photographs submitted by petitioner showed that respondent was the only individual standing in the bleachers during a game. In order for the court to grant the PPOs, the statute requires only that respondent willfully engaged in the outlined "course of conduct," not that respondent intended to bring about the harm. On the basis of the evidence, the court did not err when it concluded that respondent engaged in a willful course of conduct

under MCL 750.411h. The court also did not err by concluding that the minor children had experienced mental distress as a result of respondent's conduct. Petitioner spoke at the hearing about the children's distress after encountering respondent at the basketball games and of their daily mental distress because of the alleged sexual abuse. The court was not persuaded by respondent's testimony that his conduct did not negatively affect the children, and it concluded that a reasonable person would experience, and the minor children and petitioner did in fact experience, significant mental distress as a result of respondent's conduct. Additionally, given the circumstances, the court did not err when it granted the ex parte PPOs after it concluded that immediate and irreparable injury would result from the delay required to give notice to respondent.

Affirmed.

TERMINATION OF PARENTAL RIGHTS — EMANCIPATION — PERSONAL PROTECTION ORDERS — MCL 600.2950(26)(b).

MCL 600.2950(26)(b) bars the court from issuing a personal protection order that enjoins conduct described in MCL 600.2950(1) if the petitioner is the unemancipated minor child of the respondent; under MCL 722.1, "emancipation" means termination of the rights of the "parents" to the custody, control, services, and earnings of a minor, but "parents" includes both the plural and the singular; therefore, a court may issue a personal protection order in relation to a minor child under MCL 600.2950(26)(b) when the respondent is the natural parent of the child and when parental rights have been terminated only as to the respondent and not as to the other parent.

The Gallagher Law Firm, PLC (by *Shane Hilyard*) for respondent.

Before: SAWYER, P.J., and STEPHENS and RICK, JJ.

RICK, J. In these consolidated[1] personal protection order (PPO) appeals, respondent, BEK, appeals as of right the trial court order denying his motion to terminate the PPOs issued against respondent on

[1] *SP v BEK*, unpublished order of the Court of Appeals, entered June 30, 2020 (Docket Nos. 353984 and 353992).

behalf of two minor children, HP and RP.[2] Respondent argues that MCL 600.2950(26)(b) precludes a court from issuing a PPO on the behalf of a minor child against a respondent who is the parent of the minor child and whose parental rights have been terminated. This is an issue of first impression for this Court and is a matter of statutory interpretation. See MCR 7.215(B)(2). Respondent also argues that the trial court abused its discretion by granting the ex parte PPOs and denying his motion to terminate the PPOs. We affirm.

I. BACKGROUND

Petitioner and respondent were previously married and were divorced at the time that the petitions were filed. HP and RP were born to the parties during the marriage.

In 2016, respondent was charged with five counts of criminal sexual conduct (CSC) based on allegations that he had sexually abused the minor children. Although respondent was acquitted of all CSC charges in 2018, child protective proceedings to terminate respondent's parental rights were initiated on the basis of the CSC allegations. In the child protective proceedings, the trial court took jurisdiction over the children and found by clear and convincing evidence that termination was in the best interests of the children. Following respondent's acquittal of the CSC charges, his parental rights

[2] Although the PPOs were set to expire on February 10, 2021, the issue is not moot because the issuance of a PPO can affect other rights. See *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008) (holding that although the PPO had been terminated since the filing of the appeal, the entry of the PPO was not moot because it "may affect eligibility for a federal firearms license"). Petitioner did not submit a brief on appeal and, therefore, does not assert that the issue is moot.

to both RP and HP were terminated in May 2018.[3] Respondent had little to no contact with the minor children between 2015 and 2019 and had no contact with the children from May 2018 until November 2019.

In February 2020, petitioner filed two separate petitions seeking ex parte PPOs against respondent on behalf of RP and HP. In the petitions, petitioner alleged that respondent had attended four of HP's basketball games in November 2019, December 2019, and February 2020. Petitioner asserted that respondent stood up in the stands so that HP would see him during the games and that respondent tried to intimidate HP. Petitioner asserted that the children exhibited mental distress after seeing respondent at the games. The trial court entered an ex parte PPO against respondent on behalf of both minor children.

Respondent moved to terminate the PPOs in March 2020, arguing that the trial court erred by issuing them. Specifically, respondent argued that the PPOs could not be issued against him under MCL 600.2950(26)(b) because he was the parent of the unemancipated minor children protected by the PPOs and that the allegations in the petitions were insufficient to support the issuance of the ex parte PPOs.

Following a motion hearing, the trial court denied respondent's motion to terminate the PPOs. The trial court rejected respondent's argument that the PPOs were improperly granted because of MCL 600.2950(26)(b) and concluded that MCL 600.2950(26)(b) did not preclude it from issuing the

[3] The termination of parental rights court file is not part of the lower court record in this appeal. However, respondent did not dispute that his parental rights had been terminated on the basis of the allegations of sexual abuse, and the trial court considered the sexual abuse allegations that led to respondent's termination of parental rights in its findings and ruling.

PPOs because respondent's parental rights had been terminated. The court also concluded that the ex parte PPOs were appropriately granted.

II. STANDARD OF REVIEW

The granting and continuation of a PPO is "within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *Pickering v Pickering*, 253 Mich App 694, 700; 659 NW2d 649 (2002). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). A trial court's findings of fact underlying a PPO ruling are reviewed for clear error. *Id*. "The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made." *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386-387; 853 NW2d 421 (2014) (cleaned up). Additionally, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). "[T]he trier of fact has the advantage of being able to consider the demeanor of the witnesses in determining how much weight and credibility to accord their testimony." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Questions of statutory interpretation are reviewed de novo. *Hayford*, 279 Mich App at 325.

III. ANALYSIS

A. MCL 600.2950(26)(B)

Respondent first argues that the trial court erred in its interpretation and application of MCL 600.2950(26)(b). We disagree.

MCL 600.2950 sets forth the criteria under which a trial court may issue a PPO in a "domestic" context. The statute permits the court to restrain or enjoin from taking certain actions the petitioner's spouse, the petitioner's former spouse, an individual with whom the petitioner has had a child in common, an individual with whom the petitioner has or has had a dating relationship, or an individual residing or having resided in the same household as the petitioner. MCL 600.2950(1). Under MCL 600.2950(4), the trial court is required to issue a PPO if it determines that "there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1)."

Respondent argues that the trial court erred in its interpretation and application of MCL 600.2950(26)(b) because the subsection precluded the trial court from granting the PPOs on these facts.

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). "[T]he provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). "[N]othing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n*, 489 Mich at 218 (cleaned up). "When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted." *Pace v Edel-Harrelson*, 499 Mich 1, 7; 878 NW2d 784 (2016).

However, "[a] provision is not ambiguous just because 'reasonable minds can differ regarding' the meaning of the provision." *People v Gardner*, 482 Mich 41, 50 n 12;

753 NW2d 78 (2008), quoting *Mayor of Lansing v Pub Serv Comm*, 470 Mich 154, 165; 680 NW2d 840 (2004). "Rather, a provision of the law is ambiguous only if it irreconcilably conflicts with another provision, or when it is *equally* susceptible to more than a single meaning." *Mayor of Lansing*, 470 Mich at 166 (cleaned up). An apparently ambiguous statute can be clarified by the remainder of the statutory scheme. *MidAmerican Energy Co v Dep't of Treasury*, 308 Mich App 362, 370; 863 NW2d 387 (2014).

"Where the language of a statute is of doubtful meaning, a court 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). However, "a court should not abandon the canons of common sense." *Id*. This Court should avoid any construction that would render any part of a statute surplusage or nugatory. *Robinson v Lansing*, 486 Mich 1, 21; 782 NW2d 171 (2010). Further, "[s]tatutes 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).

MCL 600.2950(26)(b) provides that "[a] court shall not issue a personal protection order that restrains or enjoins conduct described in subsection (1) if . . . [t]he petitioner is the unemancipated minor child of the respondent." Although respondent does not dispute that his parental rights to the minor children were terminated, he argues that because he is the natural father or parent of the minor children as defined by MCL 722.1(b), the PPOs were issued in violation of MCL 600.2950(26)(b).

"Minor" and "emancipated" are not defined under MCL 600.2950. However, "[w]hen two statutes or provisions lend themselves to a construction that avoids conflict, that interpretation is controlling." *Bloomfield Twp v Kane*, 302 Mich App 170, 176; 839 NW2d 505 (2013). "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *Id*. (cleaned up). "The objective of the *in pari materia* rule is to give effect to the legislative purpose as found in statutes addressing a particular subject." *Id*.

MCL 722.1 *et seq*. codifies the "fundamental liberty interest of parents with regard to their children . . . ." *Ryan v Ryan*, 260 Mich App 315, 333; 677 NW2d 899 (2004). MCL 722.1 provides the following definitions:

> (a) "Minor" means a person under the age of 18 years.
>
> (b) "Parents" means natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate.
>
> (c) "Emancipation" means termination of the rights of the parents to the custody, control, services and earnings of a minor.

Respondent argues that in order for a court to issue a PPO under MCL 600.2950 as it relates to a minor child as petitioner against a respondent parent, the child must be emancipated from both parents, meaning both parents' parental rights must be terminated. Respondent asserts that the language of MCL 722.1(c) requires that *both* parents' parental rights be terminated in order for a minor to be "emancipated." However, a plural term may include the singular, and a singular term may be extended to include its plural. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 428; 565 NW2d 844 (1997); see also MCL 8.3b.

Given the definitions provided by MCL 722.1, we hold that "emancipated minor" as it relates to MCL 600.2950(26)(b) applies to a minor child when the parental rights of one or both parents have been terminated.

The trial court did not err when it concluded that MCL 600.2950(26)(b) did not preclude it from issuing the PPOs against respondent. It is undisputed that respondent's parental rights to the minor children were terminated.[4] On the basis of the definitions provided by MCL 722.1, the minor children were "emancipated minors" as to respondent because respondent's parental rights were terminated at the time the petitions were filed. Therefore, the trial court was not precluded from issuing the PPOs under MCL 600.2950(26)(b) because the statute did not apply under these circumstances.

B. ISSUANCE OF PPOS AND MOTION TO TERMINATE

Respondent also argues that the trial court abused its discretion by granting the ex parte PPOs and denying his motion to terminate the PPOs. We disagree.

As indicated, under MCL 600.2950(4), the trial court is required to issue a PPO if it determines that "there is reasonable cause to believe that the individual to be

[4] MCL 712A.19b(5) provides, "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." "[W]hen parental rights are terminated, what is lost are those interests identified by the Legislature *as parental rights*. In other words, the terminated parent loses any entitlement to the custody, control, services and earnings of the minor." *In re Beck*, 488 Mich 6, 15; 793 NW2d 562 (2010) (cleaned up).

restrained or enjoined may commit 1 or more of the acts listed in [MCL 600.2950(1)]." "The petitioner bears the burden of establishing reasonable cause for issuance of a PPO and of establishing a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO." *Hayford*, 279 Mich App at 326 (citations omitted). "The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts." *Id.*; see also MCL 600.2950(4). "A court shall issue an ex parte personal protection order without written or oral notice to the individual restrained or enjoined or his or her attorney if it clearly appears from specific facts shown by a verified complaint, written motion, or affidavit that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued." MCL 600.2950(12); see also MCR 3.705(A)(2). "[T]he court must make a positive finding of prohibited behavior by the respondent before issuing a PPO." *Kampf v Kampf*, 237 Mich App 377, 386; 603 NW2d 295 (1999). To terminate a PPO, a respondent is required to show "good cause." MCR 3.707(A)(1)(b).

MCL 600.2950(1)(j) allows a court to restrain individuals from engaging in conduct that is prohibited under MCL 750.411h, Michigan's stalking statute. "Stalking" is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). MCL 750.411h(1) further provides, in pertinent part:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

* * *

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(*i*) Following or appearing within the sight of that individual.

(*ii*) Approaching or confronting that individual in a public place or on private property.

* * *

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

However, MCL 750.411h "does not require a showing of fear." *Hayford*, 279 Mich App at 331.

Respondent argues that the factual allegations were insufficient to support the issuance of the ex parte PPOs. Specifically, respondent argues that there was no

evidence to support "the showing of any immediate or irreparable harm or intimidation perpetrated by [respondent] towards HP and RP" and that the allegations did not allege that he "made any attempts to contact, intimidate or otherwise interact with HP and RP."

We hold that the allegations were sufficient to support the issuance of the ex parte PPOs. The evidence at the hearing was sufficient to support the denial of respondent's motion to terminate the PPOs. The allegations and evidence established that there was reasonable cause to believe that respondent engaged in stalking behavior. MCL 600.2950(1)(j) and (4).

The record sufficiently supported the trial court's findings regarding respondent's behavior at HP's basketball games, and we are not "left with the definite and firm conviction that a mistake has been made" regarding its findings. *Arbor Farms, LLC*, 305 Mich App at 386-387 (cleaned up). The court found that the petition alleged four instances of contact between the minor children and respondent. Respondent did not dispute that he attended at least four basketball games on four separate occasions. The court noted that at least two of the contacts involved RP. At the hearing, petitioner testified that respondent stood during the games to make sure that HP saw respondent. Photographs of respondent attending the games showed respondent standing at the top of the bleachers and that respondent was the only individual standing in the stands. Petitioner testified that one photograph taken at the February 2020 game depicted respondent staring at HP, who was seated on the bench, while most other spectators watched what was going on in the game.

Respondent argues that to grant the PPOs, the trial court was required to find that the intent behind his course of conduct was "to bring about the reaction or

else the language selected, such as 'willful,' and 'purpose' would not have been the words chosen by the Legislature." Respondent's argument has no merit. The plain language of the statute requires only that respondent willfully engage in the "course of conduct." MCL 750.411h(1)(d). "Willful" has been defined as "[p]roceeding from a conscious motion of the will; voluntary; knowingly; deliberate." *Jennings v Southwood*, 446 Mich 125, 140; 521 NW2d 230 (1994) (cleaned up). MCL 750.411h does not require that an individual engage in the "course of conduct" with the intent to bring about the harm. Cf. *Jennings*, 446 Mich at 140 ("Willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.") (cleaned up; emphasis omitted). Rather, MCL 750.411h(1)(d) requires a showing that an individual willfully engaged in the "course of conduct" and that the conduct "would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). Respondent did not dispute that he attended at least four basketball games on four separate occasions, that he stood in the stands, or that HP or RP actually saw him at the games. Accordingly, the trial court did not err when it concluded that respondent engaged in "a willful course of conduct" that included a "series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a) and (d).

Respondent requests that we adopt a "more appropriate definition of stalking." However, "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich*

Ed Ass'n, 489 Mich at 218 (cleaned up). "When the plain and ordinary meaning of [the] statutory language is clear, judicial construction is neither necessary nor permitted." *Pace*, 499 Mich at 7. Therefore, we refuse to adopt a new definition of stalking under MCL 750.411h because it would be contrary to the language of the statute and the intent of the Legislature. Under the language of the statute, the trial court did not err when it concluded that respondent willfully engaged in the course of conduct of attending the basketball games.

The trial court also did not err in holding that the minor children experienced emotional distress as a result of respondent's harassment. Respondent had little to no contact with the children between 2015 and 2019. Respondent was acquitted in criminal court of five counts of CSC under the standard of proof beyond a reasonable doubt. Nevertheless, the allegations underlying those charges were sufficiently proven by clear and convincing evidence such that respondent's parental rights to the minor children were terminated as a result of the CSC allegations in May 2018. Petitioner testified that before the November 2019 game, the children had not seen respondent since May 2018. Petitioner alleged that respondent stood in the stands during HP's basketball game and tried to intimidate HP and that respondent's behavior at the games caused both of the children mental distress. Petitioner stated that although respondent was found not guilty of the criminal CSC charges, the children had daily mental distress as a result of the alleged sexual abuse that he perpetuated against the children and that respondent's attendance and behavior at the games brought back "a lot of fear in [the minor children] . . . ."

After the November 2019 game, petitioner alleged that HP and RP were "in tears" and asked "when this

will end[?]" Further, petitioner alleged that HP would not eat after the game, did not "say much," and put his head on the table, which was not normal behavior. Petitioner asserted that the children were distressed after each game that respondent attended. A photograph admitted at the hearing depicted HP with his head on a table during dinner after the November 2019 game. A photograph of RP, after she saw respondent at the February 2020 game, was also admitted during the hearing. Petitioner testified that the photograph showed RP's anxiety. Petitioner further testified that the children wanted the basketball season to "hurry up and be over with so they didn't have to deal with this" and that HP no longer wanted to play other sports because he feared that respondent would attend his games.

As indicated earlier, respondent did not dispute that he attended at least four basketball games on four separate occasions, that he stood in the stands, or that HP or RP actually saw him at the games. Respondent testified that he did not do anything at the basketball games with the intent to get the attention of HP, RP, or petitioner and that he only stood in the stands during halftime. Respondent speculated that his presence did not affect how HP played during the basketball games, and he did not believe HP felt there was any immediate danger. Respondent also testified that he only saw RP at the February 2020 game and speculated that RP did not appear to have "any angst" or "fear."

The trial court rejected respondent's cavalier rendition of how his conduct impacted the children. On the basis of the petition, hearing testimony, and photograph exhibits, the trial court concluded that respondent's intent was "to make his presence known, i.e., frighten, harass, intimidate, and threaten." The trial

court also considered the sexual abuse allegations that led to the termination of respondent's parental rights and found that respondent's presence at the games caused harm to the children. As indicated, respondent did not dispute that his parental rights to the minor children had been terminated as a result of CSC allegations that involved the minor children. Regarding the immediacy of the harm, the trial court, considering the sexual abuse allegations and circumstances that led to the termination of respondent's parental rights, concluded that the moment that the children became aware of respondent's presence there was "immediate and irreparable" harm that affected the children. The trial court recognized that respondent testified that he only attended the games to watch HP play. However, the trial court found that petitioner's testimony was more credible. This Court defers to the trial court regarding the weight of the evidence and credibility of witnesses. MCR 2.613(C); see also *In re Miller*, 433 Mich at 337 ("[T]he trier of fact has the advantage of being able to consider the demeanor of the witnesses in determining how much weight and credibility to accord their testimony."). Considering all the evidence presented at the hearing, we conclude that the trial court did not clearly err when it found that the minor children and petitioner did in fact experience, and that a reasonable person would also have experienced, significant mental distress as a result of respondent's conduct considering the circumstances.

Importantly, under MCL 600.2950(4), petitioner was not required to show that respondent actually committed one of the acts listed in MCL 600.2950(1), only that there was reasonable cause to believe that he *may* commit one of the acts. While respondent claims that petitioner was not credible, the trial court properly

considered petitioner's statements in support of the petition and found petitioner credible. The trial court did not clearly err by finding reasonable cause to believe that respondent might commit one of the prohibited acts under MCL 600.2950(1). Additionally, given the circumstances, the trial court did not err by concluding that immediate and irreparable injury, loss, or damage would result from the delay required to give notice to respondent or abuse its discretion by granting the ex parte PPOs. MCL 600.2950(12).

In sum, the trial court's findings of fact were not clearly erroneous, and we are not left with the definite and firm conviction that a mistake has been made. *Arbor Farms, LLC*, 305 Mich App at 386-387. The trial court's issuance of the ex parte PPOs and denial of respondent's motion to terminate the PPOs fell within the range of principled outcomes. *Hayford*, 279 Mich App at 325. Accordingly, the trial court did not abuse its discretion when it granted the ex parte PPOs, nor did it do so when it denied respondent's motion to terminate the PPOs. *Id*.

Affirmed.

SAWYER, P.J., and STEPHENS, J., concurred with RICK, J.

In re SMITH-TAYLOR

Docket No. 356585. Submitted September 15, 2021, at Detroit. Decided October 14, 2021, at 9:00 a.m. Reversed and remanded to the trial court 509 Mich 935 (2022).

The Department of Health and Human Services (DHHS) first petitioned the Wayne Circuit Court, Family Division, for temporary custody of respondent's children, DL and DE, after respondent threatened the children's father and suffered a mental health episode that required hospitalization. While she was in the hospital, the children were placed in the care of their father. While respondent remained hospitalized, DE was hospitalized with severe injuries and DL was also injured. The children were injured while in the care of their father, and the treating physicians rejected the father's explanations for the injuries. DHHS then filed an amended petition to terminate respondent's parental rights, citing her history of mental illness and her statements that she would not separate from the children's father. The court authorized the petition, and after respondent pleaded no contest to certain allegations stipulated to by the parties, the court assumed jurisdiction over DE and DL. While the proceedings were ongoing, respondent gave birth to DS, and DHHS filed a petition to terminate the parental rights of respondent to DS as well, which the court also authorized. During a combined adjudicative and dispositional hearing, respondent pleaded no contest to allow the court to assume jurisdiction of DS. Thereafter, the court, Edward J. Joseph, J., terminated respondent's parental rights and ordered that no further efforts toward reunification would be made. Respondent appealed.

The Court of Appeals *held*:

1. It is not improper for a court to combine the adjudicative and initial dispositional hearing, but the court must clearly bifurcate the proceedings by conducting the adjudicative hearing first to determine if there is sufficient evidence to take jurisdiction before proceeding to the dispositional phase. In this case, clear differentiation existed between the adjudicative and dispositional phases of the termination proceedings for the older

children and between the adjudicative and dispositional phases of the termination proceedings for the youngest child.

2. In general, when a child is removed from a parent's custody, reasonable efforts must be made to rectify the conditions that caused the child's removal by adopting a service plan unless there is a judicial determination that the parent has subjected the child to certain aggravated circumstances. Respondent argued she did not subject DE to aggravated circumstances and thus should have been offered services given that she did not inflict the injuries upon DE. The parent, however, need not have committed the abuse themselves for there to be aggravating circumstances. Here, respondent allowed the father to become the children's caregiver even though she was aware that he had his parental rights to other children terminated, and she did not take steps to ensure that the children were safe while she received treatment. Accordingly, the record supported the trial court's finding that DHHS did not need to provide reasonable efforts to reunify respondent and her children.

3. Under MCL 712A.19(b)(3)(g), parental rights may be terminated if the trial court finds by clear and convincing evidence that "[t]he parent, although, in the court's discretion, financially able to do so, fails to provide proper care and custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." Where the evidence showed that respondent continued to have contact with the children's father, failed to take prescribed medications for her mental health, displayed unstable and erratic behavior throughout the proceedings, and was involved in several altercations with family members, the trial court did not err by finding that respondent had not provided proper care and custody for the children and would not be able to within a reasonable time.

4. If the court finds grounds to terminate parental rights and that termination of parental rights is in the child's best interests, then the court must terminate parental rights and order no additional efforts to reunify the child with the parent. The court may consider the child's bond to the parent, the parenting ability of the parent, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home. The court may also consider a parent's history of domestic violence, the parent's compliance with a case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption. And when the best interests of multiple children do not differ significantly, the court does not err

if it fails to explicitly make individual and redundant findings concerning each child's best interests. The court did not err by concluding that it was in the best interests of the children to terminate respondent's parental rights where (1) she failed to address her mental health, (2) she continued her relationship with the father, (3) she failed to demonstrate that she had the ability to properly care for the children, (4) the children's relatives had cared for them and wanted to adopt them, and (5) given the children's ages and how long they had been in care, all of the children were in need of finality, stability, and permanency.

5. Pursuant to MCR 3.904(B), courts may allow the use of videoconferencing technology by any participant in a child protective proceeding, and as long as a respondent waives the right to be present, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in removal and evidentiary hearings under MCR 3.967, in termination proceedings under MCR 3.977, and in trials with the consent of the parties. Use of videoconferencing technology for all termination hearings does not violate a respondent's procedural due-process rights when the respondent consented to videoconferencing in every hearing in which testimony was taken and failed to show that the outcome of the proceedings would have been any different if they had taken place in person.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Brittany L. Gitau*, Assistant Attorney General, for the Department of Health and Human Services.

Thomas A. Casey for respondent.

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

K. F. KELLY, J. Respondent appeals as of right the order terminating her parental rights to her children, DL, DE, and DS, under MCL 712A.19b(3)(g) and (j). Respondent's children were removed from her care following an incident of domestic violence with the children's father and respondent's mental health epi-

sode that required police assistance. While respondent was receiving mental health treatment, the children were in the care of their father, and DE sustained serious injuries. Ultimately, a petition was filed seeking termination of respondent's parental rights, and a case service plan was not prepared for respondent in light of aggravated circumstances, MCL 712A.19a(2)(a). On appeal, respondent submitted that aggravated circumstances did not apply to her because she did not personally commit the abuse and she was not present for the abuse. However, respondent allowed the father to reside with the children, and he committed severe physical abuse upon DE, MCL 722.638(1)(a)(*iii*). Further, respondent subjected her children to an unreasonable risk of harm by her failure to eliminate the possible abuse of the children in light of her knowledge that the father's parental rights to other children had been terminated, MCL 722.638(2). MCL 722.638(2) does not limit the request for termination of parental rights at the initial dispositional hearing without the provision for services to the suspected perpetrator of abuse, but also applies to a parent suspected of placing the child at an unreasonable risk of harm by failing to take reasonable steps to eliminate the risk. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On December 11, 2019, petitioner, the Department of Health and Human Services (DHHS), requested temporary custody of DL and DE in regard to respondent, but DHHS requested that the parental rights of the children's father be terminated. At the time this petition was filed, DS was not yet born. The petition alleged that it was contrary to the welfare of the children to be in their parents' care because of physi-

cal abuse, unstable mental health, and threatened harm. It was asserted that, on October 30, 2019, Children's Protective Services (CPS) received a complaint indicating that respondent had been exhibiting erratic behaviors. Specifically, on October 26, 2019, respondent smoked marijuana and then threatened the children's father with a knife. Authorities were called, and respondent was transferred to Kingswood Hospital by ambulance, but she ran away from the ambulance once it arrived at the hospital. On October 30, 2019, respondent was found incoherent on the freeway with DE in the backseat of her car. As a result, she was admitted to Stonecrest Hospital from October 30, 2019 to November 19, 2019, and while there, she was diagnosed with bipolar disorder. On November 6, 2019, respondent was still hospitalized when DE was admitted to the Children's Hospital with severe injuries, including a skull fracture, subdural hematoma, and liver lacerations. DL also had injuries, including bruising on her face, leg, and abdomen. The children were injured while in the care of their father. He denied knowing the cause of DE's severe injuries. Later, he proffered that DE suffered the injuries in a fall from a couch, an explanation rejected by treating physicians. At the time that the children's father became their safety plan, the protective services worker was unaware that the father had his parental rights terminated to other children that he shared with a different mother.[1] However, respondent knew of the prior terminations of the father's parental rights.

On January 21, 2020, DHHS filed an amended petition to terminate respondent's parental rights at

[1] Apparently, the safety plan was handled by a worker in a different county.

the initial disposition on the basis of a history of mental illness as well as respondent's own statements that she would not separate from the children's father. The court authorized the petition. On February 27, 2020, respondent and the father pleaded no contest to certain allegations stipulated to by the parties. The court assumed jurisdiction over DL and DE. Over the next several months, the court held termination hearings. Prior to terminating respondent's parental rights, respondent gave birth to DS in August 2020, her third child with the father. During her pregnancy, respondent declined to take medication for her mental condition, yet DS was born with the active ingredient for marijuana in her system.[2] DHHS filed a petition to terminate the parental rights of respondent and the father to DS, and the court authorized the petition. Although a case service plan was not executed because of aggravated circumstances, respondent did submit to a mental health evaluation, was prescribed medications, and was allowed to participate in visitation with the children. However, it was reported that respondent was combative with her children's caregivers and the CPS workers and had police contacts as a result. On December 2, 2020, during a combined adjudicative and dispositional hearing, respondent and the father pleaded no contest to allow the court to assume jurisdiction of DS. Thereafter, the court continued the termination hearing in regard to all three children and ultimately terminated respondent's parental rights on February 26, 2021. Respondent now appeals.[3]

---

[2] Respondent had asserted that she threatened the children's father with a knife after she smoked marijuana that was "laced" with something.

[3] The children's father did not appeal the termination of his parental rights. This appeal concerns only respondent.

II. COMBINING THE ADJUDICATIVE AND INITIAL DISPOSITIONAL HEARINGS

Respondent alleges that the trial court erred by combining the adjudication phase and the dispositional hearing. We disagree.

Respondent did not object to the trial court allegedly combining the adjudicative hearing and the dispositional hearing. Therefore, this issue is not preserved for appellate review. See *In re Mota*, 334 Mich App 300, 311; 964 NW2d 881 (2020).

"[F]amily division procedure under the court rules . . . [is] reviewed de novo." *Id*. (citation and quotation marks omitted). However, unpreserved claims are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011) (quotation marks and citations omitted). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *In re Utrera*, 281 Mich App at 9.

"Child protective proceedings are governed by the juvenile code, MCL 712A.1 *et seq*., and Subchapter 3.900 of the Michigan Court Rules." *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019). "The DHHS, following an investigation, may petition a court to take jurisdiction over a child." *In re Mota*, 334 Mich App at 312. "The petition must contain essential facts that if proven would permit the court to assume and exercise jurisdiction over the child." *Id*. "If a petition is authorized, the adjudication phase of the proceedings takes place, and the question at adjudication is whether the

court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *Id*.

"If a trial is held regarding adjudication, the respondent is entitled to a determination of the facts by the jury or judge; the rules of evidence apply, and the burden of proof is a preponderance of the evidence." *Id*. at 312-313. "The dispositional phase involves a determination of what action, if any, will be taken on behalf of the child." *Id*. at 313 (citation and quotation marks omitted). "Unlike the adjudicative [trial], at the initial dispositional hearing the respondent is not entitled to a jury determination of the facts and, generally, the Michigan Rules of Evidence do not apply, so all relevant and material evidence is admissible." *Id*. (citation and quotation marks omitted). "If permanent termination of parental rights is sought, the petitioner bears the burden of proving the statutory basis for termination by clear and convincing evidence." *Id*. (citation and quotation marks omitted).

In *In re Mota*, this Court recently held that it is permissible for a trial court to combine the adjudicative hearing and the dispositional hearing. *Id*. at 314. However, the trial court must clearly bifurcate the proceedings by conducting the adjudicative hearing and determine whether there is sufficient evidence to take jurisdiction before proceeding to the dispositional phase. *Id*. at 315-316. MCR 3.973 and MCR 3.977(E) are relevant to this Court's analysis in *In re Mota*. MCR 3.973 provides, in relevant part:

> (B) Notice. Unless the dispositional hearing is held immediately after the trial, notice of hearing may be given by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920.

> (C) Time. The interval, if any, between the trial and the dispositional hearing is within the discretion of the court. When the child is in placement, the interval may not be more than 28 days, except for good cause.

MCR 3.977(E) provides, in relevant part:

> (E) Termination of Parental Rights at the Initial Disposition. 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.

Relying on MCR 3.973 and MCR 3.977(E), this Court set forth the following procedural guidelines that a trial court must follow when the adjudication trial and the initial dispositional hearing are held during the same proceeding:

> First, an adjudication trial is to be conducted with the court allowing the introduction of legally admissible evi-

> dence that is relevant to the exercise of jurisdiction under MCL 712A.2(b). At the conclusion of the adjudication trial, the court, in a bench trial, is to determine whether the DHHS established by a preponderance of the evidence a basis for jurisdiction under MCL 712A.2(b). If jurisdiction is not established, the proceeding is, of course, concluded. If the trial court finds that it has jurisdiction, the dispositional hearing in which termination is sought may immediately be commenced. At the termination hearing, the trial court, in rendering its termination decision under MCL 712A.19b, may take into consideration any evidence that had been properly introduced and admitted at the adjudication trial, MCR 3.977(E), along with any additional relevant and material evidence that is received by the court at the termination hearing, MCR 3.977(H)(2). [*In re Mota*, 334 Mich App at 316.]

Therefore, it is proper for a court to combine the adjudicative and initial dispositional hearing. Accordingly, the next issue is whether the court properly bifurcated the proceedings.

Respondent contends that the proceedings became confusing because the trial court failed to differentiate the proceedings, but rather, heard testimony for both the adjudicative and dispositional hearings. This argument lacks merit. On February 27, 2020, respondent pleaded no contest to the allegations and the court took jurisdiction of DL and DE. DS was not yet born. Respondent stipulated that DE was severely injured while in his father's care, respondent was admitted to Stonecrest Hospital for almost a month as a result of having a psychotic episode, the children's father had given inconsistent reports as to what occurred to DE, and the injuries sustained by DE were consistent with abuse. In support of the stipulation, excerpts from DE's medical records, respondent's medical records from Stonecrest Hospital, and a DHHS investigative report were admitted into evidence. No further testimony was

taken on that day. The termination hearing commenced on June 23, 2020, at which time the initial dispositional phase started in regard to DL and DE. There was a clear differentiation between the adjudicative phase and the dispositional phase.

DS was born on August 2, 2020. On December 2, 2020, the court held an adjudication hearing in regard to DS and a continued termination hearing for DL and DE. Both respondent and the father made admissions for the court to take jurisdiction of DS. Respondent admitted that DL and DE were removed from her care because of physical abuse, which occurred while respondent was hospitalized for mental health issues. Respondent also admitted that DS was born with marijuana in her system. After taking jurisdiction of DS, the court proceeded with the termination hearing for all three children, at which time testimony was taken regarding the termination of respondent's parental rights. Thus, the adjudicative phase in regard to DS was clearly separate from the continued termination hearing. Accordingly, the court employed the proper procedure, and respondent's due-process rights were not violated.

III. REASONABLE EFFORTS

Respondent also contends that the trial court erred by terminating her parental rights at the initial dispositional hearing without providing her reasonable efforts because her case did not involve aggravated circumstances. We disagree.

Issues of statutory construction are reviewed de novo. *In re Ballard*, 323 Mich App 233, 235; 916 NW2d 841 (2018). When interpreting a statute, our primary goal is to give effect to the intent of the Legislature. *In re England*, 314 Mich App 245, 255; 887 NW2d 10

(2016). If the statutory language is clear and unambiguous, this Court must enforce it as written. *In re Beers*, 325 Mich App 653, 662 n 4; 926 NW2d 832 (2018).

In order to preserve the issue of whether reasonable efforts for reunification were made, a respondent must raise the issue at the time the services are offered. See *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Respondent failed to preserve this issue. Therefore, it is reviewed for plain error affecting substantial rights. *VanDalen*, 293 Mich App at 135.

"In general, when a child is removed from the parents' custody, the petitioner is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan." *In re Sanborn*, 337 Mich App 252, 258; 976 NW2d 44 (2021) (quotation marks and citation omitted) " 'Reasonable efforts to reunify the child and family must be made in all cases except those involving aggravated circumstances under MCL 712A.19a(2).' " *Id*. at 259, quoting *In re Rippy*, 330 Mich App 350, 355; 948 NW2d 131 (2019). "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 re Rippy*, 330 Mich App at 355. Section 18, MCL 722.638, of the Child Protective Law, MCL 722.621 *et seq*., provides, in relevant part:

> (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.
>
> * * *
>
> (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.

Respondent submits that aggravated circumstances did not pertain to her case because she did not inflict the injuries upon DE, was receiving treatment in a facility at the time of the injuries, and once she became aware of the injuries to DE, she separated from the children's father and suspected abuser. Therefore, respondent contends that she should have been offered services. However, the record reflects that the children's father lived in the home. After respondent suffered mental health issues that required hospitalization, respondent allowed the children's father to become the children's caregiver. Although she was aware that the children's father had his parental rights to other children terminated, respondent did not take steps to ensure that the children were safe while she received treatment. Thereafter, while in the care of their father, DL was hospitalized for failure to thrive issues, and DE suffered severe abuse and injuries to

his brain that caused him to become legally blind. Thus, the children's father severely abused DE, MCL 722.638(1)(a)(*iii*), and respondent placed DE "at an unreasonable risk of harm due to the parent's failure to take reasonable steps to intervene to eliminate that risk," MCL 722.638(2). The plain language of MCL 722.638(2) did not limit its application to the suspected perpetrator of the abuse. *Beers*, 325 Mich App at 662 n 4. Rather a parent suspected of placing the child at an unreasonable risk of harm due to a failure to take steps to eliminate a risk of harm is also subject to termination of parental rights at the initial dispositional hearing, MCL 722.638(2). Thus, respondent was not required to commit the abuse herself in order for the aggravating circumstances to apply. Moreover, at the first hearing on the original petition, respondent volunteered on the record that she was only separated from the children's father until their case concluded, and she did not intend to divorce him. Accordingly, the record supports the trial court's finding that DHHS did not need to provide reasonable efforts to reunify respondent and her children because of the existence of aggravated circumstances.

IV. STATUTORY GROUNDS

Respondent contends that the trial court erred in finding statutory grounds to terminate her parental rights to her three children under MCL 712A.19b(3)(b)(*i*) and (*ii*), (g), and (j).[4] We disagree.

In order to terminate parental rights, a trial court must find that a statutory ground has been established by clear and convincing evidence. *In re Moss*, 301 Mich

[4] Although respondent contends that the trial court erred in terminating her parental rights under MCL 712A.19b(3)(b)(*i*) and (*ii*), the trial court only terminated her rights under MCL 712A.19b(3)(g) and (j).

App 76, 80; 836 NW2d 182 (2013). The trial court's findings regarding statutory grounds are reviewed for clear error. *Id*. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *Id*. (citation and quotation marks omitted).

Parental rights can be terminated if the trial court finds by clear and convincing evidence that "[t]he parent, although, in the court's discretion, financially able to do so, fails to provide proper care and custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g).

The trial court did not err in terminating respondent's parental rights under MCL 712A.19b(3)(g). The court found that respondent could not provide proper care and custody for the children and would not be able to because of a continued failure to adequately address her mental health needs and the court had not seen any improvement. The court noted that the clinic for child study assessment reflected that the prognosis for returning the children to respondent was not particularly good. The court also found that respondent continued to display combative behavior and there was no indication that she had improved to negate harm to the children.

The trial court's findings are supported by the evidence. The record illustrated that respondent suffered from mental health issues and displayed unstable and erratic behavior throughout the proceedings. In October 2019, respondent was taken to Kingswood Hospital after threatening the children's father with a knife. Upon arrival at Kingswood Hospital by ambulance, she fled the hospital on foot. A few days later, the

police found respondent in an incoherent state on the freeway with DE in the car, after which she was hospitalized for a three-week period for mental health services. During this time, respondent was diagnosed with bipolar disorder. Further, respondent was offered aftercare services upon discharge from the hospital, but she did not attend those services or take the prescribed medications. Moreover, respondent's continued erratic behavior indicated that she was mentally unstable throughout the proceedings. Evidence admitted in August 2020 indicated that respondent had been arrested on several occasions and had been involved in several altercations with family members. Testimony also illustrated that respondent was aggressive with providers during her parenting visits.

Further, respondent appeared to continue to have a relationship with the children's father throughout the proceedings. DE suffered severe injuries consistent with abuse while in the care of the father, but at the preliminary hearing, respondent made it clear to the court that she would separate from the father only until the completion of the proceedings and she would not divorce him. Although she testified that she was not planning on living with the father, respondent's desire to continue their relationship after DE and DL were injured called into question respondent's ability to provide proper care and custody. Further, evidence admitted in August 2020 indicated that respondent and the father lived together when they were not having a dispute. Moreover, a CPS worker testified that, in October 2020, respondent contacted her about the father pulling a knife on respondent. Thus, the evidence indicated that respondent and the father continued to have contact as of October 2020 and their relationship continued to exhibit signs of domestic abuse.

Finally, the evidence indicated that respondent did not have a full understanding of DE's injuries or the care he would need. Respondent's testimony that she believed DE to be "perfectly fine" despite testimony that he was legally blind as a result of his severe injuries indicated a failure to acknowledge DE's extensive injuries and the long-term effects of those injuries. On the basis of the above evidence, the trial court did not err in finding that respondent had not provided proper care and custody for the children and would not be able to within a reasonable time.[5]

V. BEST INTERESTS

Respondent contends that the trial court erred in concluding that it was in the children's best interests to terminate her parental rights. We disagree.

"[W]hether termination of parental rights is in the best interests of the child must be proved by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. This Court reviews the trial court's ruling that termination is in the child's best interests for clear error. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011).

---

[5] The trial court also terminated parental rights pursuant to MCL 712A.19b(3)(j) by finding clear and convincing evidence that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Because only a single statutory ground needs to be established to support termination of parental rights under MCL 712A.19b(3), *In re Martin*, 316 Mich App 73, 90; 896 NW2d 452 (2016), we need not address MCL 712A.19b(3)(j). Moreover, respondent abandoned any challenge to MCL 712A.19b(3)(j) by failing to raise any argument pertaining to this subsection. *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008). Nonetheless, the trial court properly terminated respondent's parental rights on this basis because respondent failed to address her mental health issues, her anger issues, and her toxic relationship with the father and its impact on her children.

"If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." MCL 712A.19b(5). "In deciding whether termination is in the child's best interests, the court may consider 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." *In re Olive/Metts*, 297 Mich App 35, 41-42; 823 NW2d 144 (2012) (citations omitted). "The trial court may also consider a parent's history of domestic violence, the parent's compliance with his or her case service plan, the parent's visitation history with the child, the children's well-being while in care, and the possibility of adoption." *In re White*, 303 Mich App 701, 714; 846 NW2d 61 (2014).

The trial court did not err in concluding that it was in the best interests of the children to terminate respondent's parental rights. Respondent's failure to significantly address her mental health, her erratic behavior throughout the proceedings, her continued relationship with the father, and her failure to acknowledge the severity of DE's injuries demonstrated that she did not have the ability to properly care for the children and that it was in the best interests of the children to terminate respondent's parental rights.

Further, the children were all placed in relative placements, which the trial court considered. The children's paternal great aunt had cared for DE and DL since they were released from the hospital, and she wanted to adopt the children. The children's maternal aunt had cared for DS since she was born in

September 2020 and was willing to adopt DS. Although there was evidence that respondent was bonded to the children, the trial court found that the bond between respondent and the children was outweighed by the risk of harm to the children upon reunification.

The court must consider each child's best interests individually. *In re Olive/Metts*, 297 Mich App at 42. However, a court does not err if it fails to explicitly make individual and redundant findings concerning each child's best interests when the best interests of the children do not significantly differ. *In re White*, 303 Mich App at 715-716. The interests of the children do not differ significantly. The children are all very young. DL, the oldest child, was under three years old at the time respondent's parental rights were terminated. DL and DE had been placed with their paternal great aunt for nearly a year, which is a significant portion of their lives considering their ages. DS had been placed with her maternal aunt since she was born.

Although DE has particular needs that the other two children do not have being that he was deemed legally blind as a result of his injuries, this supports the termination of respondent's parental rights to DE. The record indicates that respondent did not fully comprehend the severity of his injuries and did not believe he was blind. Further, respondent had not been permitted to attend DE's medical appointments because of an altercation with the children's paternal great aunt. Given the children's ages, how long they had been in care, and DE's particular medical needs, all of the children were in need of finality, stability, and permanency. For those reasons, the trial court did not err in concluding that it was in the best interests of all of the children to terminate respondent's parental rights.

VI. RIGHT TO IN-PERSON HEARINGS

Respondent submits that the trial court erred by failing to inform her of her right to have in-person court hearings. We disagree.

In the trial court, respondent specifically consented to the videoconference hearings. To the extent respondent alleges that the trial court was specifically required to inform respondent of a right to be present in person separate from asking whether respondent agreed to a hearing by videoconference, this argument is not preserved for appellate review.

"Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014). "The interpretation and application of statutes and court rules are also reviewed de novo." *Id*. at 404. However, unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App at 8.

MCR 3.904(B) governs the use of videoconferencing in child protective proceedings and provides:

> (B) Child Protective and Juvenile Guardianship Proceedings.
>
> (1) Except as provided in subrule (B)(2), courts may allow the use of videoconferencing technology by any participant, as defined in MCR 2.407(A)(1), in any proceeding.
>
> (2) As long as the respondent is either present in the courtroom or has waived the right to be present, on motion of either party showing good cause, the court may use videoconferencing technology to take testimony from an expert witness or any person at another location in the following proceedings:

> (a) removal hearings under MCR 3.967 and evidentiary hearings; and
>
> (b) termination of parental rights proceedings under MCR 3.977 and trials, *with the consent of the parties*. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting. [Emphasis added.]

The court held all of the termination hearings over Zoom because of COVID-19. On August 11, 2020, the trial court asked the parties whether they consented to holding the termination hearing over videoconference, to which counsel for respondent answered, "[n]o objection." For the next three hearing dates, respondent's counsel consented to video hearings on behalf of respondent.

Thus, during every hearing in which testimony was taken, respondent consented to a hearing by videoconference. Moreover, respondent failed to provide any support for the argument that the trial court was required to specifically articulate respondent's right to an in-person hearing separate from asking her whether she consented to a hearing over videoconference. In addition, respondent failed to set forth any argument as to how the outcome of the proceedings would have been different had they taken place in-person. Accordingly, respondent has failed to establish that her due-process rights were violated.

Affirmed.

CAVANAGH, P.J., and REDFORD, J., concurred with K. F. KELLY, J.

CITY OF LANSING v ANGAVINE HOLDING, LLC

Docket No. 353784. Submitted September 14, 2021, at Lansing. Decided October 14, 2021, at 9:05 a.m.

The city of Lansing appealed in the Ingham Circuit Court an adverse decision by the State Tax Commission regarding a remodeled building on property owned by Angavine Holding, LLC. Angavine had renovated its building in 2013, replacing office space on the first floor with eight apartments. The city did not, however, reassess the property's first floor for purposes of its general-property-tax assessment roll until 2019. The city initiated proceedings before the commission seeking correction of the assessment role. The commission dismissed the city's claim for tax year 2016 for lack of jurisdiction. With respect to tax years 2017 and 2018, the commission concluded that the remodeled first-floor property did not qualify as omitted property. The city appealed in the Ingham Circuit Court and argued that its income-based evaluation system required a new assessment after the property was remodeled. Angavine argued that the trial court lacked jurisdiction over the city's appeal and that the commission did not err. The court, Wanda M. Stokes, J., concluded that it had jurisdiction over the city's appeal under Article 6, § 28 of Michigan's 1963 Constitution and MCL 600.631 of the Revised Judicature Act, MCL 600.101 *et seq*., and that Angavine's remodeled property qualified as omitted property and required a new assessment. Angavine appealed.

The Court of Appeals *held*:

1. The commission's final decision affected Angavine's private rights under the tax laws and thus satisfied the prerequisites for judicial review under Article 6, § 28 of Michigan's 1963 Constitution. The commission is a state administrative agency, and the Legislature has expressly provided that, at the determination of the commission, Article 6, § 28 applies in all of its proceedings. Article 6, § 28 provides that all final decisions of any administrative officer or agency that are judicial or quasi-judicial and affect private rights are subject to direct review by the courts as provided by law. A right of judicial review of such administrative decisions has three requirements: (1) the administrative decision

must be a final decision of an administrative agency, (2) the agency must have acted in a judicial or quasi-judicial capacity, and (3) the decision must affect private rights or licenses. The parties did not dispute that the first two requirements were met. Because the case did not involve a license and because the city had no private right to levy ad valorem property taxes, the implication of Article 6, § 28 depended on whether Angavine's own right was affected. Angavine, like any taxpayer, had the private right to ensure that its property was taxed the same as similarly situated property. And Angavine's argument that the commission's decision did not affect its right, because the commission concluded that it was not required to pay additional taxes, relied on a too-limiting view of Article 6, § 28. An agency decision denying relief or otherwise maintaining the status quo vis-á-vis some private right is one that has an effect or operative influence on that right. The effect or operative influence in that case would be to keep the private right factually or legally preserved or unaltered in some relevant sense, as opposed to ordering a change that would disturb the factual circumstances or legal landscape. Because an agency's denial of relief—i.e., maintenance of the status quo—will often have a negative effect on a party's rights or interests, an agency should not be able to insulate itself from judicial review merely by denying relief. Furthermore, as written, Article 6, § 28, defines a broad set of agency decisions subject to appellate review, and in MCL 211.152(3), the Legislature specifically references Article 6, § 28 with respect to the commission's proceedings involving assessments, evidencing its recognition that this constitutional provision may be relevant during these types of proceedings.

2. Judicial review under Article 6, § 28 is specifically subject to the proviso "as provided by law." MCL 600.631, known as the catch-all provision of the Revised Judicature Act, states, in relevant part, that a circuit court appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules, from which an appeal or other judicial review has not otherwise been provided for by law, and the court shall have and exercise jurisdiction with respect thereto as in nonjury cases. The commission is a state agency that has the authority to promulgate rules, and the commission issued a decision from which an appeal or other judicial review was not otherwise provided by law, at least with respect to the city. Thus, consistently with its constitutional role to "provide by law," the Legislature created the catch-all provision of the Revised Judicature Act, MCL 600.631,

for just this type of circumstance—in which a party would otherwise be excluded from the judicial review contemplated under Article 6, § 28.

3. Property qualifies as omitted real property if the taxing authority is aware of new construction but fails to include that property when assessing a property's taxable value; the determinative factor is whether tangible property previously existed and, if so, whether it was included in the assessment. The General Property Tax Act's definition of "omitted real property" uses the definite article "the" instead of the indefinite "a" when referring to "the assessment." Thus, determining whether property qualifies as omitted real property requires examining the specific assessment in each case, which here was the general-property-tax assessment, not the special assessment. Angavine's remodeled property existed before tax year 2017, and it was not included in Lansing's general-property-tax assessment roll, the only assessment roll at issue in this case. Consequently, the remodeled first-floor property constituted omitted property because it previously existed and was not assessed on the city's general-property-tax assessment roll.

Affirmed.

1. CONSTITUTIONAL LAW — RIGHT TO APPEAL AGENCY DECISION — DECISIONS AFFECTING PRIVATE RIGHTS — AGENCY DECISIONS THAT DENY RELIEF.

Under Article 6, § 28 of Michigan's 1963 Constitution, a final decision of a state agency that is judicial or quasi-judicial and affects private rights or licenses is subject to judicial review as provided by law; MCL 211.152 provides that the constitutional provision applies in State Tax Commission proceedings, in the determination of the commission; for there to be a right of judicial review, three requirements must be met: (1) the administrative decision must be a final decision of an administrative agency, (2) the agency must have acted in a judicial or quasi-judicial capacity, and (3) the decision must affect private rights or licenses; regarding the third requirement, a company has a private right to be subject to taxation under the relevant state and local laws, properly applied—as opposed to being subject to taxation under some inapplicable provision of the tax code, arbitrary chance, or the mere whim of a tax official; an agency ruling that has an operative influence on that private right is subject to direct review; an agency decision that denies relief or otherwise maintains the status quo vis-á-vis that private right is still one that has an operative influence on that right and therefore affects it for the purpose of determining whether there is a right to review.

2. CONSTITUTIONAL LAW — RIGHT OF A MUNICIPAL TAXING AUTHORITY TO APPEAL AN AGENCY DECISION — "AS PROVIDED BY LAW" — THE CATCH-ALL PROVISION OF THE REVISED JUDICATURE ACT.

Under Article 6, § 28 of Michigan's 1963 Constitution, a final decision of a state agency that is judicial or quasi-judicial and affects private rights or licenses is subject to judicial review as provided by law; MCL 600.631 of the Revised Judicature Act states, in relevant part, that a circuit court appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, and the court shall have and exercise jurisdiction with respect thereto as in nonjury cases; when a municipal taxing authority would otherwise be excluded from accessing the judicial review contemplated under Article 6, § 28, it may seek judicial review of a decision of the State Tax Commission under MCL 600.631.

3. TAXATION — GENERAL PROPERTY TAX ACT — "OMITTED REAL PROPERTY."

MCL 211.34d(1)(b)(*i*) defines "omitted real property" as "previously existing tangible real property not included in the assessment" and provides that "[t]he assessing jurisdiction has the burden of proof in establishing whether the omitted real property is included in the assessment"; determining whether property qualifies as omitted real property requires examining *the* specific assessment in a given case.

James D. Smiertka, *F. Joseph Abood*, *Heather E. Sumner*, and *Gregory S. Venker* for the city of Lansing.

Hallahan & Associates, PC (by *Laura M. Hallahan* and *Seth A. O'Loughlin*) for Angavine Holding, LLC.

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

SWARTZLE, J. The city of Lansing received an adverse decision by the State Tax Commission on whether property had been omitted from the city's general-property-tax assessment roll. The city appealed to the Ingham Circuit Court, and Angavine Holding, LLC, objected, arguing that the trial court did not have

jurisdiction and the property had not been "omitted" within the meaning of MCL 211.154. The trial court rejected both arguments, and this appeal followed.

Our review of the record confirms that the State Tax Commission acted in a quasi-judicial capacity when it issued a final decision in this dispute. Even though the Commission's decision resulted in no change to the tax roll, its decision still "affect[ed]" a private right, triggering the right to judicial review found in Article 6, § 28 of Michigan's 1963 Constitution. As more fully explained below, the trial court had jurisdiction to hear the appeal from the Commission. Finding no other basis for reversal, we affirm.

I. BACKGROUND

Angavine owns commercial real estate located at 113 Pere Marquette in the city of Lansing. The company renovated its building in 2013, replacing office space on the first floor with eight apartments; Angavine received permits from the city for the renovation. The remodel did not alter the second floor, where 13 apartments were located. The property's first-floor remodel was assessed on the city's special-assessment roll before and after the remodel. The city did not, however, reassess the property's first floor for purposes of its general-property-tax assessment roll until 2019, leading to this dispute.

In November 2018, the city informed Angavine in writing that the remodeled space had not been included in the city's tax assessment for the property. The city explained that, based on its "income approach" to assessing property, Angavine should have paid additional taxes beginning in tax year 2014. Tax rules prohibited the city from seeking taxes over the entire period, however, so the city increased Angavine's tax liability

for tax years 2016–2018. Angavine did not respond to the city's letter.

Given the lack of response, the city initiated proceedings before the State Tax Commission. Our Legislature has granted the Commission "general supervisory authority over the assessment of property for taxation." *Superior Hotels, LCC v Mackinaw Twp*, 282 Mich App 621, 632; 765 NW2d 31 (2009). A taxpayer or assessing authority can seek the Commission's correction of an assessment roll, MCL 211.152, and the Commission has jurisdiction to correct an assessment roll for omitted property, MCL 211.154.

After reviewing the parties' submissions, staff for the State Tax Commission concluded that the first-floor apartments constituted omitted property:

> The Assessor provided the record cards for the 2017 and 2018 tax years showing an income approach was used to value the subject property. Within the income approach, twelve one-bedroom and one two-bedroom apartments were identified. The 2017 and 2018 record cards submitted by the Assessor did not include any building area identified as ground-floor commercial office space or the eight flat apartments that are the subject of the Petition. Further, in examining the record cards, there is no indication of a change to the apartment count, size or quality as a result of building permits filed in 2011 for "interior tear-out" or "alterations for apartments." Similarly, in 2013, there is no indication of a change for eight plumbing, eight mechanical and eight electrical permits, nor was there a reduction given for the loss of office space in that tax year. Based on the information provided to-date, there is no indication that [the] disputed building area was valued for the 2017 and 2018 tax years.

The State Tax Commission dismissed the city's claim for tax year 2016 for lack of jurisdiction. With respect to tax years 2017 and 2018, despite the staff recom-

mendation, the Commission concluded that the remodeled first-floor property did not qualify as omitted property.

In the letter informing the city of the decision, the State Tax Commission included boilerplate language informing the parties of their appellate rights:

> A person to whom property is assessed may appeal the State Tax Commission's determination within 35 days of the date of issuance to the Michigan Tax Tribunal. More information on how to file an appeal with the Michigan Tax Tribunal can be found at www.michigan.gov/taxtrib or by calling the Michigan Tax Tribunal at 517-335-9760. *Local taxing authorities may appeal* the State Tax Commission's determination within 21 days of the date of issuance *to the circuit court of the county where the local taxing authority is located, or to the Ingham County Circuit Court*. [Emphasis added.]

The city appealed to the Ingham Circuit Court, challenging the State Tax Commission's decision with respect to tax years 2017 and 2018. Angavine responded, arguing, first, that the trial court lacked jurisdiction over the city's appeal and, second, that the State Tax Commission did not err. With respect to the first argument, the city replied that Michigan's 1963 Constitution guaranteed it a right of judicial appeal from the Commission's decision. As for the second argument, the city reiterated its earlier position that the first-floor apartments qualified as omitted property under the law.

The trial court concluded that it had jurisdiction over the city's appeal under Article 6, § 28 of Michigan's 1963 Constitution and § 631 of the Revised Judicature Act, MCL 600.101 *et seq*. On the merits of the city's claim that the remodeled property qualified as omitted property, the trial court agreed with the city that the latter's income-based evaluation system required a new assessment after the 2013 remodel. The fact that the first-floor

apartments appeared on the special-assessment roll had no impact on the city's general-property-tax assessment roll. Accordingly, the trial court reversed the State Tax Commission's decision.

This appeal followed.

II. ANALYSIS

On appeal, Angavine raises the same claims that it raised below—(1) the trial court lacked jurisdiction to hear the city's appeal from the State Tax Commission; and (2) the first-floor remodel did not qualify as omitted property. We take up each claim in turn, and, as explained below, we conclude that each one is without merit.

A. STANDARD OF REVIEW

We review de novo questions of law, including issues involving constitutional and statutory interpretation. *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010); *Stallworth v Stallworth*, 275 Mich App 282, 288; 738 NW2d 264 (2007). Our Supreme Court addressed the principles of constitutional interpretation in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 652; 698 NW2d 350 (2005):

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. This rule of "common understanding" has been described by Justice COOLEY in this way:
>
> > A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it*. "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it,

> *the intent to be arrived at is that of the people*, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed."
>
> In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified. [Citations omitted.]

When interpreting our Constitution, "we apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed." *Id*.

B. JURISDICTION

Angavine first challenges the trial court's jurisdiction to hear the city's appeal from the State Tax Commission. "Subject-matter jurisdiction concerns the right of an adjudicative body to exercise judicial power over a class of cases; not the particular case before it, but rather the abstract power to try a case of the kind or character of the one pending." *Peterson Fin LLC v Kentwood*, 326 Mich App 433, 441; 928 NW2d 245 (2018) (cleaned up). Jurisdiction concerns itself about the nature of the case, not the truth or falsity of the allegations made by the respective parties. *Id*. at 433-434.

Angavine's jurisdictional argument is straightforward: *First*, the State Tax Commission's decision maintained the status quo with respect to Angavine's tax assessment, and therefore its private right was not affected, i.e., changed. Because Angavine's private right was not affected, the constitutional right of

judicial review under Article 6, § 28 of Michigan's 1963 Constitution was not implicated. *Second*, because § 28 was not implicated, the city did not have a constitutional right of judicial review under § 28, and thus the city's right of review, if any, would have to be found in statute. *Third*, the Tax Tribunal Act, MCL 205.701 *et seq*., vests the Tax Tribunal with exclusive and original jurisdiction over appellate review of the State Tax Commission's rulings involving assessments. *And fourth*, the General Property Tax Act only permits taxpayers, not taxing authorities like the city, to seek appellate review of the Commission's decisions with respect to omitted property.

1. CONSTITUTIONAL RIGHT OF JUDICIAL REVIEW

We begin our analysis by considering the constitutional right to appeal from an agency decision found in Article 6, § 28. The State Tax Commission is a state administrative agency, MCL 209.131, and the Legislature has expressly provided that, at the determination of the Commission, Article 6, § 28 "shall apply" "in all of its proceedings," MCL 211.152. The text of the provision states, in full:

> All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

> In the absence of fraud, error of law or the adoption of wrong principles, no appeal may be taken to any court from any final agency provided for the administration of property tax laws from any decision relating to valuation or allocation. [Const 1963, art 6, § 28.]

As should be clear from the text, this provision "is not an absolute guarantee of judicial review of every administrative decision." *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 91; 803 NW2d 674 (2011). Rather, for there to be a right of judicial review, three requirements must first be met: "(1) the administrative decision must be a 'final decision' of an administrative agency, (2) the agency must have acted in a 'judicial or quasi-judicial' capacity, and (3) the decision must affect private rights or licenses." *Id*. Our review of the record confirms that the first two requirements have been met here, and the parties do not dispute either of these. See *id*. at 92.

With respect to whether the State Tax Commission's decision "affect[ed] private rights or licenses," however, the parties take divergent views. On this question, we first observe that this dispute does not involve a license. We also observe that Lansing is a public municipal body and, in the context of its taxing authority as a subdivision of the state, the city does not have a "private" right or license. See *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 302 Mich App 574, 582; 841 NW2d 135 (2013) ("A private right is a personal right, as opposed to the right of the public or the state.") (quotation marks omitted). In arguing to the contrary, the city points to Article 7, § 21 of our Constitution, which states in relevant part: "The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxation for municipal purposes, and restrict the powers of cities and villages to borrow

money and contract debts." From this provision, the city draws the conclusion that it has the private right to levy ad valorem property taxes. Yet, unlike Article 7, § 29, which this Court has held to grant a private right to a municipality, see *Oshtemo Charter Twp*, 302 Mich App at 584, it is clear that Article 7, § 21 is a *limitation* on, not a right with respect to, the authority of municipalities to levy ad valorem property taxes, see, e.g., *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006); *Berkley v Royal Oak Twp*, 320 Mich 597, 601; 31 NW2d 825 (1948) (similar provision in 1908 Constitution). We are not aware of any other private right of a municipality that could be at issue here, and the city has likewise not pointed us to any such right. Accordingly, for Article 6, § 28 to be implicated in this case, it must be Angavine's own right that provides the constitutional hook upon which the trial court's jurisdiction hung.

Generally speaking, Angavine had the right to be subject to taxation under the relevant state and local laws, properly applied—as opposed to being subject to taxation under some inapplicable provision of the tax code, arbitrary chance, or the mere whim of a tax official. See *Orion Twp v State Tax Comm*, 195 Mich App 13, 17; 489 NW2d 120 (1992). As our Supreme Court has explained, "[T]axpayers have a private right to ensure that their property is taxed the same as similarly situated property." *Midland Cogeneration*, 489 Mich at 93; cf. *Viculin v Dep't of Civil Serv*, 386 Mich 375, 387; 192 NW2d 449 (1971) ("One may not have a constitutional right to go to Baghdad, but the government may not prohibit one from going there unless by means consonant with due process of law.") (cleaned up).

More concretely, with respect to its property taxes for tax years 2017 and 2018, Angavine had the right to

be subjected only to those taxes for which it was lawfully liable under the relevant state and local tax laws, properly applied. Lansing understood this liability to be higher than had been originally determined, Angavine disagreed, and the dispute went to the State Tax Commission. Thus, there was a private right at issue in the proceeding before the Commission, as even Angavine concedes on appeal.

And yet, Angavine maintains that the State Tax Commission's decision did not "affect" this right because the Commission concluded that the company was not required to pay additional taxes for those tax years. In effect, Angavine argues that, by denying the city any relief and thereby maintaining the status quo with respect to the company's tax liability, the Commission did not "affect" any private right of the company. To affect a private right means to change or alter it in some way, and to maintain the status quo necessarily means that the private right was not changed or altered, according to Angavine.

With this interpretation, however, Angavine takes too blinkered a view of our Constitution. Although the meaning of a constitutional or statutory word or phrase can sometimes be gleaned without the aid of a dictionary, *Bartalsky v Osborn*, 337 Mich App 378, 387; 977 NW2d 574 (2021), a dictionary can be helpful in situations like this, where we focus on the core meaning of a word, rather than its interpretive boundaries, Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 418. Moreover, regardless of whether a dictionary is consulted, context can often provide critical insight into the meaning of the word or phrase. See *Bartalsky*, 337 Mich App at 387; *Reading Law*, p 418.

The current version of Article 6, § 28 was included in the original version of our Constitution when it was approved by Michigan voters in 1963. At that time (and still today), the verb "affect" was defined, in relevant context, as meaning, "[t]o make a material impression on; to act upon, influence, move, touch, or have an effect on." *The Oxford English Dictionary* (1933) (*OED*); see also *Webster's Seventh New Collegiate Dictionary* (1963) (defining the verb as "to produce an effect upon"). Similarly, *Black's Law Dictionary* (4th ed rev) defined "affect" as "[t]o act upon; influence; change; enlarge or abridge" and "to act, or produce an effect upon." See also 2D *Words & Phrases* (2020) (identifying several judicial decisions from the 1960s and prior that understood "affect" as acting upon, influencing, concerning, and even "to determine a right or interest in"). The noun "effect" was commonly understood in 1963 (and still today) to mean an "operative influence." *OED*. Thus, the relevant "affect" provision in § 28 could be rewritten as follows: "All final decisions . . . of any administrative officer or agency . . . which . . . [have an effect (i.e., operative influence) on] private rights or licenses, shall be subject to direct review by the courts as provided by law."

On this reading, an agency's decision that denied relief or otherwise maintained the status quo vis-á-vis some private right would still be one that had an effect or operative influence on that right. The effect or operative influence in that case would be to keep the private right factually or legally preserved or unaltered in some relevant sense, as opposed to ordering a change that would disturb the factual circumstances or legal landscape. Stated differently, the effect or operative influence of the agency's decision would be that a sought-after change did *not* occur, and, it is important to recognize, that decision would likely have legal

import with respect to, and could have substantial implications for, the specific private right at issue. As a rough analogy, when an appellate court affirms a trial court's ruling, that appellate ruling could, in one sense, be understood as merely preserving the status quo, though, in another sense, that ruling certainly has a legal effect or operative influence on the trial court's ruling as well as the parties' legal rights.

While the listing of "change" in the definition found in *Black's Law Dictionary* does provide some support for Angavine's position, we conclude that the better understanding is the one advocated by the city: to produce an effect on. This broader understanding reflects the commonsense observation that an agency's denial of relief—i.e., maintenance of the status quo—will often have a seriously negative impact on a party's rights or interests, and an agency should not be able to insulate itself from judicial review merely by denying relief.

Context further supports this reading. As written, the provision defines a broad set of agency decisions subject to appellate review: "*All* final decisions, findings, rulings and orders of any administrative officer or agency" that "are judicial or quasi-judicial" in nature and "affect private rights or licenses." Const 1963, art 6, § 28 (emphasis added). Our reading subjects this entire set of agency decisions to potential judicial review. It makes sense, therefore, that the provision is found in Article 6 of our Constitution, entitled "The Judiciary."

But under Angavine's reading, the center of this broad set of cases would be hollowed out like a metaphorical donut hole. Specifically, those cases where the agency denied relief or otherwise maintained the status quo would simply be beyond any constitutional

right of judicial review. This would create something much more akin to a constitutional right *from* judicial review in that subset of cases, and one might have expected to find such a right in Article 1, "Declaration of Rights," rather than Article 6, "The Judiciary."

Moreover, as noted earlier, the Legislature specifically references Article 6, § 28 with respect to the State Tax Commission's proceedings involving assessments. See MCL 211.152(3). The Legislature cannot confer a constitutional right where none exists, but this reference in statute provides evidence that the Legislature has also recognized that this constitutional provision may be relevant during these types of proceedings.

Given all of this, we conclude that the State Tax Commission's decision affected Angavine's private rights under the tax laws, albeit in Angavine's favor. The decision was a final one made by an agency acting in a quasi-judicial capacity. Accordingly, the decision satisfies the prerequisites for judicial review under Article 6, § 28. See *Midland Cogeneration*, 489 Mich at 93; cf. *Viculin*, 386 Mich at 389 (noting that " 'private right' is to be liberally construed in favor of review").[1]

2. "AS PROVIDED BY LAW"

This does not, however, end our inquiry. Angavine points out that the judicial review available under § 28

[1] As an aside, we note that neither party has framed this dispute in terms of standing or aggrieved-party status. As we have explained, the State Tax Commission's decision affected a private right. Although the right affected by the decision was Angavine's, it was the city that appealed from that decision. Because the issue was not raised by the parties, we will not reach it sua sponte. With that said, our state's standing jurisprudence is more permissive than that found in federal courts. Compare *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010), with *Speech First, Inc v Schlissel*, 939 F3d 756, 763-764 (CA 6, 2019). In our courts, standing is a "limited, prudential

is specifically subject to the proviso "as provided by law," and, according to Angavine, the Legislature has so provided with MCL 205.731(a) and MCL 211.154(7). The first section vests the Tax Tribunal with "exclusive and original jurisdiction over" appeals from the State Tax Commission involving, among other things, an "assessment . . . under the property tax laws of this state." MCL 205.731(a). The second section authorizes an appeal from the Commission to the Tax Tribunal with respect to the former's decision involving property omitted from an assessment roll, *but critically*, the appeal is limited to those by a "person to whom property is assessed under this section." MCL 211.154(7). A tax-assessing authority like the city does not qualify as a "person to whom property is assessed." See *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 435; 852 NW2d 650 (2014). Thus, under Angavine's reading of the tax laws, all appeals from the State Tax Commission involving omitted property must go to the Tax Tribunal, but only taxpayers have the statutory right to appeal to the Tax Tribunal. Angavine recognizes that, under its reading of the law, the city has no avenue to initiate judicial review, but it maintains that this statutory scheme satisfies § 28's requirement for such review "as provided by law."

This reading would, indeed, divest the city of any right to initiate judicial review of the State Tax Commission's decisions. One party to a contested matter would be blocked from judicial review, while the other

---

doctrine," and "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n*, 487 Mich at 372. Our Supreme Court has explained that, even "[w]here a cause of action is not provided at law," a party might still have standing if that party has "a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant." *Id*.

party would not. This reading offends not only fundamental notions of due process and fair play, but it also offends an alternate reading of statutory law that is consistent with Article 6, § 28.

As our Supreme Court observed long ago, "No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown . . . ." *Sears v Cottrell*, 5 Mich 251, 259 (1858). "In case of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act." *Id*.

The Legislature does not have the authority to "eradicat[e] constitutional guarantees." *Oshtemo Charter Twp*, 302 Mich App at 590; see also *Coalition Protecting Auto No-Fault v Mich Catastrophic Claims Ass'n*, 317 Mich App 1, 24; 894 NW2d 758 (2016); *Plymouth Twp v Hancock*, 236 Mich App 197, 202; 600 NW2d 380 (1999). While our Constitution gives the Legislature the authority to enact the protections provided by Article 6, § 28, this just means that it can "dictate 'how,' 'when,' and 'what' type of appeal of an agency decision is permitted." *Midland Cogeneration*, 489 Mich at 94.

In line with its constitutional role, the Legislature has provided three avenues of judicial review of an agency's final decision. These are, in descending order of preference: (1) in accordance with the statutory procedure provided for the specific agency; (2) in accordance with the Administrative Procedures Act of 1969, MCL 24.201 *et seq*. (APA); and (3) in accordance with the catch-all provision of the Revised Judicature Act. *Morales v Mich Parole Bd*, 260 Mich App 29, 33; 676 NW2d 221 (2003). The latter catch-all provision has

been recognized by courts as "a method of review 'provided by law' " specifically for purposes of Article 6, § 28. *Viculin*, 386 Mich at 395.

The first two avenues do not apply to the city. As we have seen, the General Property Tax Act does not authorize any appeal by the city in this circumstance. Moreover, there is nothing in the act making the APA applicable to appeals from the State Tax Commission, and, in fact, the Legislature specifically excluded APA procedures from contested cases before the Commission involving tax assessments. MCL 211.152(3). Thus, we turn to the catch-all option, the Revised Judicature Act.

MCL 600.631 of the Revised Judicature Act reads as follows:

> An appeal shall lie from any order, decision, or opinion of any state board, commission, or agency, authorized under the laws of this state to promulgate rules from which an appeal or other judicial review has not otherwise been provided for by law, to the circuit court of the county of which the appellant is a resident or to the circuit court of Ingham county, which court shall have and exercise jurisdiction with respect thereto as in nonjury cases. Such appeals shall be made in accordance with the rules of the supreme court.

The city's appeal fits squarely within this provision. The State Tax Commission is a state agency and has the authority to promulgate rules. MCL 209.131; MCL 211.10d(10). The Commission issued a decision from which "an appeal or other judicial review has not otherwise been provided by law," MCL 600.631, at least with respect to the city. Thus, consistent with its constitutional role to "provide by law," we conclude that the Legislature created the catch-all provision of the Revised Judicature Act for just this type of

circumstance—where a party would otherwise be excluded from the judicial review contemplated under Article 6, § 28.

Finally, we note that our courts have recognized in several decisions that, with the Tax Tribunal Act, the Legislature intended to invest the Tax Tribunal with exclusive and original jurisdiction over appeals involving, among other things, tax assessments. See, e.g., *Peterson Fin*, 326 Mich App at 443. Read in a vacuum, these decisions could be viewed as supporting Angavine's position. These decisions did not, however, consider the precise question that we face here. The Legislature does not have the authority to foreclose a municipality from seeking any-and-all judicial review from a decision of the State Tax Commission, and we do not read its statutes as doing so. More to the point, by enacting the catch-all provision for judicial review in the Revised Judicature Act, the Legislature made plain that the city and similarly situated municipalities do have an available avenue for judicial review. Rather than declare that one or more provisions of the tax laws are unconstitutional, we read MCL 600.631 of the Revised Judicature Act as the Legislature's plainly expressed intent to resolve any statutory ambiguity or inconsistency in favor of judicial review.

Accordingly, we hold that the city was authorized to pursue its appeal before the Ingham Circuit Court, and that court had jurisdiction to hear the appeal.

C. OMITTED PROPERTY

In addition to its jurisdictional challenge, Angavine also argues that the circuit court erred by concluding that the first-floor apartments qualified as omitted property.

The trial court noted at the outset of its analysis that its review of the State Tax Commission's decision was limited by Article 6, § 28 to matters involving "fraud, error of law or the adoption of wrong principles." There is no question of fraud here. Thus, "[a]n agency commits an error of law or adopts wrong principles when the agency's findings are not supported by competent, material, and substantial evidence on the whole record." *New Covert Generating Co, LLC v Covert Twp*, 334 Mich App 24, 71; 964 NW2d 378 (2020).

With respect to the claim of omitted property, the trial court reviewed the applicable provisions of the General Property Tax Act. Specifically, the act provides that if property has been "incorrectly reported or omitted for any previous year," then "the corrected assessment value" is to be placed on the roll for "the current assessment year and 2 years immediately preceding the date the incorrect reporting or omission was discovered and disclosed to the state tax commission." MCL 211.154(1). The act goes on to define "omitted real property" as "previously existing tangible real property not included in the assessment" and provides that "[t]he assessing jurisdiction has the burden of proof in establishing whether the omitted real property is included in the assessment." MCL 211.34d(1)(b)(*i*) (defining "omitted real property" for purposes of the subparagraph, but then also specifically referencing MCL 211.154).

The General Property Tax Act's definition of omitted real property is clear and unambiguous, so we must enforce it as written. See *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009). This Court has previously held that property qualifies as omitted real property if the taxing author-

ity is aware of new construction but fails to include that property when assessing a property's taxable value; the determinative factor is whether tangible property previously existed and, if so, whether it was included in the assessment. *Superior Hotels, LLC*, 282 Mich App at 638-639. Such is the case here. The property's first-floor apartments existed before tax year 2017, but they were not included in Lansing's general-property-tax assessment roll, the only assessment roll at issue in this case.

Angavine argues that the property's first-floor apartments do not qualify as omitted property because the property's first floor previously appeared on the district's special assessment of the property, and the city was aware of the apartments' existence. Although these two facts were established in the record, they are not dispositive here.

First, the General Property Tax Act's definition of "omitted real property" uses the definite article "the" instead of the indefinite "a" when referring to "the assessment." Thus, determining whether property qualifies as omitted real property requires examining the specific assessment in a given case, see *Massey v Mandell*, 462 Mich 375, 382 n 5; 614 NW2d 70 (2000), and here, as noted, at issue is the general-property-tax assessment, not the special assessment, see *Fluckey v Plymouth*, 358 Mich 447, 453; 100 NW2d 486 (1960) (explaining the distinction between a special assessment and a property tax levied to fund the general expenses of government).

Second, it is uncontroverted that the city was aware of the remodel. For instance, Angavine received work permits from the city, and the apartments appeared on the special-assessment roll. But the assessment at issue in this case assessed the property as having only

the 13 second-floor apartments, as the State Tax Commission's own staff recognized. The first-floor apartments do not appear on the general-property-tax assessment roll at all. Consequently, the first-floor apartments constitute omitted property because they previously existed and were not assessed on the city's general-property-tax assessment roll. The trial court correctly concluded that the Commission legally erred by ruling otherwise.

Finally, Angavine argues, in essence, that the result in this case is unfair because the city knew about the first-floor renovations for years before the assessment leading to this case. But the Legislature already addressed this point by permitting taxing authorities to collect back-taxes for only the two years preceding a new assessment. MCL 211.154. The Legislature made a policy choice by doing so, and it is our role to implement the law as written, not to implement whatever our own policy preferences may be. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 560; 912 NW2d 593 (2018).

III. CONCLUSION

With respect to disputes involving omitted property under MCL 211.154, circuit courts have jurisdiction over a taxing authority's appeal of a decision of the State Tax Commission. In this case, the trial court did not err in concluding that Angavine's first-floor apartments qualified as omitted property. For the reasons set forth above, we affirm.

The city of Lansing, as the prevailing party, may tax costs under MCR 7.219.

BECKERING, P.J., and SHAPIRO, J., concurred with SWARTZLE, J.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES

Docket No. 354384. Submitted September 15, 2021, at Lansing. Decided October 21, 2021, at 9:00 a.m. Leave to appeal denied 509 Mich 934 (2022).

Consumers Energy Company petitioned the Public Service Commission (the Commission) in a general-rate case to increase the rates it charged for electricity; Consumers Energy did not seek recovery of any expenses related to the appliance-service program or any other value-added programs and services. Phil Forner sought to intervene, arguing that Consumers Energy violated MCL 460.10ee and the Commission's code of conduct, Mich Admin Code, R 460.10101 *et seq*., by failing to properly allocate the costs of appliance-service programs and other value-added programs and services. The administrative law judge (the ALJ) denied Forner's motion, concluding that the proper forum for his claim was a complaint proceeding, not a general-rate case. The ALJ specifically addressed 2016 PA 341 (Act 341), concluding that despite the substantial ways in which it amended the Commission's enabling act, the overall purpose of the Commission's enabling act remained the same—to prevent subsidization of nonregulated utility programs or services by regulated utilities. Forner appealed to the Commission, which affirmed the ALJ's ruling on the same grounds. Forner moved for a rehearing, which the Commission denied. Forner appealed.

The Court of Appeals *held*:

Act 341 does not permit a challenge to the allocation of costs for appliance-service programs in a general-rate case; rather, the challenge must be made in a complaint proceeding. Under MCL 460.6a(1), a utility may not increase its rates without receiving approval from the Commission, and that approval comes through a general-rate case proceeding. MCL 460.6a(16)(b) defines a general-rate case as a proceeding initiated by a utility in an application filed with the Commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service. During the general-rate case, the utility must provide the Commission with facts support-

ing its application, and the Commission must notify all interested parties within the service area to be affected of the general-rate case; those parties shall have a reasonable opportunity for a full and complete hearing that provides the parties an opportunity to present evidence and arguments relevant to the specific elements of the request that are the subject of the hearing. Finally, this all must be accomplished within 10 months unless an exception applies; if the Commission does not rule on the utility's application to increase rates within 10 months, then the application is automatically approved. By contrast, MCL 460.58 addresses complaint proceedings, which must be initiated by a complaint. Complaint proceedings address whether any rate, classification, regulation, or practice charged, made, or observed by any public utility is unjust, inaccurate, or improper to the prejudice of the complainant and require the Commission to investigate the matter. Consequently, complaint proceedings address rates that have already been established. General-rate cases address the creation of a rate, whereas complaint proceedings address, among other things, whether an already established rate prejudices a rate payer. Finally, complaint proceedings do not have a time limit. MCL 460.10ee(1) directs the Commission to establish a code of conduct governing the interplay between a utility's regulated and unregulated services; the Commission in Mich Admin Code, R 460.10101 to 460.10113 duly promulgated a code of conduct addressing those issues. The code of conduct regulates how utilities can offer value-added programs and services; it does not address general-rate cases. Rather, code-of-conduct violations are addressed in complaint proceedings. Act 341 added requirements that a utility must comply with if it offers value-added programs and services; however, the added requirements in MCL 460.10ee did not affect the distinction between general-rate cases and complaint proceedings. In this case, Forner argued that Consumers Energy did not comply with MCL 460.10ee and the code of conduct when allocating appliance-service program costs and that he should be permitted to intervene in the general-rate case to test his theory. Because Forner argued that Consumers Energy violated MCL 460.10ee and the code of conduct, Forner's claim should have been addressed in a complaint proceeding, not in a general-rate case. Accordingly, the ALJ and the Commission did not err by denying Forner's motion to intervene.

Affirmed.

PUBLIC UTILITIES — GENERAL-RATE CASE PROCEEDINGS — COMPLAINT PROCEEDINGS — VIOLATIONS OF THE CODE OF CONDUCT.

Under MCL 460.6a(1), a public utility may not increase its rates without receiving approval from the Public Service Commission,

> and that approval comes through a general-rate case proceeding; MCL 460.58 addresses complaint proceedings, which must be initiated by a complaint; complaint proceedings (1) address whether any rate, classification, regulation, or practice charged, made, or observed by any public utility is unjust, inaccurate, or improper to the prejudice of the complainant and (2) require the Public Service Commission to investigate the matter; an argument that a utility violated MCL 460.10ee and the code of conduct, Mich Admin Code, R 460.10101 *et seq*., including an argument that a utility failed to comply with the requirements for offering value-added programs and services, must be addressed in a complaint proceeding, not in a general-rate case.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, and *Benjamin J. Holwerda* and *Spencer A. Sattler*, Assistant Attorneys General, for the Public Service Commission.

Robert W. Beach and *Bret A. Totoraitis* for Consumers Energy Company.

Phil Forner *in propria persona*.

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

SWARTZLE, J. In the past, Phil Forner has sought to challenge how Consumers Energy Company allocates funds for its appliance-service program by attempting to intervene in Consumers Energy's general-rate cases before the Michigan Public Service Commission. These challenges have been rejected because the Commission and this Court have held that these types of claims should be raised in a complaint proceeding, not a general-rate case. See, e.g., *In re Application of Consumers Energy Co to Increase Rates*, unpublished per curiam opinion of the Court of Appeals, issued June 21, 2018 (Docket No. 334276). The Legislature substantially modified the Commission's enabling act, MCL 460.1 *et*

seq., including the former Customer Choice and Electricity Reliability Act, MCL 460.10 *et seq*., with 2016 PA 341.

After Act 341 became effective, Forner again sought to intervene in a Consumers Energy general-rate case and raise the issue of how Consumers Energy allocates costs for its appliance-service program. The administrative law judge and the Commission both concluded that Act 341 still requires that these types of claims be raised in a complaint proceeding rather than a general-rate case. The administrative law judge and the Commission are correct; Act 341 does not permit a challenge to the allocation of costs for appliance-service programs in a general-rate case. Rather, the challenge must be made in a complaint proceeding. Consequently, we affirm the Commission's order denying Forner's motion to intervene.

I. BACKGROUND

Forner has a lengthy history of seeking to intervene in Consumers Energy's general-rate cases. These attempts have failed, with the most recent being this Court's affirmance of the denial of his motion in 2016 to intervene in a Consumers Energy general-rate case in *In re Application of Consumers Energy Co to Increase Rates*. The matter appeared settled until the Legislature substantially amended the Commission's enabling act with Act 341. With the change in law, Forner moved to intervene in another Consumers Energy general-rate case, leading to this appeal.

Consumers Energy sought to increase the rates it charged for electricity in a general-rate case in February 2020. As part of that case, Consumers Energy did not seek recovery of any expenses related to the appliance-service program or any other value-added

programs and services. Nevertheless, Forner filed a motion to intervene based on his concerns regarding Consumers Energy's cost calculations and allocations regarding Consumers Energy's appliance-service program in 2018. Forner argued that Consumers Energy violated the Commission's code of conduct, Mich Admin Code, R 460.10101 *et seq*., by failing to allocate properly the costs of appliance-service programs and other value-added programs and services.

The administrative law judge denied Forner's motion to intervene, concluding that the proper forum for his claim was a complaint proceeding, not a general-rate case. The administrative law judge also specifically addressed Act 341, concluding that despite the substantial changes it enacted, "the overall purpose of the law remains the same—to prevent subsidization of non-regulated utility programs or services by regulated utilities." Consequently, the administrative law judge held that—as in Forner's previous cases—his claim should have been brought in a complaint proceeding, not as a motion to intervene in Consumers Energy's general-rate case. Forner appealed the administrative law judge's decision to the Commission, which affirmed the administrative law judge's ruling on the same grounds. He then moved for rehearing, which was denied. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

As previously explained by this Court in an earlier case brought by Forner against Consumers Energy:

> The standard of review for [Commission] orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regu-

> lations, practices, and services prescribed by the [Commission] are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the [Commission] has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a [Commission] order is unlawful, the appellant must show that the [Commission] failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the [Commission's] administrative expertise, and should not substitute its judgment for that of the [Commission]. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
>
> A final order of the [Commission] must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the [Commission] exceeded the scope of its authority is a question of law that is reviewed de novo. [*In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010).]

B. PRINCIPLES OF STATUTORY INTERPRETATION

Forner, the Commission, and Consumers Energy dispute Act 341's meaning. Forner argues that it permits him to challenge the allocation of Consumers Energy's appliance-service program costs in a general-rate case; the Commission and Consumers Energy disagree and contend that he must do so through a complaint proceeding. These arguments require us to interpret Act 341's meaning, which necessarily involves the principles of statutory interpretation.

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

Furthermore, "rules of statutory construction require that separate provisions of a statute, where possible, should be read as being a consistent whole, with effect given to each provision." *Gebhardt v O'Rourke*, 444 Mich 535, 542; 510 NW2d 900 (1994). "Also, where a statute contains a general provision and a specific provision, the specific provision controls." *Id*. at 542-543.

Particularly pertinent here, "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." *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). "This is especially the case when the statutory language and history confirm that the change is a substantive one, and not merely a recodification of existing law." *D'Agostini Land Co, LLC v Dep't of Treasury*, 322 Mich App 545, 559; 912 NW2d 593 (2018). Consequently, when examining a statute that has been amended, cases interpreting earlier versions of the statute may have only limited precedential value depending on the scope of an amendment. See *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 119-120; 667 NW2d 880 (2003). The language of the new statute controls over caselaw interpreting an earlier

version of a statute, but the changes in an act "must be construed in light of preceding statutes and the historical legal development[s]." *Id*. at 120 (quotation marks and citation omitted).

C. STATE OF THE LAW AFTER ACT 341

As discussed, the Commission and this Court have repeatedly concluded that Forner must raise his appliance-service program claims in a complaint proceeding, not by intervening in a general-rate case. See *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App at 121; *In re Application of Consumers Energy Co to Increase Rates*, unpub op at 8-9. But Act 341 substantially amended the Commission's enabling act. Accordingly, we must examine Act 341 to determine whether it permits a rate payer, such as Forner, to intervene in a general-rate case to dispute the allocation of appliance-service costs.

The parties focus much of their briefs on interpreting MCL 460.10ee to determine whether Forner can intervene in this case. In doing so, they fail to address the statutory provision addressing complaints, MCL 460.58. We are mindful that, when interpreting statutes, "[t]he paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *PNC Nat'l Bank Ass'n*, 285 Mich App at 506 (quotation marks and citation omitted). In doing so we are not bound by the parties' arguments. Consequently, before addressing the statutory provisions the parties focused on in their briefs, we first consider general-rate cases and complaint proceedings generally.

1. GENERAL-RATE CASES AND COMPLAINT PROCEEDINGS

We begin by addressing the two types of proceedings at issue in this case: general-rate cases and complaint

proceedings. A utility cannot increase its rates "without first receiving commission approval"; that approval comes through a general-rate case proceeding. MCL 460.6a(1). A "general rate case" is statutorily defined as "a proceeding initiated by a utility in an application filed with the commission that alleges a revenue deficiency and requests an increase in the schedule of rates or charges based on the utility's total cost of providing service." MCL 460.6a(16)(b).[1] In a general-rate case,

> the utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates and charges, or to alter, change, or amend any rate or rate schedules. The commission shall require notice to be given to all interested parties within the service area to be affected, and all interested parties shall have a reasonable opportunity for a full and complete hearing. A utility may use projected costs and revenues for a future consecutive 12-month period in developing its requested rates and charges. [MCL 460.6a(1).]

A "full and complete hearing" is statutorily defined as "a hearing that provides interested parties a reasonable opportunity to present and cross-examine evidence and present arguments relevant to the specific element or elements of the request that are the subject of the hearing." MCL 460.6a(16)(a).

We additionally note that general-rate cases have strict procedural requirements, such as the rule that

> if the commission fails to reach a final decision with respect to a completed petition or application to increase or decrease utility rates within the 10-month period following the filing of the completed petition or application, the

[1] Before Act 341, this definition was found at MCL 460.6a(2)(b), see MCL 460.6a, as amended by 2008 PA 286, but Act 341 moved it to MCL 460.6a(16)(b). The actual definition, however, was unchanged. Compare MCL 460.6a(2)(b), as amended by 2008 PA 286, with MCL 460.6a(16)(b), as amended by 2016 PA 341.

> petition or application is considered approved. If a utility makes any significant amendment to its filing, the commission has an additional 10 months after the date of the amendment to reach a final decision on the petition or application. If the utility files for an extension of time, the commission shall extend the 10-month period by the amount of additional time requested by the utility. [MCL 460.6a(5).]

Consequently, general-rate cases have a strict time limit that requires the Commission to rule on applications and petitions to increase and decrease rates within 10 months unless certain exceptions apply.

In summary, a utility can increase its rates only by filing an application to do so with the Commission. This application initiates a general-rate case. During the general-rate case, the utility must provide the Commission with facts supporting its application, and the Commission must notify "all interested parties within the service area to be affected" of the general-rate case. MCL 460.6a(1). Those parties "shall have a reasonable opportunity for a full and complete hearing" that provides interested parties an opportunity to present evidence and argument "relevant to the specific element or elements of the request that are the subject of the hearing." MCL 460.6a(1) and (16)(a). Finally, all of this must be accomplished in 10 months unless an exception applies; if the Commission does not rule on the utility's application to increase rates within 10 months, then the application is automatically approved.

Complaint proceedings, in contrast, are statutorily established by MCL 460.58,[2] which provides:

> Upon complaint in writing that any rate, classification, regulation or practice charged, made or observed by any

[2] Act 341 did not amend MCL 460.58.

public utility is unjust, inaccurate, or improper, to the prejudice of the complainant, the commission shall proceed to investigate the matter. The procedure to be followed in all such cases shall be prescribed by rule of the commission: Provided, however, That in all cases reasonable notice shall be given to the parties concerned as to the time and place of hearing. An investigation of any such complaint, and the formal hearing thereon, if such is deemed necessary, may be held at any place within the state and by any member or members of the commission, or by any duly authorized representative thereof. Witnesses may be summoned and the production of books, and records before the commission, or the member, or any duly authorized representative thereof conducting the hearing, may be required. Any witness summoned to appear or to produce papers at any such hearing, who neglects or refuses so to do shall be deemed guilty of a contempt. It shall be competent for the commission in any such case to make application to any circuit court of the state setting forth the facts of the matter. Thereupon said court shall have the same power and authority to punish for the contempt and to compel obedience to the subpoena or order of the commission as though such person were in contempt of such court or had neglected or refused to obey its lawful order or process. The taking of testimony at such hearing shall be governed by the rules of the commission: Provided, That at the request of either party a record of such testimony shall be taken and preserved. Upon the completion of any such hearing, the commission shall have authority to make an order or decree dismissing the complaint or directing that the rate, charge, practice or other matter complained of, shall be removed, modified or altered, as the commission deems just, equitable and in accordance with the rights of the parties concerned. For attending on any such hearing, any witness summoned by the commission shall be entitled to the same fees as are, or may be, provided by law for attending the circuit court in any civil matter or proceedings, which said fees shall be paid out of the general fund in the treasury of the state. All claims for such fees shall be approved by the secretary, or by some member of the

> commission, and shall be audited and allowed by the board of state auditors.

Complaint proceedings, therefore, must be initiated by a "complaint in writing." Complaint proceedings address whether "any rate, classification, regulation or practice charged, made or observed by any public utility is unjust, inaccurate, or improper, to the prejudice of the complainant" and require the Commission to "investigate the matter." Consequently, complaint proceedings address a utility's "rate . . . charged," which means that they address rates that already have been established, presumably after the completion of a general-rate case. This differentiates complaint proceedings from general-rate cases. General-rate cases address the creation of a rate, and complaint proceedings address, among other things, whether an already established rate prejudices a rate payer. Finally, complaint proceedings do not have a time limit like general-rate cases do.

2. THE CODE OF CONDUCT

Forner argues that MCL 460.10ee establishes that he can intervene in this case. MCL 460.10ee(1) directs the Commission to establish a code of conduct governing the interplay between a utility's regulated and unregulated services. Regulated services are electric, steam, and natural gas utilities; unregulated services are value-added programs and services, which include appliance-service programs. MCL 460.10ee(16). The Commission duly promulgated a code of conduct addressing those issues. Mich Admin Code, R 460.10101 to 460.10113.

The code of conduct regulates how utilities can offer value-added programs and services. In doing so, it does not address general-rate cases. Rather, code-of-conduct

violations are addressed in complaint proceedings. Mich Admin Code, R 460.10112; MCL 460.10c; MCL 460.10ee(14). Indeed, the statutory scheme as a whole establishes that code-of-conduct violations should be addressed by the Commission on its "own motion" or through a complaint, which, as discussed, can be filed by any individual prejudiced by a utility's "rate, classification, regulation or practice charged." MCL 460.10c; MCL 460.58. Code-of-conduct violations, therefore, are not generally addressed in general-rate cases.

3. MCL 460.10ee

MCL 460.10ee is substantially similar to former MCL 460.10a; therefore, we need not address every subsection here.[3] MCL 460.10ee, however, added language specifically addressing formal and informal proceedings to determine whether a utility violated the rules regarding value-added programs and services. See MCL 460.10ee(2) to (5). These provisions refer to complaint proceedings. By adding this language in Act 341, therefore, the Legislature provided direction to the Commission and interested parties about how to proceed if a utility's value-added programs and services violated rules established by the Legislature and the Commission.

We additionally note that MCL 460.10ee(15) added a requirement that a utility offering a value-added program or service must file an annual report with the Commission addressing, among other things, "a de-

[3] Compare former MCL 460.10a(4) and (5) with MCL 460.10ee(1); former MCL 460.10a(6) with MCL 460.10ee(6) and (7); former MCL 460.10a(7) with MCL 460.10ee(8); former MCL 460.10a(8) with MCL 460.10ee(9); former MCL 460.10a(9) with MCL 460.10ee(10); former MCL 460.10a(10) with MCL 460.10ee(12); and former MCL 460.10a(11) with MCL 460.10ee(13).

tailed accounting of how the costs for the value-added programs and services were apportioned between the utility and the value-added programs and services." This subsection places additional restrictions on utilities, but it does not affect the distinction between general-rate cases and complaint proceedings. The requirement that a utility file an annual report would clearly make enforcing the provisions of MCL 460.10ee and the new code of conduct easier than if no annual report was required—as was the case before Act 341. Yet again, however, we note that these provisions addressing enforcement implicate complaint proceedings, not general-rate cases. As a whole, these subsections of MCL 460.10ee address requirements a utility must comply with if it offers value-added programs and services. They do not address general-rate cases or complaints. Subsections (8) and (12), however, are relevant to those issues.

Subsections (8) and (12) provide:

> (8) All utility costs directly attributable to a value-added program or service allowed under this section shall be allocated to the program or service as required by this section. The direct and indirect costs of all utility assets used in the operation of the program or service shall be allocated to the program or service based on the proportional use by the program or service as compared to the total use of those assets by the utility. The cost of the program or service includes administrative and general expense loading to be determined in the same manner as the utility determines administrative and general expense loading for all of the utility's regulated and unregulated activities.
>
> * * *
>
> (12) Except as otherwise provided in this subsection, the commission shall include only the revenues received by a

> utility to recover costs directly attributable to a value-based program or service under subsection (8) in determining a utility's base rates. The utility shall file with the commission the percentage of additional revenues over those that are allocated to recover costs directly attributable to a value-added program or service under subsection (8) that the utility wishes to include as an offset to the utility's base rates. Following a notice and hearing, the commission shall approve or modify the amount to be included as an offset to the utility's base rates.

Subsection (8) establishes how value-added program or service costs should be allocated. Subsection (12) addresses how the Commission should consider these costs when establishing a utility's base rates. Neither subsection addresses or appears to contemplate complaint proceedings. Subsection (12) does, however, address how value-based programs and services should be considered when the Commission determines a utility's base rates. Consequently, under Subsections (8) and (12), value-added program or service costs can certainly be included in a general-rate case. Indeed, a general-rate case addresses whether a utility's base rates should be increased "based on the utility's total cost of providing service." MCL 460.6a(16)(b). As can be seen with MCL 460.10ee, if a utility offers a value-added program or service, then its "total cost of providing service" necessarily includes determining whether costs for its value-added programs and services are allocated correctly.

Subsections (8) and (12), therefore, establish that value-added programs and services must be addressed in a general-rate case if a utility offers value-added programs and services. But just because these issues must be addressed in a general-rate case, that does not mean every issue related to value-added programs and services can be addressed in a general-rate case. Indeed,

Subsections (8) and (12) do not actually change general-rate cases or complaint proceedings. Each type of proceeding remains the same as it was before Act 341.

D. APPLICATION TO THIS CASE

Forner argues that he should be permitted to intervene in Consumers Energy's general-rate case to ensure that Consumers Energy properly allocates funds for its appliance-service program. Consumers Energy and the Commission both argue that—as this Court and the Commission have repeatedly ruled before Act 341's enactment—Forner's claim should be addressed in a complaint proceeding instead of in Consumers Energy's general-rate case. Indeed, a Consumers Energy employee—Steven McLean—has averred that Consumers Energy does not seek "recovery of any expenses related to the [appliance-service program], or any other [value-added programs and services], in this electric rate case filing." McLean further averred that Consumers Energy complied with the code of conduct and MCL 460.10ee when "allocat[ing] electric expenses related to the [appliance-service program]." As explained by McLean, "This allocation ensures that the electric utility customers are not paying costs attributed to the [appliance-service program]."

Forner essentially argues that he does not believe McLean's statement that Consumers Energy complied with MCL 460.10ee and the code of conduct when allocating appliance-service program costs and that he should be permitted to intervene in Consumers Energy's general-rate case to test his theory. But a general-rate case is the proper forum to determine whether the rate sought by a utility is appropriate, not whether it complies with the rules and regulations regarding appliance-service programs. McLean averred that Con-

sumers Energy fully complied with MCL 460.10ee and the code of conduct when allocating costs for its appliance-service program. The proper forum to contest that statement is a complaint proceeding. Complaint proceedings are intended to address whether a utility has complied with the code of conduct and MCL 460.10ee. That is exactly the type of issue presented here. Indeed, Forner alleged in his motion to intervene that Consumers Energy violated MCL 460.10ee and the code of conduct. These allegations should be addressed in a complaint proceeding, not a general-rate case. A general-rate case's focus should be on the calculation regarding a new electric rate, while complaint proceedings address a utility's potential violations of rules and regulations. Forner alleges that Consumers Energy violated rules and regulations. Thus, his claim should be addressed in a complaint; not in a general-rate case.

Thus, Forner must raise his claim in a complaint proceeding; the administrative law judge and the Commission did not err by denying Forner's motion to intervene.

III. CONCLUSION

Act 341 substantially amended the Commission's enabling act, but it did not affect the issue presented in this case. Issues regarding whether a utility complies with rules and regulations should be addressed through complaint proceedings, not general-rate cases. Consequently, we affirm the Commission's order denying Forner's motion to intervene. Consumers Energy, as the prevailing party, may tax costs under MCR 7.219.

BECKERING, P.J., and SHAPIRO, J., concurred with SWARTZLE, J.

In re HOCKETT

Docket No. 353132. Submitted December 1, 2020, at Detroit. Decided October 21, 2021, at 9:05 a.m.

The Department of Health and Human Services filed a temporary custody petition in December 2019 in the Wayne Circuit Court, Family Division, requesting that the trial court take jurisdiction over respondent's minor child, NRH, and enter an order making NRH a temporary court ward. At a combined adjudicatory and dispositional hearing held before a referee, a specialist from Children's Protective Services (CPS) testified that in October 2019, CPS was contacted by hospital staff when respondent refused to retrieve NRH, who has multiple mental health diagnoses, from the hospital. Respondent told CPS that she had left NRH at the hospital because NRH needed more help with his mental health problems than she could provide. Respondent also told CPS that she had been evicted and was homeless. When she was evicted, respondent attempted to place NRH with a family friend, but NRH threatened to harm the friend's minor grandson on the first day of that placement and the friend called the police, who took NRH to the hospital. Respondent attempted to arrange for the hospital staff to transfer NRH to a separate children's unit for additional care, but the hospital determined that NRH was able to be discharged. After the hearing, the trial court, Cylenthia LaToye Miller, J., determined that the evidence presented was sufficient to establish a statutory basis to exercise jurisdiction over NRH under MCL 712A.2(b)(1). Respondent appealed.

The Court of Appeals *held*:

1. The trial court did not err by concluding that statutory grounds to exercise jurisdiction over NRH had been established by a preponderance of the evidence. MCL 712A.2(b)(1) provides that the trial court has jurisdiction over a juvenile under 18 years of age whose parent, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals. That provision also states that the trial court has jurisdiction over a juvenile who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other

custodian, or who is without proper custody or guardianship. Further, MCL 712A.2(b)(2) provides that the court has jurisdiction over a juvenile whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in. In this case, the court determined that by failing to retrieve NRH when the hospital determined that he was ready to be discharged, respondent had failed to provide proper and necessary support and care for the child, who was subject to a substantial risk of harm to his mental health and well-being. Respondent was in an extremely difficult position, being without a home and having a child whose mental health issues were significant. Although the statute uses the word "unfit" to describe situations such as this—and unfitness connotes active wrongdoing, which was not apparent in this case—culpability is not a prerequisite for court intervention under MCL 712A.2(b)(2). Respondent's admitted inability, not her unwillingness, to care for NRH's special needs with the level of assistance she was receiving, along with her homelessness, rendered NRH's environment a place of danger for the seriously ill child and, thus, statutorily unfit.

2. The trial court did not err by determining that there were grounds to exercise jurisdiction over NRH despite the fact that NRH had been placed in a residential facility that could address NRH's mental health needs. When considering whether to exercise jurisdiction under MCL 712A.2(b), the trial court must examine the child's situation at the time the petition was filed, and at that time, NRH was still at the children's hospital. Thus, the threat to NRH's well-being had not ceased by the time the trial court assumed jurisdiction over NRH.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Lesley Carr Fairrow*, Assistant Attorney General, for petitioner.

Dorothy J. Dean for respondent.

Juvenile Advocacy & Defense Group (by *Joel W. Jonas*) for NRH.

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

STEPHENS, J. Respondent appeals as of right the trial court's order of disposition entered following a combined adjudicatory and dispositional hearing before a referee. The trial court determined that petitioner, the Department of Health and Human Services, presented sufficient evidence to establish by a preponderance of the evidence that there was a statutory basis to exercise jurisdiction over respondent's child, NRH, under MCL 712A.2(b)(1) (giving a court jurisdiction over a juvenile "[w]hose parent . . . , when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for [the child's] health or morals," "who is subject to a substantial risk of harm to his or her mental well-being," or "who is abandoned by his or her parents"). We affirm.

I. BACKGROUND

These proceedings began in December 2019, when petitioner filed a temporary custody petition requesting that the trial court take jurisdiction over NRH and enter an order making NRH a temporary court ward. At the combined adjudicatory and dispositional hearing, Akedia Lewis, a Children's Protective Services (CPS) specialist, testified that in October 2019, CPS was contacted by hospital staff when respondent refused to retrieve NRH, who has multiple mental health diagnoses, from the hospital. Lewis testified that she contacted respondent and that respondent agreed to pick up NRH from the hospital. CPS was contacted again in November 2019, with the same complaint of respondent's having left NRH at the hospital. A family team meeting was held with respondent, and respondent told CPS that she had left NRH at the hospital because NRH needed more help with his mental health problems. Respondent also told CPS that she had been evicted and was homeless.

At the hearing, respondent testified that NRH was taking three medications and receiving in-home therapy twice a week until the family was evicted in October 2019. When respondent was evicted, she placed NRH with a family friend, and she placed NRH's brother, MH, in relative care. On the same day, that friend called the police because NRH threatened to harm her 11-year-old grandson. NRH threatened suicide when the police arrived, and the officer took NRH to the hospital again. Respondent testified about NRH's hospitalization in July 2019 when he undressed in front of her home, the police were called, and he expressed suicidal ideations. A little over a month later, NRH took himself to the hospital for care. Respondent testified that she agreed to take NRH home in late October 2019 because CPS had promised her assistance. It was after respondent had arranged for the unsuccessful placement with a family friend and the police were called that she declined to pick NRH up from the hospital. Respondent testified that she had refused to take NRH home at that time until he received the help he needed and because she was homeless. Respondent attempted to arrange for the hospital staff to transfer NRH to a separate children's unit for additional care. Lewis investigated respondent's concerns and relied on the hospital's determination that NRH was able to be discharged. It is noteworthy that NRH's hospitalizations were never more than a week and usually a matter of days, and appeared to be accelerating in frequency.

After testimony concluded, the trial court determined that the evidence presented was sufficient to establish a statutory basis to exercise jurisdiction over NRH. This appeal followed.

II. STANDARD OF REVIEW

"We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re Long*, 326 Mich App 455, 460; 927 NW2d 724 (2018) (citation and quotation marks omitted). "A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made." *Id*. (citation and quotation marks omitted).

III. ANALYSIS

"To properly exercise jurisdiction, the trial court must find that a statutory basis for jurisdiction exists." *Id*. (citation and quotation marks omitted). "Jurisdiction must be established by a preponderance of the evidence." *Id*. (citation and quotation marks omitted).

Relevant to this appeal, MCL 712A.2(b) provides that the trial court has jurisdiction over a juvenile under 18 years of age

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.
>
> * * *
>
> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

After a hearing, a referee concluded that respondent had "failed to provide proper and necessary support and care for [NRH], who was subject to a substantial risk of harm to his mental health and wellbeing." This conclusion was based on a finding that respondent refused to pick up NRH when the hospital determined that he was ready to be discharged. Like the hearing referee, this Court acknowledges the extremely difficult position in which respondent found herself. She had no home. She had a child whose mental health issues were significant. She wanted the kind of care for NRH that he only began to get when the state assumed jurisdiction. While she is not a mental health professional, respondent sensed, and later mental health professionals agreed, that NRH needed more than respondent could give. It is unfortunate that our statute uses the word "unfit" to describe situations such as this. We note that "the underlying purpose of the statutory scheme is to protect children from an unfit homelife." *In re Sterling*, 162 Mich App 328, 339; 412 NW2d 284 (1987). Unfitness connotes active wrongdoing, which we do not see in this case. The statute, however, implies some understanding of the existence of parents who do not have the resources to provide for their children in the phrase "when able to do so." This mother was unable to manage the complex mental health needs of her child. The referee correctly determined that respondent declined to retrieve her child upon discharge. The referee also correctly noted that respondent had the physical capacity to retrieve her minor child and did not do so. Our concern is that this mother, who took desperate action to get care for her child, is now labeled "unfit" and listed on a registry for persons who acted to harm children when she, in fact, was seeking to protect her child. The scant and costly resources available for mental healthcare for children

likely places other parents in the same situation as this respondent. We can only look to our policymakers for a resolution to this conundrum. However, "culpability is not a prerequisite" for court intervention under MCL 712A.2(b)(2). *In re Jacobs*, 433 Mich 24, 41; 444 NW2d 789 (1989). Respondent's admitted inability, not her *unwillingness*, to care for NRH's special needs with the level of assistance she was receiving, along with her homelessness, rendered NRH's environment a place of danger for the seriously ill child and, thus, statutorily unfit. In this case, we are not left with a definite and firm conviction that the trial court was mistaken in finding statutory grounds to exercise jurisdiction over NRH.

Respondent briefly asserts that the trial court erred when it determined that there were grounds to exercise jurisdiction over NRH because NRH had already been placed in a residential facility that could address NRH's mental health needs, and therefore, any alleged threat to NRH's well-being had ceased by the time the trial court assumed jurisdiction. We disagree. When considering whether to exercise jurisdiction under MCL 712A.2(b), the trial court must examine the child's situation at the time the petition was filed. *In re MU*, 264 Mich App 270, 279; 690 NW2d 495 (2004). At the time the petition was filed, NRH was still at the children's hospital and had not been placed in a residential facility capable of addressing NRH's mental health needs. Thus, the threat to NRH's well-being had not ceased by the time the trial court assumed jurisdiction over NRH.

Affirmed.

MURRAY, C.J., and K. F. KELLY, J., concurred with STEPHENS, J.

LEAGUE OF WOMEN VOTERS OF MICHIGAN v SECRETARY OF STATE

Docket Nos. 357984 and 357986. Submitted October 19, 2021, at Lansing. Decided October 29, 2021, at 9:00 a.m. Affirmed 508 Mich 520 (2022).

The League of Women Voters of Michigan, Progress Michigan, Coalition to Close Lansing Loopholes, and Michiganders for Fair and Transparent Elections brought an action in the Court of Claims against the Secretary of State, challenging the constitutionality of 2018 PA 608, which changed the procedures by which the people of Michigan can circulate petitions to invoke the referendum, initiative, and constitutional-amendment processes set forth in Michigan's Constitution and statutory election laws. Relevant here, 2018 PA 608 amended MCL 168.471 to state that no more than 15% of the signatures used to determine the validity of a petition could be from any one congressional district; 2018 PA 608 similarly amended MCL 168.477(1) and MCL 168.482(4). In addition, the act amended MCL 168.482 by adding Subsection (7), which required petitions to include checkboxes that would indicate whether the circulator of the petition was a paid signature gatherer or a volunteer; and it added MCL 168.482a, which provides that signature gatherers who are being paid must, before circulating any petition, file a signed affidavit to that effect with the Secretary of State. The Department of the Attorney General intervened to defend the laws, and the Michigan House of Representatives and Senate participated as amici curiae. The Court of Claims, CYNTHIA D. STEPHENS, J., struck down the geographical limitation in MCL 168.471 as well as the checkbox requirement of MCL 168.482(7); however, it ruled that the affidavit requirement, MCL 168.482a, was constitutional. The parties appealed, and the Court of Appeals consolidated the appeals. Plaintiffs filed an application to bypass the Court of Appeals under MCR 7.305(C)(1)(a), which the Supreme Court denied. 508 Mich 934 (2021).

The Court of Appeals *held*:

1. Const 1963, art 2, § 9 reserves to the people the ability to approve or reject legislation that the Legislature has already

adopted (the referendum) and to propose laws to the Legislature and enact them if the Legislature refuses (the initiative). The initiative provision set forth in Article 2, § 9 serves as an express limitation on the authority of the Legislature. In turn, Const 1963, art 12, § 2 allows the registered electors of Michigan to propose amendments to the Constitution by petition. Under that provision, every petition must include the full text of the proposed amendment and be signed by registered electors of the state equal in number to at least 10% of the total votes cast for all candidates for governor at the last preceding general election at which a governor was elected. The provision prescribes the filing deadline and provides that any petition must be in the form, and must be signed and circulated, as prescribed by law. Thus, these constitutional provisions reserve the initiative power to the people and provide the mechanism to invoke the power with their terms. Article 2, § 9 and Article 12, § 2 are self-executing provisions. Constitutional provisions that are self-executing must not be burdened or curtailed by supplementary legislation. A constitutional provision is found to be self-executing if it supplies a sufficient rule, by which the right given may be enjoyed and protected, or the duty imposed may be enforced. In other words, whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision. Although the provisions are self-executing, the Constitution allows the Legislature to enact laws regarding the procedures regulating initiatives. However, legislation that is supplementary to self-executing constitutional provisions must be in harmony with the spirit of the Constitution and its object to further the exercise of constitutional rights, and such laws must not curtail the rights reserved or exceed the limitations specified. Any statute which is both unnecessary for the effective administration of the initiative process and restrictive of the initiative right is unreasonable and thus unconstitutional.

2. Relevant here, the 15% geographic requirement in MCL 168.471, as amended, limits voter participation in the initiative process by placing additional limitations on the electorate's power under the Constitution. The provision does not pertain to "procedures" regulating initiatives, and the requirement does not make the initiative process more available to the electors; rather, the provision reduces the rights of certain voters to have their signatures counted toward a ballot proposal. While Article 2, § 9 sets a floor for the total number of signatures required, it does not set a cap, the imposition of which would unconstitutionally add a requirement that restricts the initiative process by unconditionally denying untold numbers of registered voters the right to have

their signatures counted. Accordingly, the 15% geographic requirement was not valid under Article 2, § 9. The geographic requirement was also not valid under Article 12, § 2: the geographic limit nullifies otherwise timely and valid signatures simply because they exceed the arbitrary 15% ceiling, it bars only those signatures over the 15% geographic limit, and it is not akin to the mere legislative details as contemplated by Article 12, § 2. Moreover, the text of Michigan's Constitution does not contain a geographic-distribution requirement, and the 2018 PA 608 amendment of MCL 168.471 conflicts with the intent of the framers of the Constitution, who expressly considered—and rejected—a more lenient 25% geographic requirement. In this case, the geographic requirement in MCL 168.471, MCL 168.477, and MCL 168.482(4) is unconstitutional because it establishes an unnecessary and unreasonable restraint on the constitutional right of the people to initiate laws.

3. MCL 168.482(7) requires a petition that proposes a constitutional amendment, initiation of legislation, or referendum on legislation to include checkboxes that clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer. Pursuant to MCL 168.482(8), any signature obtained on a petition that does not comply with the checkbox requirement is invalid and will not be counted. Consistently with the statement required by MCL 168.482(8), MCL 168.482a provides that if a petition under MCL 168.482 is circulated and the petition does not meet all the requirements under MCL 168.482, any signature obtained on that petition is invalid and must not be counted. MCL 168.482c also makes it a misdemeanor if a circulator knowingly makes a false statement concerning their status as a paid signature gatherer or volunteer signature gatherer. The First Amendment of the United States Constitution prohibits Congress from passing any laws abridging the right of the people to petition the government for a redress of grievances. The circulation of an initiative petition necessarily involves both the expression of a desire for political change and a discussion of the merits of the proposed speech, making it core political speech under the First Amendment. Thus, soliciting signatures in support of a petition and the signing of a petition are protected speech under the First Amendment of the United States Constitution. It is unconstitutional for a state to ban paid petition circulators because it restricts political expression by limiting the number and hours of voices to carry the message, thereby limiting the available audience and limiting the power of the people to initiate legislation and mandating strict-scrutiny review. Similar to the statute at issue in *Buckley v American*

Constitutional Law Foundation, Inc, 525 US 182 (1999), which required petition circulators to wear identification badges stating their names and whether they were volunteers or being paid (and, if so, by whom), the checkbox requirement in MCL 168.482(7) compels the petition circulator to disclose their status as paid or volunteer at the same time the political message is being delivered. However, in this case, circulators are not being forced to reveal anything as personal as their identity or their employer, and they are therefore not subject to the same sort of personalized heat-of-the-moment harassment that was present in *Buckley*. When considering a challenge to a state election law, courts generally apply a more flexible review such as the test set forth in *Anderson v Celebrezze*, 460 US 780 (1983), and *Burdick v Takushi*, 504 US 428 (1992). The *Anderson-Burdick* test requires a reviewing court to weigh the character and magnitude of the burden that the state's rule imposes on First Amendment rights against the interests that the state contends justify that burden and consider the extent to which the state's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less-exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. Restrictions on core political speech may be upheld if they are narrowly tailored to serve a compelling state interest. Transparency in the political process, especially transparency that permits voters to "follow the money," is a compelling state interest that ensures the political speech involved in circulated petitions comes with full disclosure, whether it is paid or volunteer. Given the limited nature of the disclosure at issue, the actual burden on First Amendment rights caused by the checkbox requirement was so minimal that a governmental interest in increasing information for voters justified the requirement; further, the requirement is clearly narrowly tailored and imposes little to no burden on circulators. Finally, no evidence was presented that the checkbox requirement would disincline paid or volunteer circulators to participate in circulating petitions, and the requirement applies equally to all circulators. Therefore, the checkbox requirement in MCL 168.482(7) does not violate the First Amendment.

4. 2018 PA 608 added MCL 168.482a, which requires paid signature gatherers, before circulating any petition, to file a signed affidavit with the Secretary of State indicating that they are paid signature gatherers. Any signature obtained on a petition by a paid circulator who has not filed the precirculation affidavit is invalid and must not be counted. Unlike the checkbox

requirement, the affidavit requirement is a prerequisite to circulation of a petition before the First Amendment communication can occur, and its timing is meaningful because it forces paid circulators to file an affidavit that volunteer circulators are not required to file; the requirement will make sponsors' political speech more difficult by increasing the time required for petition drives given that paid circulators cannot begin circulating petitions immediately but, instead, must file affidavits before circulation can commence; moreover, it will result in harsher treatment for organizations that must rely on paid circulators. The affidavit requirement imposes a significant burden on the right of political speech protected because the affidavit must be submitted before signatures may be collected and it applies only to paid circulators. Intervening defendant failed to establish that the state's interests are furthered by the disclosure requirement. The affidavit requirement of MCL 168.482a does not pass strict scrutiny, and the provision is unconstitutional given the burden it places on groups that rely on paid signature gatherers and the lack of an apparent state interest served by the affidavit.

5. In this case, the Court of Claims correctly struck down as unconstitutional the 15% geographic requirement. The court erred by holding the checkbox requirement unconstitutional and by holding the precirculation affidavit constitutional. The 15% geographic limit and the precirculation affidavit requirement applicable to paid circulators only were severed from the relevant provisions of 2018 PA 608, and the remainder of the act was complete and operable without those provisions.

Court of Claims judgment affirmed in part and reversed in part.

CAMERON, J., concurring, agreed with the majority that the 15% geographic restriction and the precirculation affidavit requirement are unconstitutional and that the checkbox requirement is constitutional. Judge CAMERON wrote separately to underscore the constitutionality of the checkbox requirement. The circulation of an initiative petition constitutes core political speech. The *Anderson-Burdick* test sets forth the relevant standard of review, which establishes a sliding scale of judicial review, ranging from strict scrutiny to rational-basis review, depending on the facts of each case. When a state election law provision imposes only reasonable, nondiscriminatory restrictions, the state's important regulatory interests are generally sufficient to justify the restrictions. Plaintiffs failed to provide any evidence that political speech would be burdened by the checkbox requirement, and there was no evidence in the record to support plaintiffs' speculation, which is insufficient

to establish a facial challenge to MCL 168.482(7). There was also no evidence that disclosure of a circulator's paid or volunteer status would increase the risk of harassment in the same way the name badge did in *Buckley*. Further, there is no reason to believe that the disclosure of one's volunteer or paid status by marking a box on the petition form is a requirement so onerous or troublesome that it will provoke some circulators to disengage from the political process. Because there is no evidence that the checkbox requirement will inhibit core political speech, strict scrutiny does not apply. Even if the checkbox requirement somewhat implicates the First and Fourteenth Amendments, it serves a reasonable regulatory interest that is designed to ensure transparency, provides relevant information to the electors, and is a neutral, nondiscriminatory measure given that the requirement applies equally to paid and volunteer circulators alike. Accordingly, Judge CAMERON agreed that the Court of Claims erred by concluding that the checkbox requirement is unconstitutional.

Goodman Acker, PC (by *Mark Brewer*) for plaintiffs.

Christopher M. Allen, Assistant Solicitor General, *Mark G. Sands*, *S. Peter Manning*, *Linus Banghart-Linn*, and *Christopher Braverman*, Assistant Attorneys General, for the Department of the Attorney General.

Amicus Curiae:

Daniel S. Korobkin and *Sharon Dolente* for the American Civil Liberties Union of Michigan.

Dickinson Wright PLLC (by *Charles R. Spies*, *Robert L. Avers*, and *Maureen J. Moody*) and *Bursch Law PLLC* (by *John J. Bursch*) for the Michigan Senate and House of Representatives.

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

RONAYNE KRAUSE, P.J. In these consolidated appeals, appellants in both cases claim an appeal by right of the

July 12, 2021 opinion and order of the Court of Claims, which addressed the constitutionality of certain provisions of 2018 PA 608, granted summary disposition in part to plaintiffs, and dismissed the case. We affirm in part and reverse in part.[1]

I. FACTS AND PROCEDURAL HISTORY

In 2018, sponsors of six statewide proposals to initiate laws and constitutional amendments submitted signed initiative petitions; three of those proposals qualified for the ballot. Michigan voters passed all three: (1) Proposal 1 legalized recreational marijuana,[2] (2) Proposal 2 enacted legislation to establish a legislative redistricting committee comprised of citizens,[3] and (3) Proposal 3 expanded voter options, including no-reason absentee voting and straight-ticket voting.[4] Two other proposals, involving earned sick leave and an increased minimum wage, would have been on the ballot had the Legislature not enacted them within 40 days of receiving the voters' petitions.[5]

---

[1] As discussed later in this opinion, this marks the second occasion these issues have come before this Court, as two of these plaintiffs filed a similar action in the Court of Claims in 2019, raising comparable issues.

[2] See the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq*.

[3] See *Citizens Protecting Michigan's Constitution v Secretary of State,* 503 Mich 42; 921 NW2d 247 (2018), holding that Proposal 2 could appear on the ballot.

[4] See *League of Women Voters of Mich v Secretary of State*, 333 Mich App 1; 959 NW2d 1 (2020), which discussed the subsequent amendments of the Constitution as a result of Proposal 3.

[5] Michigan's 1963 Constitution provides the Legislature with 40 days to enact any law, without amendment, that was proposed by initiative petition. Const 1963, art 2, § 9. The Legislature immediately amended the election law provisions and later sought an advisory opinion from

Among the 400 bills submitted to Governor Rick Snyder in the 2018 lame-duck legislative session was a bill to amend the Michigan Election Law, MCL 168.1 *et seq*., to set new requirements regarding initiative petitions.[6] On December 28, 2018, Governor Snyder signed into law 2018 PA 608, which had immediate effect. 2018 PA 608 added a geographic requirement to MCL 168.471, which limited the total number of signatures to be used to determine the validity of a petition to no more than 15% from one congressional district.[7] Also, when filing petitions with the Secretary of State (the Secretary), submitters would be required to sort the signed petitions by congressional district and include a good-faith estimate regarding the number of signatures from each district.[8] 2018 PA 608 amended MCL 168.477, forbidding the Board of State Canvassers from "count[ing] toward the sufficiency of a petition . . . any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in [MCL 168.471]."

2018 PA 608 also amended MCL 168.482 to require that signatures be gathered on forms designated by congressional district rather than by county, which was the designation previously used.[9] Also, the amendment

---

our Supreme Court regarding the legislation, but our Supreme Court denied the requests. *In re House of Representatives Request for Advisory Opinion regarding 2018 PA 368 & 369*, 505 Mich 884 (2019).

[6] 2018 HB 6595. As enacted, the bill amended "sections 471, 477, 479, 482, and 544d (MCL 168.471, 168.477, 168.479, 168.482, and 168.544d), section 471 as amended by 1999 PA 219, section 477 as amended by 2012 PA 276, section 482 as amended by 1998 PA 142, and section 544d as amended by 1999 PA 218, and by adding sections 482a, 482b, 482c, and 482d." 2018 PA 608, title.

[7] Michigan is divided into 14 congressional districts. MCL 3.51a.

[8] MCL 168.471.

[9] MCL 168.482(4). See also MCL 168.544d.

requires paid petition circulators,[10] before gathering signatures, to file an affidavit with the Secretary disclosing their nonvolunteer status.[11] Additionally, the amendment mandates that new petition forms contain a checkbox for a circulator to indicate whether he or she is a paid circulator.[12] The petition forms also must contain a statement that, if a petition circulator fails to comply with the requirements, signatures obtained by that circulator are invalid and will not be counted.[13] Under the amendment, circulators who provide false information relating to their status as a paid circulator are subject to criminal prosecution for a misdemeanor.[14] 2018 PA 608 made other substantive changes to the Michigan Election Law, but those changes have not been challenged in this appeal.

On January 22, 2019, the Secretary, the chief election officer of the state,[15] asked Michigan Attorney General Dana Nessel for a formal opinion regarding the constitutionality of 2018 PA 608.[16] In OAG, 2019-2020, No. 7,310 (May 22, 2019), the Attorney General stated that the 15% geographic requirement violated the petition

---

[10] The statute defines a "paid signature gatherer" as "an individual who is compensated, directly or indirectly, through payments of money or other valuable consideration to obtain signatures on a petition as described in [MCL 168.471]." MCL 168.482d. In this opinion, we use the terms "paid circulators" and "paid petition circulators" as referring to paid signature gatherers.

[11] MCL 168.482a(1).

[12] MCL 168.482(7).

[13] MCL 168.482(8).

[14] MCL 168.482c.

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

[16] Under MCL 14.32, the Attorney General gives opinions on questions of law posed by state officers. The opinions are not binding on the courts, *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 407 n 2; 185 NW2d 9 (1971), but "command the allegiance of state agencies," *id*.

and amendment provisions of the Michigan Constitution because neither of those provisions restricts the number of signatures collected from one geographic region. She also opined that the checkbox requirement did not further any asserted governmental interest and exposed circulators to the risk of "heat of the moment" harassment, such that it was unconstitutional. The Attorney General additionally reasoned that no state interest was apparent in the requirement that the Secretary must receive a precirculation affidavit from paid circulators, particularly when the petitions will contain circulators' addresses. She concluded that the affidavit requirement was not substantially related to Michigan governmental interests and was unconstitutional. Thus, the Attorney General determined that the following sections that were unconstitutional could be severed from the remainder of the act:

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

In May 2019, the League of Women Voters (the League), Michiganders for Fair and Transparent Elections (MFTE),[17] and three individual plaintiffs filed suit in the Court of Claims against the Secretary, alleging that portions of 2018 PA 608, including the geographic requirement, checkbox, and precirculation affidavit, were unconstitutional. In June 2019, the Michigan

[17] MFTE is a Michigan nonprofit corporation and a registered ballot-question committee that was conducting a petition drive in 2020.

House of Representatives and the Michigan Senate (hereinafter, the Legislature) filed a separate action against the Secretary in the Court of Claims. The Legislature likewise sought injunctive and declaratory relief, stating that, as the exclusive lawmaking body of Michigan, it would be harmed if the Secretary refused to enforce 2018 PA 608. It asked the Court of Claims to declare that 2018 PA 608 was constitutional and to direct the Secretary to enforce the new law.

The Court of Claims ruled that the Legislature did not have standing but opted to accept its pleadings as amici curiae briefs. The Court of Claims held that the 15% geographic cap and the checkbox requirement were unconstitutional. The Court rejected the plaintiffs' challenge to the affidavit requirements for paid petition circulators.

In an expedited[18] decision, this Court affirmed the Court of Claims' ruling that the 15% geographic cap and the checkbox requirement were unconstitutional and that the Legislature lacked standing to bring the suit. This Court reversed regarding the affidavit requirements for paid circulators, ruling that the affidavit also ran afoul of the Constitution. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156; 952 NW2d 491 (2020) (*LWV I*). Judge BOONSTRA dissented, in part, and would have held that the Legislature had standing and that the checkbox requirement was constitutional. *Id*. at 156 (BOONSTRA, J., dissenting in part).

The parties in both cases applied for leave to appeal in our Supreme Court. Meanwhile, MFTE had terminated its petition drive because of the COVID-19 pan-

[18] Our Supreme Court denied bypass but directed this Court to expedite the appeal. *League of Women Voters v Secretary of State*, 505 Mich 931 (2019).

demic. Eleven months after this Court's expedited opinion in *LWV I*, in an opinion by Justice VIVIANO, joined by Chief Justice MCCORMACK and Justices BERNSTEIN and CAVANAGH, our Supreme Court ruled that the case was moot because MFTE was not pursuing its ballot initiative and no other plaintiff had standing to pursue the appeal.[19] *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 574-599; 957 NW2d 731 (2020) (*LWV II*). The *LWV II* Court took no position on the merits of the constitutional arguments, declining to examine the legal issues in the absence of a genuine controversy between adverse parties. *Id*. at 599 n 60. Beyond affirming this Court regarding standing, our Supreme Court otherwise vacated this Court's opinion in *LVW I*, commenting that the case "ha[d] been a procedural mess from the beginning . . . ." *Id*. at 589-590. In dissent, Justice MARKMAN commented that the Court's failure to address the legal issues was "likely only to generate further litigation and controversy." *Id*. at 612 (MARKMAN, J., dissenting).

Within weeks of the Supreme Court's order of dismissal in *LWV II*, Justice MARKMAN's prediction was borne out when further litigation commenced. Plaintiffs—the League, Progress Michigan, Coalition to Close Lansing Loopholes, and MFTE—filed the instant declaratory action, seeking injunctive relief in the Court of Claims.[20] Plaintiffs maintained that the

---

[19] The Supreme Court affirmed on alternate grounds this Court's ruling that the Legislature had no standing, holding that the Legislature had not suffered harm from the Attorney General opinion but commenting that the Legislature has standing when it intervenes in a case in which the Attorney General fails to defend a statute against a constitutional attack in court. *LWV II*, 506 Mich at 571, 599.

[20] Progress Michigan is a Michigan nonprofit corporation that sponsors statewide ballot questions. Coalition to Close Lansing Loopholes is a registered ballot-question committee formed to support a proposal

amendments would increase the cost and difficulty of initiating a petition campaign. They asserted that the 15% geographic requirement was an unconstitutional restriction imposed on the citizens' rights of initiative, referendum, and/or amendment, particularly because the drafters of the 1963 Constitution expressly rejected geographic limitations for petitions. They also argued that the 15% geographic requirement violated the rights of free speech, association, and petition. They challenged the checkbox and affidavit requirements imposed on paid petition circulators, arguing that those also violated the right of free speech. Plaintiffs further claimed that the invalidation of signatures for circulator errors was unconstitutional.

The parties stipulated to the Department of Attorney General intervening as a defendant in the case.[21] The Legislature also moved to intervene, but intervening defendant indicated that it would defend the entirety of 2018 PA 608 and would adequately represent the Legislature's interests. The Court of Claims thus declined to permit duplicative representation of the same interests and invited the Legislature instead to participate as amici curiae.

Plaintiffs moved for summary disposition under MCR 2.116(C)(9) and (10), arguing that the 15% geographic requirement was an unconstitutional legislative amendment and violated the rights of free speech and association and the right to petition under Const 1963, art 1, §§ 3 and 5. Further, the new burdens on

---

regarding lobbyists for the 2022 ballot. MFTE is planning a campaign-finance-reform ballot proposal for the 2022 ballot.

[21] To support its authority to intervene, intervening defendant cites the Attorney General's "power to defend the constitutionality of legislative enactments[.]" *Attorney General v Pub Serv Comm*, 243 Mich App 487, 517-518; 625 NW2d 16 (2000).

paid circulators violated Const 1963, art 1, §§ 3 and 5. In her motion for partial summary disposition under MCR 2.116(C)(8) and (10), the Secretary contended that the signature invalidation provisions in MCL 168.482a(3), (4), and (8) did not violate plaintiffs' rights of free speech and association, or their right to petition, and that MCL 168.482a(3) and (4) did not violate the Due Process Clause.[22] Intervening defendant argued in its motion under MCR 2.116(C)(8) that plaintiffs had failed to state a claim because the 15% geographic requirement assures the support of a broad coalition of voters across the state and that the requirement should be upheld because it does not severely burden First Amendment rights and advances a legitimate state interest. Also, it argued the checkbox and paid-circulator affidavit requirements were consistent with the Legislature's charge to set the procedure for exercising the initiative and referendum powers. It also contended plaintiffs lacked standing. Plaintiffs responded, in part, that they had standing because they needed guidance as to their future conduct regarding petition drives so as to comply with 2018 PA 608 before spending millions of dollars.

In its opinion, the Court of Claims ruled in a substantially similar manner as it had in the first League case. It rejected intervening defendant's position that plaintiffs could not show a present legal controversy and thus decided that plaintiffs had standing to seek declaratory relief.[23] In considering the 15% geographic require-

[22] Those provisions in MCL 168.482a include the invalidation of signatures when a paid circulator has not filed a precirculation affidavit, a circulator uses a false address or provides fraudulent information, or the petition does not meet all requirements under MCL 168.482.

[23] Although intervening defendant has abandoned its argument that plaintiffs do not have standing, we take this opportunity to observe that

ment, the court observed that the Constitution contains no limits on where voters' signatures may be gathered and concluded that the Legislature may neither curtail, nor place undue burdens on, constitutional rights contained in self-executing provisions of the Constitution. The court ruled that the 15% requirement impaired the citizens' ability to circulate petitions and thus was unconstitutional. The court declined to decide plaintiffs' alternative argument that the 15% geographic requirement ran afoul of Article 1, §§ 3 and 5. With regard to the requirement that paid petition circulators check a box to indicate that they are paid, the court concluded that the checkbox did not substantially relate to an important governmental interest and that the compelled disclosure of a circulator's status discourages participation in the political process and thus inhibits core political speech. The Court of Claims also concluded that the invalidation of voters' signatures on the basis of a circulator's failure to comply with the checkbox requirement was unconstitutional. The court held that the precirculation affidavit requirement was constitutional because the burden on speech by way of the affidavit was less significant than that of the checkbox. The affidavit did not impose the same "heat of the moment" burden on the circulator as the checkbox requirement, and the government had a valid interest in knowing the money spent on initiative petitions.

In tandem with its determinations, the court ruled that the offending portions of 2018 PA 608 could be severed from the act. The court therefore struck the 15% geographic requirement, the requirement that the

---

it can be assumed that plaintiffs have standing given that the ballot-committee plaintiffs are currently in the process of gathering support for several statewide petitions for the November 2022 ballot and the League is comprised of voters who will support or oppose those petitions.

Board of Canvassers reject signatures not in compliance with the 15% geographic requirement, and the condition that the petition forms should refer to congressional districts. The court also concluded that 2018 PA 608 was unconstitutional with regard to its checkbox requirements, but determined that the affidavit requirement passed constitutional muster, and granted summary disposition accordingly.

Plaintiffs and intervening defendant filed the instant appeals. Plaintiffs quickly sought bypass, arguing that our Supreme Court should hear the matter immediately because the 2022 election might have as many as seven ballot proposals, all of which are hampered by uncertainty regarding the constitutionality of 2018 PA 608. Our Supreme Court denied plaintiffs' bypass application and directed this Court to expedite our decision. *League of Women Voters of Mich v Secretary of State*, 508 Mich 934 (2021). This Court consolidated plaintiffs' and intervening defendant's appeals for review and ordered that the appeals would be decided on the briefs as filed. *League of Women Voters of Mich v Secretary of State*, unpublished order of the Court of Appeals, entered September 14, 2021 (Docket Nos. 357984 and 357986).

II. STANDARDS OF REVIEW

We review de novo a trial court's decision regarding a motion for a summary decision in a declaratory-relief action. *Smith v Straughn*, 331 Mich App 209, 214; 952 NW2d 521 (2020). The constitutionality of a statute presents a question of law, which also is subject to a de novo standard of review. *Council of Organizations & Others for Ed About Parochiaid v Michigan*, 326 Mich App 124, 147; 931 NW2d 65 (2018).

III. GENERAL PRINCIPLES OF CONSTITUTIONALITY

In the context of a constitutional analysis, courts generally construe a statute as not violating the Constitution unless it clearly appears that the statute is unconstitutional. *In re Int'l Transmission Co Application*, 304 Mich App 561, 569; 847 NW2d 684 (2014). In reviewing the constitutionality of a statute, courts should not "inquire into the wisdom of the legislation." *Oakland Co v Michigan*, 325 Mich App 247, 260; 926 NW2d 11 (2018) (quotation marks and citation omitted).

Because 2018 PA 608 has yet to be enforced, arguments regarding its constitutionality constitute a facial challenge.[24] In such a challenge, "[t]he party challenging the facial constitutionality of an act 'must establish that no set of circumstances exists under which the [a]ct would be valid.' " *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999) (second alteration in original), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). In keeping with this legal framework, we begin with the presumption that 2018 PA 608 is constitutional and proceed with caution in determining whether plaintiffs have met their burden of proof to show that it is unconstitutional.

---

[24] A facial challenge is a claim that the law is "invalid *in toto*—and therefore incapable of any valid application . . . ." *Steffel v Thompson*, 415 US 452, 474; 94 S Ct 1209; 39 L Ed 2d 505 (1974) (quotation marks and citation omitted). In contrast, "[a]n as-applied challenge . . . alleges 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid, Ohio v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

IV. 15% GEOGRAPHIC REQUIREMENT

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

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

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

> The board of state canvassers may not count toward the sufficiency of a petition described in this section any valid signature of a registered elector from a congressional district submitted on that petition that is above the 15% limit described in [MCL 168.471]. [MCL 168.477(1), as amended by 2018 PA 608.]

In addition, 2018 PA 608 amended the act to require petitions to indicate in which congressional district the people who sign the petition reside. MCL 168.482(4), as amended by 2018 PA 608.

Intervening defendant argues that the 15% geographic requirement passes constitutional scrutiny and is a valid means to ensure participation from voters within the entire state. Intervening defendant adds that the Court of Claims erred by failing to recognize that the

Legislature may enact laws that do not unduly burden the rights secured by self-executing constitutional provisions. Plaintiffs rejoin that the 15% geographic requirement violates the self-executing provisions of the Constitution.

The Court of Claims ruled that the geographic requirement violates the constitutional provisions regarding initiative petitions and constitutional amendments because those provisions are self-executing. We agree.

Constitutional provisions that are self-executing must not be burdened or curtailed by supplementary legislation. *Hamilton v Secretary of State*, 227 Mich 111, 125; 198 NW 843 (1924) (opinion by BIRD, J.). Further, this Court liberally construes constitutional initiative and referendum provisions, through which the people reserve to themselves a direct legislative voice, to achieve their purposes. *Kuhn v Dep't of Treasury*, 384 Mich 378, 385; 183 NW2d 796 (1971); *Bingo Coalition for Charity—Not Politics v Bd of State Canvassers*, 215 Mich App 405, 410; 546 NW2d 637 (1996).[25]

To determine whether the 15% geographic limit survives a constitutional challenge, we first examine the constitutional provisions at issue to determine whether they are self-executing. A constitutional provision is deemed self-executing "if it supplies a sufficient rule, by means of which the right given may be

[25] We acknowledge that intervening defendant urges this Court to apply a reasonable-construction standard by citing *McQueer v Perfect Fence Co*, 502 Mich 276, 293 n 29; 917 NW2d 584 (2018). However, it is not clear that the reasonable-construction standard should apply to these particular constitutional provisions in light of the express language in *Kuhn*. Nevertheless, under either standard, the geographic limit is unconstitutional as discussed later in this opinion.

enjoyed and protected, or the duty imposed may be enforced . . . ." *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 725-726; 180 NW2d 820 (1970) (*Wolverine Golf Club I*) (quotation marks and citations omitted). "Whether a constitutional provision is self-executing is largely determined by whether legislation is a necessary prerequisite to the operation of the provision." *Id*. at 725.

Const 1963, art 2, § 9 governs initiatives and referenda, and provides, in pertinent part:

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

Our Supreme Court has ruled that Article 2, § 9 is a self-executing constitutional provision. In *Wolverine*, when considering a statutory deadline mandating that referendum petitions be submitted to the Secretary ten days before a legislative session began, the Court held that the statutory time line "restricts the utilization of the initiative petition and lacks any current reason for so doing." *Wolverine Golf Club v Secretary of State*, 384 Mich 461, 465, 466; 185 NW2d 392 (1971) (*Wolverine Golf Club II*). Our Supreme Court later added that

Article 2, § 9 is "an express limitation on the authority of the Legislature." *Woodland v Mich Citizens Lobby*, 423 Mich 188, 214; 378 NW2d 337 (1985).

The other constitutional provision at issue, Const 1963, art 12, § 2, governs constitutional amendments and provides, in relevant part:

> Amendments may be proposed to this constitution by petition of the registered electors of this state. Every petition shall include the full text of the proposed amendment, and be signed by registered electors of the state equal in number to at least 10 percent of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected. Such petitions shall be filed with the person authorized by law to receive the same at least 120 days before the election at which the proposed amendment is to be voted upon. Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law.

Our Supreme Court long has held that the principle that the Legislature cannot unduly burden self-executing constitutional procedures applies to Article 12, § 2, as well as to Article 2, § 9. *Ferency v Secretary of State*, 409 Mich 569, 591 n 10; 297 NW2d 544 (1980). While reiterating that Article 12, § 2 is self-executing, our Supreme Court more recently observed that the Constitution specifically allows the Legislature to enact laws regarding the procedures regulating initiatives. *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 63; 921 NW2d 247 (2018).

Our review therefore calls for us to determine, in part, whether the statutory requirements added by 2018 PA 608 are merely procedural. We do not view a geographic requirement that limits voter participation in the initiative process as pertaining to "procedures" regarding initiatives. Rather, the geographic require-

ment places additional limitations on the electorate's power under the Constitution.

Article 2, § 9 and Article 12, § 2 do not depend on statutory implementation, despite the language in Article 2, § 9 indicating that the Legislature shall implement its provisions.[26] See *Woodland*, 423 Mich at 213. In fact, the provision's drafters expressly indicated that Article 2, § 9 was to be self-executing to preclude the Legislature from hindering the people's intent by failing to act. *Id*., citing, in part, 2 Official Record, Constitutional Convention 1961, p 3367. The constitutional provisions at issue reserve the initiative power to the people and provide the mechanism to invoke that power within their terms.

As self-executing provisions, Article 2, § 9 and Article 12, § 2 may not be encumbered by supplemental legislation. *Hamilton*, 227 Mich at 125 (opinion by BIRD, J.). 2018 PA 608 levies an additional requirement of geographic location onto the existing self-executing constitutional provisions by setting a 15% limit of all signatures from any one congressional district. MCL 168.471, as amended by 2018 PA 608. Legislation that is supplementary to self-executing constitutional provisions " 'must be in harmony with the spirit of the Constitution and its object to further the exercise of constitutional right and make it more available, and such laws must not curtail the rights reserved, or exceed the limitations specified.' " *Wolverine Golf Club I*, 24 Mich App at 730, quoting *State ex rel Caldwell v Hooker*, 22 Okla 712, 718; 98 P 964 (1908). "Any statute which is both unnecessary for the effective administration of the initiative process and restrictive of the initiative right is unreasonable and thus unconstitu-

[26] At its close, the section states that "[t]he legislature shall implement the provisions of this section." Article 2, § 9.

tional." *Wolverine Golf Club I*, 24 Mich App at 735. The 15% geographic requirement does not make the initiative process more available to the electors but, instead, curtails the rights of certain voters to have their signatures counted toward a ballot proposal. Put more simply, it will disenfranchise some electors and seriously burden the work of circulators—especially circulators who have limited resources.

Intervening defendant argues that Article 2, § 9 sets only a floor for the total number of signatures required, such that its plain language does not foreclose the Legislature from imposing a cap on the number of signatures. Given that there is no existing cap in Article 2, § 9, the imposition of a cap would be an additional requirement, and it is an obligation that restricts, rather than furthers, the initiative process. The Legislature may not act to impose additional obligations on a self-executing constitutional provision. *Soutar v St Clair Co Election Comm*, 334 Mich 258, 265; 54 NW2d 425 (1952).

Further, intervening defendant is silent on the stifling effect of the cap, instead arguing that the Legislature previously has imposed other requirements on initiative petitions, such as font size.[27] Intervening defendant theorizes that such requirements serve the public-policy goal of readability. Nonetheless, and as pointed out by the Court of Claims, the increased readability of a petition aids voters, where a geographic limitation does not. Also, the limitation of voters' signatures on the basis of geographic location does not fall within the "form" of a petition and cannot

[27] In *Stand Up for Democracy v Secretary of State*, 492 Mich 588; 822 NW2d 159 (2012), our Supreme Court upheld the rule that the form of initiative petitions must strictly comply with the requirements of MCL 168.482, including with regard to the font size.

be likened to the font size of text. Furthermore, changing the font size on a form may be an annoyance, but it requires little more than careful attention to detail, whereas the 15% geographic requirement restricts the number of people in a geographical area allowed to engage in political speech and burdens circulators by imposing burdensome sorting and estimation requirements that will also require additional expenditures of resources.

Indeed, it was not even disputed in the Court of Claims that the new geographic requirement adds an impediment to the petition process. That the process would be more difficult was established by the unrebutted affidavits detailing the burdens imposed by the 15% geographic requirement. Other than arguing that the 15% geographic requirement would ensure that support for voter-proposed ballot measures would be "more evenly spread" across congressional districts, intervening defendant has not explained why a ceiling, rather than a floor, is necessary, or why that ceiling should be just 15%. Additionally, although intervening defendant states that the geographic requirement likely would increase the "total quantum of speech" on public issues, that argument is weakened by the fact that the geographic requirement is not a minimum, but instead is a preclusive cap on voters' signatures and the cap does not serve the state's proffered purpose.[28] It will instead have the effect of *reducing* the "total quantum of speech." Finally, it should go without

[28] In its brief amicus curiae, the Legislature notes that the geographic requirement forces campaigns not to focus on dense population centers and thereby exclude other voters in less populous areas of Michigan. This argument may not be true when a proposal proponent could concentrate its efforts on the eight or nine most densely populated congressional districts and not the less dense districts. What is true, however, is that a cap on signatures would be more likely to exclude

saying that getting a measure onto the ballot does not mean that the measure will actually be approved by the voters; it only ensures that the measure will be considered.

Intervening defendant also argues that a geographic requirement is common, citing the statistic that of the 24 states with a citizen-initiative process, 14 impose "some kind" of geographic requirement. But intervening defendant does not indicate whether the geographic requirements of other states are a ceiling or a floor, or if they are designated by county or by congressional district. The general citation to other states' rules, without reference to analogous provisions, does not aid in our analysis of the legal issues before us, as illustrated by intervening defendant's reliance on cases from Utah and New York. In *Utah Safe to Learn-Safe to Worship Coalition, Inc v Utah*, 94 P3d 217, 229; 2004 UT 32 (2004), the Utah Supreme Court concluded that a newly enacted geographic distribution requirement did not offend the right to initiate legislation, but the Utah requirement is not substantively similar to the 15% geographic requirement here because the Utah requirement was a threshold, not a cap, and the language of the Utah constitutional provision regarding initiatives made clear that the right of petition in that state was not unfettered. We also find unhelpful intervening defendant's citation of *Moritt v Governor of New York*, 42 NY2D 347, 350; 366 NE2d 1285 (1977), in which the New York Court of Appeals upheld as constitutional a geographic requirement for petitions for statewide office that operated as a floor, not a ceiling. The requirements in Utah and New York thus *required* support from a minimum number of

electors in the more densely populated districts given that the 15% cap would be reached more rapidly in those districts.

voters; in contrast, 2018 PA 608 *prohibits* support from voters within a particular congressional district when the arbitrary 15% cap is exceeded within that congressional district.

Intervening defendant also argues that the 15% requirement operates like the minimum threshold in Article 2, § 9 and Article 12, § 2 because, before 2018 PA 608, a voter's signature in excess of the minimum would not, in effect, contribute to placing an initiative on the ballot. A distinction exists, however, between being one of many petitioners above a minimum threshold as compared to being denied the opportunity to be a petitioner at all once the 15% cap is reached. As noted by *LWV I*,[29] the 15% requirement's "effect would be to unconditionally deny untold numbers of registered voters the right to have their signatures counted . . . ." *LWV I*, 331 Mich App at 182.[30]

Next, intervening defendant maintains that even if the 15% geographic requirement is not valid under Article 2, § 9, it is valid under the following language in Article 12, § 2: "Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law." Intervening defendant argues that Article 12, § 2 thus creates "a wider lane" for the Legislature, citing *Consumers Power Co v Attorney General*, 426 Mich 1, 6-10; 392 NW2d 513 (1986), which upheld a prohibition on signatures gathered more than 180 days before a petition's submission to

---

[29] We recognize that *LWV I* was vacated by our Supreme Court and that it therefore has no binding precedential value, but we nevertheless arrive at the same conclusion.

[30] Amicus curiae the American Civil Liberties Union further observes that 2018 PA 608's burdens will disproportionately fall on Black voters where over half of Michigan's Black voters currently are concentrated in just two of the state's 14 congressional districts.

the Secretary. But the reasonable—and rebuttable—presumption of staleness in *Consumers Power* is not on par with the nullification of otherwise timely and valid signatures merely because they exceed an arbitrary 15% geographic requirement. Also, the time limit in *Consumers Power* applied equally to all signatures more than 180 days old, whereas here the geographic limit bars only those signatures exceeding the 15% geographic limit. Further, a geographic requirement limiting otherwise valid petition signatures cannot be equated with petition signatures invalidated on the basis of incorrect addresses or signing dates. Additionally, the geographic requirement is not akin to mere legislative "details"[31] as contemplated by Article 12, § 2 and discussed in *Citizens for Capital Punishment v Secretary of State*, 414 Mich 913 (1982), and cited by *Consumers Power*, 426 Mich at 7. We therefore decline to interpret Article 12, § 2 as expanding the legislative role relating to ballot petitions.

Although Michigan law requires candidates running for certain statewide offices to obtain signatures from at least half of Michigan's congressional districts,[32] no geographic requirements have ever applied to ballot petitions—until 2018 PA 608. In Michigan, the number of signatures required for a petition for statewide ballot depends on the number of votes cast in the most recent gubernatorial election. See Const 1963, art 2, § 9 and Const 1963, art 12, § 2. In November 2018, nearly 4.3 million Michiganders cast votes in the

[31] As noted in the record from the Constitutional Convention, "legislative details" are for the Legislature, but even so the Legislature cannot "thwart the popular will . . . ." *Woodland*, 423 Mich at 213, citing 2 Official Record, Constitutional Convention 1961, p 3367.

[32] See, e.g., MCL 168.53, regarding candidates running for Michigan Governor.

midterm election. Therefore, to qualify for the 2022 ballot, sponsors must obtain over 212,000 signatures for a referendum, over 340,000 signatures for an initiative, or over 425,000 signatures for a constitutional amendment. In light of the 15% limitation, sponsors now must obtain signatures from over half of Michigan's congressional districts at a minimum.[33]

Our Constitution, however, contains no geographic-distribution requirement in the text. Under the long-standing constitutional structure, a registered voter anywhere in Michigan could sign a petition and that signature would be counted in support. In contrast, under the 2018 PA 608 amendments, a voter's signature would not be counted if the geographic cap had been reached in their district. The new statutory bar to counting voters' signatures simply is not in line with the intent of the framers of our current Constitution. In construing a constitutional provision, the key objective is to give effect to the intent of the people who ratified the Constitution. *UAW v Green*, 498 Mich 282, 286; 870 NW2d 867 (2015). Although the plain meaning of the text is primary, the constitutional convention record also is relevant in determining the intent of the ratifiers. *Id*. at 287-288. The delegates of the 1961 Constitutional Convention considered adding a 25% geographic requirement to the Constitution. Proponents gave reasons similar to those offered here: to gain an informed electorate and to prevent placement on the state ballot matters of only very local interest. Opponents stated that all signatures of voters should be equally counted, and the rule of "one person, one vote" should hold true for petition signors as well. The

[33] Given the possible invalidation of signatures, sponsors would need to obtain many more signatures than the minimum, so they realistically would need to obtain signatures in more than seven districts.

delegates voted down the proposed 25% geographic requirement (notably, the 25% ceiling proposed then was more generous than the 15% requirement in 2018 PA 608). 2 Official Record, Constitutional Convention 1961, pp 3200-3201. Thus, it is manifest that the people chose not to add a geographic requirement to the Constitution. Had the people wanted to tie a geographic condition to the process, they would have done so.

We thus conclude that the geographic requirement does not survive constitutional scrutiny, as correctly concluded by the Court of Claims. We hold that the provision in MCL 168.471 imposing a 15% geographic limit, as amended by 2018 PA 608, establishes an unnecessary and unreasonable restraint on the constitutional right of the people to initiate laws. It therefore is unconstitutional. The provisions of the statutes involving the 15% geographic requirement, MCL 168.477 and MCL 168.482(4), likewise are unconstitutional. In light of this conclusion, we decline to discuss the alternate constitutional argument put forth by plaintiffs.

V. PETITION CIRCULATORS

We next examine the requirements in 2018 PA 608 concerning petition circulators. As amended, MCL 168.482 now provides, in relevant part:

> (7) Each petition under this section must provide at the top of the page check boxes and statements printed in 12-point type to clearly indicate whether the circulator of the petition is a paid signature gatherer or a volunteer signature gatherer.
>
> (8) Each petition under this section must clearly indicate below the statement required under subsection (7) and be printed in 12-point type that if the petition circu-

> lator does not comply with all of the requirements of this act for petition circulators, any signature obtained by that petition circulator on that petition is invalid and will not be counted.

Consistent with the statement required by MCL 168.482(8), "[i]f a petition under [MCL 168.482] is circulated and the petition does not meet all of the requirements under [MCL 168.482], any signature obtained on that petition is invalid and must not be counted." MCL 168.482a(4). In addition, 2018 PA 608 imposes a further criminal penalty for a false statement regarding a circulator's status: "The circulator of a petition under [MCL 168.482] who knowingly makes a false statement concerning his or her status as a paid signature gatherer or volunteer signature gatherer is guilty of a misdemeanor." MCL 168.482c.

MCL 168.482a(1) requires that "[i]f an individual who circulates a petition under [MCL 168.482] is a paid signature gatherer, then that individual must, before circulating any petition, file a signed affidavit with the secretary of state that indicates he or she is a paid signature gatherer." If a paid circulator has not filed the affidavit, any signature obtained by the circulator is invalid, and if a circulator's petition does not meet the necessary requirements under MCL 168.482, any signature on that petition is invalid. MCL 168.482a(2) and (4).

A. CHECKBOX

The Court of Claims concluded that the checkbox requirement does not substantially relate to a sufficiently important governmental interest and that it is therefore unconstitutional. Intervening defendant contends that the checkbox is constitutional, while plaintiffs align with the Court of Claims. We conclude that

the checkbox requirement imposes little to no burden on political speech and substantially relates to an important governmental interest. The Court of Claims therefore erred by holding it to be unconstitutional.

Intervening defendant does not dispute that soliciting signatures in support of a petition, and the signing of a petition, are protected speech under the First Amendment. *Doe v Reed*, 561 US 186, 194-195; 130 S Ct 2811; 177 L Ed 2d 493 (2010). "The State, having 'cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles.' " *Id*. at 195 (citation omitted; alteration in original). Nevertheless, intervening defendant posits that a sliding scale of scrutiny should be applied here, and it offers the reasoning enunciated in the *Anderson-Burdick* test, which is named for *Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983), and *Burdick v Takushi*, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992). Under the test:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." [*Burdick*, 504 US at 434, quoting *Anderson,* 460 US at 789.]

Thus, "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not invidious. *Anderson*, 460 US at 788 n 9.

As explained in *Timmons v Twin Cities Area New Party*, 520 US 351, 358; 117 S Ct 1364; 137 L Ed 2d 589

(1997), the *Anderson-Burdick* test involves a different scrutiny depending on the severity of the burden:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. [*Timmons*, 520 US at 358 (quotation marks and citations omitted).]

Intervening defendant argues that the checkbox requirement is a lesser burden and that it thus should be analyzed under the *Anderson-Burdick* test. We agree; however, we conclude that the checkbox is constitutional even under the more exacting strict-scrutiny test.

The First Amendment prohibits abridgment of "the right of the people . . . to petition the Government for a redress of grievances." US Const, Am I. The clauses of the First Amendment of the United States Constitution apply to the states through the Fourteenth Amendment. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 729; 664 NW2d 728 (2003), citing *Whitehill v Elkins*, 389 US 54, 57; 88 S Ct 184; 19 L Ed 2d 228 (1967). In *Meyer v Grant*, 486 US 414, 416; 108 S Ct 1886; 100 L Ed 2d 425 (1988), the United States Supreme Court considered the constitutionality of a Colorado law making it a felony to pay people to circulate petitions. The Colorado District Court and the Colorado Court of Appeals both ruled that the burden on the sponsors was outweighed by the

state's interests in ensuring a broad base of support for petitions and in eliminating a temptation to pad signatures. *Id*. at 418-419. On appeal, the United States Court of Appeals for the Tenth Circuit reversed, opining that the effect of the ban on paid circulators impeded the sponsors' dissemination of their views to the voters, curtailed discussions at the time of circulation of the petitions, and shrunk the "size of the audience." *Id*. at 419 (quotation marks and citations omitted).

The United States Supreme Court agreed, explaining that "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change," rendering it "core political speech" under the First Amendment. *Meyer*, 486 US at 421-422 (quotation marks omitted). It observed that the prohibition against paid circulators restricted political expression by limiting the number and hours of voices to carry the message, thereby limiting the available audience; in turn, that reduced the probability that enough signatures could be gathered to place the measure on the ballot. *Id*. at 422-423. Because the prohibition against paid circulators limited the power of the people to initiate legislation, it was subject to close scrutiny. *Id*. at 423. The Court concluded:

> The State's interest in protecting the integrity of the initiative process does not justify the prohibition because the State has failed to demonstrate that it is necessary to burden appellees' ability to communicate their message in order to meet its concerns. The Attorney General has argued that the petition circulator has the duty to verify the authenticity of signatures on the petition and that compensation might provide the circulator with a temptation to disregard that duty. No evidence has been offered to support that speculation, however, and we are not

> prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot. [*Id*. at 426.]

Because the law burdened core political speech and the restriction on expression had not been justified under exacting scrutiny, the United States Supreme Court agreed with the Tenth Circuit that the prohibition was unconstitutional. *Id*. at 428.

In *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182, 186; 119 S Ct 636; 142 L Ed 2d 599 (1999), nonprofit public interest groups in Colorado challenged several statutory requirements, including that petition circulators wear an identification badge with their name and status as a paid or volunteer circulator, as well as submit an affidavit, which was to be completed after the circulators' interaction with voters. In balancing the competing interests, the Supreme Court stated that "the First Amendment requires us to be vigilant in [separating valid provisions from speech restrictions], to guard against undue hindrances to political conversations and the exchange of ideas." *Id*. at 192, citing *Meyer*, 486 US at 421.

The *Buckley* Court cited with favor the opinion of the Tenth Circuit, which ruled that the name-badge requirement " 'forces circulators to reveal their identities at the same time they deliver their political message,' " which occurs simultaneously with the potential signor's reaction to the circulator's message, a reaction that " 'may be the most intense, emotional, and unreasoned[.]' " *Buckley*, 525 US at 198-199, quoting *American Constitutional Law Foundation, Inc v Meyer*, 120 F3d 1092, 1102 (CA 10, 1997). The Court distinguished the affidavit, which, unlike the badge, was not provided

to the signors, and stated that it did not subject the circulator to the risk of " 'heat of the moment' harassment." *Buckley*, 525 US at 199. The Court determined that "the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." *Id*. The Court concluded that it discouraged participation in the petition circulation process by mandating disclosure of the circulator's name without sufficient justification. *Id*. at 199-200. While the *Buckley* Court struck the badge requirement, the Court expressly declined to decide the constitutionality of a requirement for circulators to wear a badge disclosing their volunteer or paid status. *Id*. at 200. Notably, the *Buckley* Court observed that there was real evidence that circulators were discouraged from participation by the requirement that they display name badges, noting that they had actually been subjected to harassment and possible retaliation. *Id*. at 197-200.

Meyer and *Buckley* make evident that exacting scrutiny is applied to the core political speech at issue in this case. Nevertheless, in neither case did the United States Supreme Court hold that no burden of any degree could ever be countenanced, or that it was impossible for a state to justify a particular burden. Our Supreme Court has explained that restrictions on core political speech may be upheld if they are "narrowly tailored to serve a compelling state interest." *In re Chmura*, 461 Mich 517, 532-534; 608 NW2d 31 (2000). The burden to establish that the law is narrowly tailored rests with the government. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 319; 783 NW2d 695 (2010). Courts also weigh the need for regulation of elections to assure a fair, honest, and orderly process. *Storer v Brown*, 415 US 724, 730; 94 S Ct 1274; 39 L Ed 2d 714 (1974).

Consequently, we weigh the sponsors' and voters' First Amendment rights against the state's asserted interests. Here, intervening defendant asserts that the state has an interest in offering information regarding the paid status of a circulator to voters when they decide whether to sign an initiative petition. We agree. Transparency in the political process, especially transparency that permits voters to "follow the money," is a compelling state interest. Giving voters knowledge of whether they are being asked to sign a petition by a volunteer or a paid circulator is valuable in its own right, but so is knowing the extent to which the petition has the funds to pay circulators. Rather than being a mere trivial curiosity, knowledge about a campaign's funding carries great weight and may have grave consequences for the public at large. See *McIntyre v Ohio Elections Comm*, 514 US 334, 348-350; 115 S Ct 1511; 131 L Ed 2d 426 (1995).[34] Furthermore, although *Meyer* held that the risk of intentional fraud by circulators who are paid by the signature was insufficient to justify banning paid circulators altogether, we recognize that being paid by the signature may, at a minimum, incentivize sloppiness or a lack of concern for correctness. Consequently, marking petitions circulated by paid circulators provides the state and campaigns with a valuable monitoring tool for tracking petitions that may warrant additional scrutiny. Although the phrase "transpar-

[34] *McIntire* involved a ban on the distribution of anonymous handbills. The United States Supreme Court held that the state did not have a sufficiently compelling interest in merely providing "additional relevant information" about the distributor's identity, but the state *did* have a special interest in preventing fraud and libel during election campaigns. The United States Supreme Court held that the state's interest in preventing fraud and libel did not justify the ban but might have justified "a more limited identification requirement." *McIntyre*, 514 US at 351-353. We think the interest here is of similar importance, and, far from imposing a ban, the "identification requirement" of the checkbox is trivial.

ency and accountability" is, in the abstract, somewhat vague, we are persuaded that the state has a compelling interest in ensuring that the political speech involved in circulating petitions comes with a "full disclosure," whether it is paid or volunteer.

Furthermore, the checkbox requirement, by itself, is clearly narrowly tailored. Unlike the prohibition in *Meyer*, it imposes little to no burden on circulators. Unlike the requirements in *Buckley*, circulators are not obligated to provide any personal information. We are not aware of any evidence that paid circulators are subject to harassment just for being paid; in *Buckley*, it is clear that the circulators were harassed because of the contents of the petitions. Whether they are paid or volunteer would hardly make a difference, nor would it give aggressive persons interested in retaliation any greater ability to commit such offenses. A checkbox, unlike a badge, is far less conspicuous and might not even be noticed. Although amicus suggests an alternative provision generally stating that the circulator *might* be paid, such a provision would not communicate anything and would therefore not be more narrowly tailored; rather, it would be essentially pointless. We have not been presented with any evidence that the checkbox requirement would cause paid or volunteer circulators to be disinclined to participate in circulation. Although some people might decide not to engage with circulators if they are being paid, other people might have more sympathy for a circulator they regard as merely "doing their job." Therefore, we are also not persuaded that the checkbox requirement will have a meaningful overall effect on the audience a circulator can reach.

We recognize that adding a checkbox and ensuring that it is correctly marked will impose some adminis-

trative burden on campaigns, lest, under MCL 168.482a(4), the signatures on a petition be deemed invalid. However, nothing in *Meyer*, *Buckley*, or *Chmura* suggests that no such burden is ever permissible when a compelling and legitimate state interest will be served. Indeed, *Buckley* expressly held that although potential restrictions on free speech should be regarded with skepticism and exacting scrutiny, " 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions[.]" *Buckley*, 525 US at 192, quoting *Storer*, 415 US at 730. The United States Supreme Court has held, in no uncertain terms, that all election regulations have some effect on the right to vote,[35] but they are not necessarily invalid for that reason alone. *Burdick v Takushi*, 504 US at 434. We are not persuaded that the minimal additional administrative review, given the need to inspect petitions in any event,[36] and the added value of knowing which petitions may demand extra scrutiny, is significant. Finally, we observe that the checkbox requirement applies equally to all circulators. Even if we were to conclude that the checkbox requirement imposes some burden, it is not a significant one.[37] We therefore conclude that it passes constitutional muster.

---

[35] *Burdick* emphasized that the distinction between voting-rights cases and ballot-access cases is vague, possibly bordering on nonexistent. *Burdick*, 504 US at 438.

[36] We note that under MCL 168.482(6), which incorporates the requirements of MCL 168.544c(1) and (2), petitions must include a "certificate of circulator," including a checkbox to indicate whether the circulator is a resident of Michigan, and the name and signature of the circulator. Presumably, campaigns already check this information; tracking whether the circulator is paid or volunteer would add very little further effort.

[37] We recognize that 2018 PA 608 also added a misdemeanor penalty for making a knowingly false statement regarding a circulator's status as paid or volunteer. MCL 168.482c. There is no evidence in the lower court

B. AFFIDAVIT

As discussed, in *Meyer*, the Supreme Court struck down Colorado's prohibition on the use of paid petition circulators. In its opinion, the Supreme Court acknowledged that the bar on paid circulators imposed a burden on First Amendment expression. *Meyer*, 486 US at 423. The Court took judicial notice "that it is often more difficult to get people to work without compensation than it is to get them to work for pay." *Id*. (quotation marks and citation omitted). Also, the Court noted "that the solicitation of signatures on petitions is work. It is time-consuming and it is tiresome—so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration." *Id*. at 423-424 (quotation marks and citations omitted).

In *Buckley*, the Supreme Court rejected, on First Amendment grounds, portions of a Colorado statute requiring reports disclosing information regarding only paid petition circulators' names, addresses, and amounts paid to those circulators. *Buckley*, 525 US at 201-204. The Supreme Court held that "[l]isting paid circulators and their income from circulation forc[es] paid circulators to surrender the anonymity enjoyed by their volunteer counterparts . . . ." *Id*. at 204 (quotation marks and citation omitted; second alteration in original).[38] The Court also stated that the reporting require-

---

record that this penalty will discourage circulators. We further note that it is already a misdemeanor to make a false statement in the certificate of circulator. MCL 168.482e(1)(b) and (2). Indeed, the latter penalty does not include a "knowingly" requirement, and it apparently has not proven to be an impediment to obtaining circulators.

[38] *Buckley* is not on all fours because the legislation in that case required the disclosure of the circulator's name and other identifying information. Nevertheless, unlike the evenhanded checkbox require-

ments were "no more than tenuously related" to the substantial state interests that disclosure serves and ruled that, to the extent that reports targeted paid circulators, they failed the exacting scrutiny test. *Id*. The same result should occur here.

Plaintiffs draw this Court's attention to *Buckley*, in which all circulators, paid or volunteer, were to submit a signed affidavit when they submitted a petition to the Secretary of State. The affidavit required their name and address, eligibility to be a circulator, and a statement that they understood the petition laws. *Buckley*, 525 US at 188-189, 196. The *Buckley* affidavit was submitted at the time the petitions were submitted, not before. *Id*. at 196. That distinction between the affidavit in *Buckley* and the affidavit in this case is meaningful because it supports our conclusion that the statute forces paid circulators—before a single signature is gathered—to file an affidavit that volunteer circulators are not obliged to file. The affidavit thus is not an evenhanded restriction, and the state has not shown how it protects the integrity of the election process.

Intervening defendant cites *Libertarian Party of Ohio v Husted*, 751 F3d 403 (CA 6, 2014), wherein Ohio required a disclosure submitted to the Secretary of State with the circulator's name and address, and, if the circulator was paid, the name and address of the person employing the circulator. *Id*. at 406. In analyzing the potential chill on political speech, the United States Court of Appeals for the Sixth Circuit noted that the disclosure was not made to the voter but, instead, was made after the signatures were gathered. *Id*. at 417. The affidavit requirement here does not survive

---

ment, the affidavit requirement here requires circulators to fulfill a requirement that their volunteer counterparts need not.

the reasoning in *Husted* because the disclosure here is made *before* the First Amendment communication can occur. It is reasonable to conclude that the requirement would have a dampening effect, one applying selectively to paid circulators, and one that would not inhibit volunteer circulators.

Additionally, in any petition campaign, time is of the essence. First Amendment protections have been extended to laws that encumber different stages of the speech process. See *Citizens United v Fed Election Comm*, 558 US 310, 336-337; 130 S Ct 876; 175 L Ed 2d 753 (2010) (describing invalid laws imposed at various stages of the speech process). 2018 PA 608's precirculation affidavit requirement will make sponsors' political speech more difficult by increasing the time required for petition drives because paid circulators cannot begin circulating petitions immediately but, instead, must file affidavits before circulation can commence.

Further, we struggle to comprehend any compelling interest served by the affidavit, when the Michigan Campaign Finance Act, MCL 169.201 *et seq*., requires sponsors of ballot-question committees to report the names, addresses, and amounts contributed by financial supporters. See MCL 169.226(1)(b) through (j). Further, MCL 169.206(1) directs petition proponents to report whether they are hiring a firm that employs paid circulators. In light of those requirements, intervening defendant has not demonstrated that the affidavit serves a compelling interest. Conversely, *Buckley* indicated generally that free speech is inhibited by provisions that have the effect of decreasing the pool of potential circulators. *Buckley*, 525 US at 194-195.

Intervening defendant also has not shown why an affidavit relating to an individual circulator's status,

rather than information from sponsors of a petition, would advance the state's interests. As discussed, we agree that the state has a legitimate and compelling interest in increasing the transparency of elections and in providing accurate information to the electorate. It is not clear to us how the affidavits required by 2018 PA 608 actually advance that interest. However, even if we were to presume the affidavits did serve that interest, we must consider whether that interest can be served by "less problematic measures." *Buckley*, 525 US at 204. Assuming an affidavit disclosing the petition circulator's paid status should be required, such an affidavit should be filed at the same time as the signed petitions, rather than beforehand.[39]

It is beyond dispute that Michigan has an important interest in an orderly petition process. Intervening defendant, however, has presented very little basis for a conclusion that 2018 PA 608's requirement for a precirculation affidavit to be filed only by people who receive remuneration for their petition circulation is either necessary or substantially related to that interest. An affidavit requirement for some circulators, but not others, on the basis of whether work is paid, will result in harsher treatment for organizations that must rely on paid circulators. See *Riley v Nat'l Federation of the Blind of North Carolina, Inc*, 487 US 781, 799; 108 S Ct 2667; 101 L Ed 2d 669 (1988) (explaining that a requirement applying to only paid personnel making charitable

[39] Intervening defendant has not shown that the interests of locating signatories, verifying campaign-finance reporting, and assuring that employed circulators are aware of applicable laws must be accomplished by the filing of an affidavit before any signatures are gathered. Similarly, even if the focus on paid circulators is rationally related to verifying campaign-finance expenditures as argued by intervening defendant, other, less intrusive, means to do so exist.

solicitations "necessarily discriminates against small or unpopular charities" that typically rely on professional fundraisers).

Given that the affidavit must be submitted before signatures may be collected and that it applies only to paid circulators,[40] it can be seen as imposing a significant burden on the right of political speech protected by the First Amendment. We must balance this burden against the state's interests in election integrity. Intervening defendant has not shown that the state's interests are furthered by the disclosure requirement, which singles out only paid circulators, and burdens the sponsors' political speech by imposing a requirement that circulators must file an affidavit *before* gathering any signatures. Accordingly, the affidavit requirement does not meet the strict-scrutiny standard, so we hold that it is unconstitutional.

VI. SEVERABILITY

Portions of a statute that are found to be unconstitutional are not to be given effect if the remaining portions of the statute remain operable. See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 345; 806 NW2d 683 (2011). Therefore, because courts are obliged to uphold the constitutionality of legislation to the greatest extent possible, they will not invalidate an entire act if the offending provisions can be severed from the act. *In re Certified Questions From United States Dist Court*, 506 Mich 332, 373; 958 NW2d 1 (2020) (opinion by

[40] That it applies only to paid circulators dilutes intervening defendant's argument that the requirement is analogous to the requirements governing precinct election inspectors under MCL 168.677, which applies to all such inspectors, not a select subset.

MARKMAN, J.). As well, courts have statutory authority to sever unconstitutional portions of statutes from the whole:

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

2018 PA 608 contains no express severability clause. Nevertheless, we are convinced that 2018 PA 608 can be given effect without the 15% geographic requirement and the precirculation affidavit. 2018 PA 608 contains other provisions that leave it operative[41] such that the entire act need not be declared unconstitutional. Further, the record reflects no indication that the Legislature would not have adopted 2018 PA 608 if it had been aware that portions of it ultimately would be found unconstitutional. See *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 345-346. 2018 PA 608 therefore may be read as if the offending provisions are not there. Thus,

---

[41] For example, 2018 PA 608 provides that once the Board of Canvassers approves a 100-word summary of the purpose of the proposed initiative/referendum/amendment, the Board may not consider a later challenge to petitions on the basis of the summary. MCL 168.482b(1). Also, persons aggrieved by the Board's decision may file suit in our Supreme Court within seven days of the Board's determination, or no later than 60 days before the election, whichever comes first. MCL 168.479. We take no position regarding the constitutionality of those provisions, which are not before us in this appeal.

when the unconstitutional language is severed, the remainder of the act is complete in itself and is not inoperable.

VII. CONCLUSION

We affirm the Court of Claims to the extent it struck as unconstitutional the 15% geographic requirement in sections MCL 168.471, MCL 168.477(1), and MCL 168.482(4). We reverse the Court of Claims to the extent it found unconstitutional the checkbox requirement in MCL 168.472(7), and we reverse the Court of Claims to the extent it found constitutional the precirculation affidavit requirement of MCL 168.472(2). The parties shall bear their own costs. MCR 7.219(A).

K. F. KELLY, J., concurred with RONAYNE KRAUSE, P.J.

CAMERON, J. (*concurring*). I agree with the majority opinion that the 15% geographic restriction for collecting petition signatures and the precirculation affidavit requirement for paid circulators impose unnecessary burdens on the people's right to initiate laws. These statutory provisions are therefore unconstitutional. I further agree with the majority's conclusion that the checkbox requirement is constitutional because it imposes little to no burden on a circulator's exercise of protected speech. I write separately to examine the checkbox issue and to underscore its constitutionality.

The checkbox requirement of 2018 PA 608, as contained in MCL 168.482(7), provides:

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

"The freedom of speech . . . guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Meyer v Grant*, 486 US 414, 421; 108 S Ct 1886; 100 L Ed 2d 425 (1988) (quotation marks and citations omitted). "[T]he circulation of [an initiative] petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' " *Id*. at 421-422. "[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United v Fed Election Comm*, 558 US 310, 340; 130 S Ct 876; 175 L Ed 2d 753 (2010).

I first note that the parties dispute the relevant standard of review. For the reasons explained in this opinion, I conclude that the *Anderson-Burdick* standard applies. In *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983), the United States Supreme Court set forth the following test with regard to states' election laws:

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also

> must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations omitted.]

"[W]hen a State election law provision imposes only reasonable, nondiscriminatory restrictions . . . , the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992) (quotation marks and citation omitted). However, when First and Fourteenth Amendment rights are "subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id*. (quotation marks and citation omitted). Importantly, the United States Supreme Court has recognized that, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Id*. at 433.

In sum, *Anderson* and *Burdick* establish a sliding scale of judicial review, ranging from strict scrutiny to rational-basis review, depending on the particular facts and circumstances of each case. Under the *Anderson-Burdick* framework, the "rigorousness of [a court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id*. at 434.

In ruling on the competing motions for summary disposition, the Court of Claims agreed with plaintiffs' arguments concerning the unconstitutionality of the checkbox requirement and reasoned that the checkbox

requirement burdened a circulator's right to engage in political speech. Specifically, the Court of Claims expressed concern over the timing of the checkbox disclosure, noting that circulators must disclose their paid or volunteer status "at the same time the circulator is delivering his or her political message" and at the moment "when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned." (Quotation marks and citation omitted.) This observation led the Court of Claims to conclude that the checkbox disclosure "discourages participation in the petition circulation process and inhibits core political speech." In other words, the checkbox disclosure burdens speech because the law will discourage the circulation of petitions because some circulators will no longer "participat[e] in the petition circulation process," therefore resulting in less political speech.

This conclusion hinges on several necessary findings. First, that circulators are genuinely concerned that the "intense, emotional and unreasoned" confrontations that sometimes occur between the public and circulators will be made worse by the disclosure of the circulators' paid or volunteer status. Second, that these confrontations, made more difficult by the checkbox disclosure, will cause some petition circulators to choose to no longer circulate petitions. And third, that the natural consequence of checkbox disclosure will be fewer circulators willing to engage in political speech.

While plaintiffs argue on appeal that the Court of Claims properly concluded that the checkbox requirement is unconstitutional, plaintiffs failed to provide any evidence before the Court of Claims to support that political speech would be severely burdened by the checkbox requirement. If the checkbox disclosure is as

burdensome as plaintiffs suggest, such evidence should not have been difficult for plaintiffs to produce. For instance, plaintiffs attached to their complaint affidavits from two owners of petition-gathering companies explaining how the 15% geographical limit would impose severe burdens on the signature-gathering process. However, neither affiant mentioned the checkbox disclosure, let alone how the law would burden their ability to recruit or retain circulators in the future. Nor did plaintiffs offer any opinion evidence explaining why the checkbox disclosure is of such magnitude that some circulators would refuse to circulate petitions. Simply put, there is no evidence in this record to support plaintiffs' speculation, and speculation is insufficient to establish a facial challenge. See *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997).

Rather than provide evidence, plaintiffs' constitutional challenge draws on a comparison between Michigan's checkbox law and a Colorado law held to be unconstitutional in *Buckley v American Constitutional Law Foundation, Inc*, 525 US 182; 119 S Ct 636; 142 L Ed 2d 599 (1999). But in *Buckley*, the Supreme Court did not analyze whether requiring circulators to disclose whether they were paid or volunteers was unconstitutional. *Id*. at 200. Instead, the *Buckley* Court held that the Colorado statute that required circulators to wear identification badges bearing the circulator's name violated the First Amendment. *Id*. The Court's conclusion was based on evidence that "compelling circulators to wear identification badges inhibits participation in the petitioning process" because of the potential and actual "harassment," "recrimination and retaliation[.]" *Id*. at 197-198 (quotation marks and citation omitted). The *Buckley* Court emphasized that "the name badge requirement forces circulators to

reveal their identities at the same time they deliver their political message" in an effort "to persuade electors to sign the petition" and that the requirement "operates when reaction to the circulator's message is immediate and may be the most intense, emotional, and unreasoned[.]" *Id*. at 198-199 (quotation marks and citations omitted). Consequently, the *Buckley* Court held that the requirement that the circulators reveal their identity "significantly inhibit[ed] communication with voters about proposed political change, and [was] not warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Id*. at 192.

There is no indication that disclosure of a circulator's paid or volunteer status increases the risk of harassment to circulators in the same way that a name badge does. In a heated political dispute, it is understandable that the circulators in *Buckley* balked at having to share their personal information with strangers who occasionally have an "intense, emotional and unreasoned" reaction to their political message. *Id*. at 199. But no serious argument can be made that disclosing whether a circulator is paid or a volunteer *increases the risk* of harassment among circulators[1] and that the increased magnitude of hostility will cause some circulators to no longer circulate petitions. Nor is there any reason to believe that the disclosure of one's volunteer or paid status by marking a box on the petition form is a requirement so onerous or troublesome that it will provoke some circulators to disengage from the political process. And unlike a conspicuously

[1] Interestingly, plaintiffs do not specifically identify on appeal whether paid or volunteer circulators are met with greater hostility. While plaintiffs appear to suggest that paid circulators will be met with more vitriol than unpaid circulators, there is no evidence in the record to support this conclusion.

worn name badge disclosing one's personal identifying information, the checkbox disclosure is in the same 12-point font found throughout the entire petition form and is unlikely to be seen by a potential signer until *after* the in-person interaction with the circulator has begun. Cf. *Buckley*, 525 US at 198-199 (noting that "the name badge requirement forces circulators to reveal their identities at the same time they deliver their political message") (quotation marks and citation omitted). Consequently, there is no evidence that the checkbox requirement will impede the circulator's delivery of their political message.

Because there is no reason to believe that the checkbox disclosure will inhibit core political speech, strict scrutiny does not apply. Cf. *Meyer*, 486 US at 420-424 (applying strict scrutiny when a prohibition on paid circulators restricted political expression by restricting the number of people who would carry the sponsor's message).

Moreover, even if the checkbox requirement implicates the First and Fourteenth Amendments to some degree, I would conclude that the requirement serves a reasonable, regulatory interest. It is well settled that "[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v Twin Cities Area New Party*, 520 US 351, 358; 117 S Ct 1364; 137 L Ed 2d 589 (1997). Additionally, States have "considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley*, 525 US at 191. In this case, the checkbox requirement is a neutral, nondiscriminatory measure because both paid and volunteer circulators are required to disclose their status. The checkbox requirement is designed to en-

sure transparency and to provide relevant, valuable information to the electors. See *Eu v San Francisco Co Democratic Central Comm*, 489 US 214, 228; 109 S Ct 1013; 103 L Ed 2d 271 (1989) (stating that "the State has a legitimate interest in fostering an informed electorate").

For these reasons, I agree that the Court of Claims erred when it concluded that the checkbox disclosure requirement is unconstitutional.[2] See *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 11; 743 NW2d 902 (2008) ("Statutes are presumed constitutional unless the unconstitutionality is clearly apparent.").

---

[2] Although the Court of Claims also concluded that the invalidation of voters' signatures on the basis of a circulator's failure to comply with the checkbox requirement was also unconstitutional, plaintiffs do not argue on appeal that this Court should affirm on this basis. Therefore, the issue is abandoned and need not be considered.

PEOPLE v ERICKSON

Docket No. 355943. Submitted November 3, 2021, at Grand Rapids. Decided November 18, 2021, at 9:00 a.m. Remanded in part and leave to appeal denied in part 509 Mich 960 (2022).

Defendant was charged in the 82d District Court with three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b), and one count each of distributing sexually explicit material to a minor, MCL 722.675, possession of sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, MCL 752.796. Defendant, then a middle school teacher, allegedly exchanged photographs and had sex with a male student while the student was in the eighth grade and during the summer before the student entered the ninth grade. On May 8, 2013, defendant pleaded guilty in the Ogemaw Circuit Court to one count of CSC-I in exchange for the prosecution dropping the remaining counts. The court, Michael J. Baumgartner, J., sentenced defendant to 15 to 30 years in prison. After various appellate proceedings not relevant to this appeal, in January 2019, defendant moved for relief from judgment, arguing, among other things, that he must be allowed to withdraw his guilty plea because the trial judge that took his plea had not informed defendant that defendant would be subject to lifetime electronic monitoring. The circuit court, Robert Bennett, J., agreed with defendant, granted the motion, and set the case for trial. By way of a motion in limine dated June 10, 2020, defendant argued that statements he made at sentencing and statements he made in connection with the presentence investigation report (PSIR) should be excluded from trial because of their link to the vacated guilty plea, which was itself inadmissible under MRE 410, as conceded by the prosecutor. Defendant also argued that pursuant to MCL 791.229, statements set forth in a PSIR are privileged. The prosecution argued that *People v Cowhy*, 330 Mich App 452 (2019), belied defendant's assertion that the evidence must be excluded from trial. Regarding the PSIR evidence, the prosecution also argued that the need for impeachment outweighed any confidentiality conferred by way of MCL 791.229. The court concluded that MRE 410 did not bar admission of the challenged statements, stating that *Cowhy* was on point. The

court also held that statements made in connection with the PSIR were confidential but ultimately admitted all the evidence in question for impeachment purposes only. Defendant sought leave to appeal, and in an unpublished order entered on May 3, 2021, the Court of Appeals, GADOLA and RICK, JJ. (RONAYNE KRAUSE, P.J., dissenting), denied the application. Defendant moved for reconsideration, and in an unpublished order entered on June 29, 2021, the Court of Appeals, RONAYNE KRAUSE, P.J., and RICK, J. (GADOLA, J., dissenting), granted the motion for reconsideration, granted leave to appeal, and vacated the May 3, 2021 order.

The Court of Appeals *held*:

1. MRE 410 provides, in relevant part, that evidence of a guilty plea that was later withdrawn, including any statement made in the course of the plea hearing in any civil or criminal proceeding, is not admissible against the defendant who made the plea or was a participant in the plea discussions. MRE 410 is limited to precluding admission of statements made to a prosecuting attorney in the course of plea proceedings. In this case, the trial court did not admit for impeachment purposes any such statements, given that the statements were all made after the plea agreement was finalized. Accordingly, defendant's argument was foreclosed by the plain language of MRE 410. Furthermore, *Cowhy* reinforced this conclusion. *Cowhy* addressed the issue of MRE 410 head-on and in detail. The analysis set forth in *Cowhy* accorded with the language of MRE 410. Defendant's statements in the PSIR were made in the context of an extended explanation regarding why defendant should be incarcerated for the least amount of time the circuit court was legally able to impose. Defendant's statements at sentencing were also made after entry of the plea and were similarly made in the context of an extended explanation regarding why the court should be as lenient as possible when imposing a sentence. The circuit court did not err by concluding that the inculpatory statements were not barred by MRE 410. There was nothing in the record to indicate that defendant believed that he was actively negotiating a plea agreement at the time the statements were made. And even if defendant did believe he was still negotiating the plea, that belief was not objectively reasonable given the totality of the circumstances. The terms of the plea agreement had been set forth at the plea hearing, and the court made very clear to defendant that the plea did not, in fact, encompass sentencing.

2. MCL 791.229 provides, in pertinent part, that except as otherwise provided by law, all records and reports of investigations made by a probation officer, and all case histories of

probationers, shall be privileged or confidential communications not open to public inspection. The prosecution contended that MCL 791.229 did not apply to defendant's statements in the PSIR and that the rest of the report could be redacted. But the letter containing defendant's statements was set forth in a section of the PSIR labeled, in bold typeface, "Defendant's Description of the Offense." Even though the statements were conveyed in the form of a letter to the court, they were an integral part of the report, and there was no rational basis for viewing the statements set forth in this section of the report differently from the information set forth in other sections of the report. In addition, *Cowhy* clarified that admissibility in connection with MRE 410 does not "trump" privileges.

Affirmed and remanded for further proceedings.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *LaDonna A. Schultz*, Prosecuting Attorney, and *Andrew J. Walker*, Assistant Prosecuting Attorney, for the people.

Friedman Legal Solutions, PLLC (by *Stuart G. Friedman* and *Suzanne C. Schuelke*) and *Satawa Law, PLLC* (by *Mark Satawa*) for defendant.

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J. In this interlocutory appeal, defendant, Neal Haviland Erickson, appeals by leave granted[1] an order granting in part and denying in part his motion to exclude certain evidence from trial. We affirm and remand for further proceedings.

I. FACTS

In 2013, the prosecutor charged defendant with three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b), and one count each of distributing sexually explicit material to a minor, MCL

[1] *People v Erickson*, unpublished order of the Court of Appeals, entered June 29, 2021 (Docket No. 355943).

722.675, possession of sexually abusive material, MCL 750.145c(4), and using a computer to commit a crime, MCL 752.796. Defendant, then a middle school teacher, allegedly exchanged photographs and had sex with a male student while the student was in the eighth grade and during the summer before the student entered the ninth grade. On May 8, 2013, defendant pleaded guilty to one count of CSC-I in exchange for the prosecution dropping the remaining counts. On July 10, 2013, the circuit court sentenced him to 15 to 30 years in prison.

After various appellate proceedings not relevant to this appeal, in January 2019, defendant filed a motion for relief from judgment, arguing, among other things, that he must be allowed to withdraw his guilty plea because the trial judge that took his plea had not informed defendant that he would be subject to lifetime electronic monitoring. The circuit court agreed with this argument, granted the motion, and set the case for trial.

By way of a motion in limine dated June 10, 2020, defendant argued that statements he made at sentencing and statements he made in connection with the presentence investigation report (PSIR) should be excluded from trial because of their link to the vacated guilty plea, which was itself inadmissible under MRE 410, as conceded by the prosecutor. Defense counsel argued at the motion hearing that sentencing "is part [and] parcel of the plea itself." Counsel argued that defendant's plea was withdrawn, meaning that he had not been convicted of anything, and contended that statements made in connection with sentencing should not be admitted because they would never have been

made without a conviction.[2] Defendant also argued that pursuant to MCL 791.229, statements set forth in a PSIR are privileged.

The prosecutor argued that *People v Cowhy*, 330 Mich App 452; 948 NW2d 632 (2019), belied defendant's assertion that the evidence must be excluded from trial. The prosecutor stated, "[I]f you look at the plain, unambiguous language of [MRE] 410, there is no language that extends [the prohibition of introducing plea evidence] beyond the plea itself, and that's what the [*Cowhy* Court] held here." The prosecutor also argued, with regard to the PSIR evidence, that the need for impeachment outweighed any confidentiality conferred by way of MCL 791.229.

The circuit court concluded that MRE 410 did not bar admission of the challenged statements, stating that *Cowhy* and a case cited in *Cowhy*—*People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994)—were on point. It also held that statements made in connection with the PSIR were confidential but ultimately admitted all the evidence in question—but only for impeachment purposes.

---

[2] At sentencing, defendant had stated, in part: "And more often than not, the dozens and dozens of times that [the student] was at my house, nothing inappropriate happened. But in the incident that I pled guilty to, I am guilty of mutual oral sex." Defendant added, "I'm guilty of this terrible, terrible decision." The PSIR includes a letter defendant wrote to the court. In this letter, defendant stated that he and the student had watched pornographic videos together, became aroused, and fondled each other's genitals. He added, "In these few inappropriate encounters we never ended up engaging in more than mutual oral sex." Defendant said that there had been four or five sexual encounters. He claimed that the student had sent him two photographs that the student had taken of the student's penis but that he immediately deleted them. Defendant stated that, eventually, the two stopped engaging in sexual activity and the relationship became one of a mentor and mentee.

We now turn to defendant's challenges to the trial court's decision.

II. STANDARDS OF REVIEW

We review for an abuse of discretion a trial court's ruling regarding a motion to exclude evidence. *Cowhy*, 330 Mich App at 461. "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014) (citations omitted). "Whether a confidential communication is privileged is reviewed de novo." *Cowhy*, 330 Mich App at 461.

III. MRE 410 AS INTERPRETED IN *COWHY*

MRE 410 states:

> 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[3] or comparable state or federal procedure regarding either of the foregoing pleas; or

[3] This rule is inapplicable because the parties are not arguing about any statements made during the plea hearing itself.

> (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.

Pursuant to the unambiguous language of MRE 410 as reinforced by *Cowhy*, the trial court's conclusions were correct. First, MRE 410 is limited to precluding admission of statements made to a prosecuting attorney in the course of plea proceedings. Here, the trial court did not admit for impeachment purposes any such statements, as the statements were all made after the plea agreement was finalized. Defendant's argument is foreclosed by the plain language of the rule of evidence.

Second, *Cowhy* reinforces this conclusion. The defendant in *Cowhy* pleaded guilty to multiple counts of second- and third-degree criminal sexual conduct and first-degree child abuse, as well as to one count of accosting a child for immoral purposes. *Cowhy*, 330 Mich App at 457. After his plea was entered, but before the sentence was imposed, the parties stipulated that the defendant "would submit to 'a risk assessment/evaluation . . . for the purposes of sentencing.' " *Id*. at 458 (ellipses in original). The defendant met with a social worker in accordance with this stipulation and admitted to abusing the children named in the information. *Id*. After sentencing, the defendant filed a motion to withdraw his guilty plea.

Id. The defendant attached to that motion an affidavit in which he stated, in part, that all the sexual incidents to which he pleaded guilty " 'occurred when he was between the ages of 13 and 15, or possibly right after he turned 16.' " *Id*. at 458-459. The trial court initially denied the motion to withdraw the plea, but the defendant was allowed to withdraw it after various appellate proceedings. *Id*. at 459-460.

Before trial, the prosecutor filed a motion to admit the statements the defendant made in the affidavit attached to the motion to withdraw the plea. *Id*. at 460. In addition, the defendant filed motions to exclude testimony by his initial attorney and by the social worker who performed his risk assessment/evaluation. *Id*. The trial court concluded that all this evidence was precluded by MRE 410. *Id*.

This Court held that none of the evidence was precluded by MRE 410(1), (2), or (3), because "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 [sic] federal procedure." *Id*. at 462-463. As for whether the challenged statements were "made in the course of plea discussions for purposes of MRE 410(4)," the *Cowhy* Court explained that courts should apply the "two-pronged test adopted in" *Dunn*, 446 Mich at 415. *Cowhy*, 330 Mich App at 463. "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).

Applying the test set forth by the *Dunn* Court, the *Cowhy* Court concluded that the circuit court erred by excluding statements made to the social worker under MRE 410. *Cowhy*, 330 Mich App at 465-466. The Court concluded that the defendant did not have an actual subjective expectation to negotiate a plea when he spoke to the social worker and that even if he did, "his expectation was not reasonable under the totality of the circumstances," *id*. at 465, as the plea had already been entered when the defendant spoke with the social worker, *id*. The Court mentioned the stipulation for the risk assessment/evaluation and stated:

> [The social worker'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, . . . 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 [the social worker] under MRE 410. [*Id*. at 466.]

With regard to the statements made in the affidavit, the Court stated that the defendant's "expectation when he made the inculpatory statements in the affidavit was to have his plea withdrawn." *Id*. The Court stated:

> 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, . . . 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")[.] [*Id*. (emphasis omitted).]

The Court concluded that "the trial court abused its discretion by excluding the statements in the affidavit under MRE 410." *Id*.

Concerning the statements made to defense counsel, the *Cowhy* Court stated:

> Finally, the trial court abused its discretion by excluding statements Cowhy made to [the lawyer] under MRE 410. Based on the information before this Court, it is apparent that the statements were made by Cowhy to [the lawyer] before Cowhy entered into a plea agreement with the prosecution because they were used to inform [the lawyer'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. And, although the information may have been used by [the lawyer] 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 [the lawyer] were not protected by MRE 410. [*Id*. at 466-467 (citation omitted).]

Here, at defendant's May 8, 2013 plea hearing, the court asked defendant if he understood that there was "no agreement as to the sentence," that the court had not yet scored the sentencing guidelines, and that the court had not "talked to probation/parole nor seen a report so [the court does not] know what the sentencing [will] be." Defendant remained steadfast in wanting the court to accept the plea, which the court did.

The statements in the PSIR are contained in a letter dated June 13, 2013. The inculpatory statements in the letter, including a description of the sexual activity at issue and an acknowledgment of defendant's responsibility, were made in the context of an extended explanation regarding why defendant should be incarcerated "for the least amount of time" the circuit court was "legally able" to impose. Defendant's statements at sentencing were also made after entry of the plea and were similarly made in the context of an extended explanation regarding why the court should be as lenient as possible when imposing a sentence. Defendant stated at the sentencing hearing, "I'm begging the [c]ourt to consider my reasoning for sentencing me below the guidelines or consider some sort of alternative to longer incarceration—county time or time served, sent home with a tether, super-restrictive and long probations or restrictions and conditions anybody can think of, anything that gets me home to my family as soon as possible."

Pursuant to *Dunn*, as discussed and applied in *Cowhy*, the circuit court did not err by concluding that the inculpatory statements are not barred by MRE 410. There is nothing in the record to indicate that defendant believed he was actively negotiating a plea agreement at the time the statements were made. The plea agreement had, in fact, already been consummated. At this later point, defendant was attempting to moderate whatever sentence was to be imposed, but the plea agreement did not include any deal concerning sentencing. And even if defendant did believe he was still negotiating the plea, that belief was not objectively reasonable given the totality of the circumstances. Indeed, the terms of the plea agreement were

set forth at the plea hearing, and the court made very clear to defendant that the plea did not, in fact, encompass sentencing.

Defendant's attempts to distinguish *Cowhy* are not convincing. With respect to his argument that the PSIR that was formulated and the sentencing that occurred were integral parts of the plea process, whereas the affidavit and the statements to the attorney in *Cowhy* were not related at all to the plea process, it is enough to simply reiterate that defendant's plea agreement did not, in fact, encompass sentencing. Also, and significantly, the *Cowhy* Court cited favorably to *United States v Marks*, 209 F3d 577, 582 (CA 6, 2000), where the court stated that "statements made after a plea agreement is finalized are not made in the course of plea discussions." (Quotation marks and citation omitted.) As we have repeatedly noted, the statements at issue occurred after finalization of the plea.

Defendant next attempts to distinguish the statements made to the social worker in *Cowhy* by arguing that they were contained in a "voluntary mitigation document" that a defendant can submit to try to lessen a sentence. But the letter in the PSIR and the statements made at sentencing were of the same nature—i.e., they were voluntary statements made in an attempt to lessen a sentence. And again, they were made after finalization of the plea. *Id*.[4]

[4] Defendant contends that the prosecutor's failure to seek admission of certain statements in *Cowhy* means that the *Cowhy* Court's holding must be viewed as not applying to statements made at sentencing. Defendant's argument is neither logical nor persuasive. The reasons for the prosecutor's alleged failure to seek admission of these statements are unknown and had no bearing on the issues brought before the *Cowhy* Court.

Cowhy addressed the issue of MRE 410 head-on and in detail, and we are bound by *Cowhy*. In addition, the analysis set forth in *Cowhy* accords with the language of MRE 410 itself and with *Dunn*.

IV. DISTINGUISHABLE CASELAW

Defendant cites *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428; 674 NW2d 709 (2003), for the proposition that when a guilty plea is vacated, everything that transpired pursuant to it is a nullity. *Carr* dealt with whether "a person who successfully completes probation under MCL 333.7411 and had the felony charge dismissed under that statutory provision is . . . deemed to have been convicted of a felony under the concealed pistol licensing act . . . by virtue of the charge dismissed under MCL 333.7411." *Id*. at 429-430. The *Carr* Court cited language from *People v George*, 69 Mich App 403, 407; 245 NW2d 65 (1976), where the Court stated that "when a guilty plea is vacated it is a nullity. That means that everything that transpired pursuant to the guilty plea is a nullity." *Carr*, 259 Mich App at 436 (quotation marks and citation omitted). Crucially, however, *George* dealt with the prosecutor's attempt to introduce statements made *at the plea hearing itself*. *George*, 69 Mich App at 404-405. The Court concluded that facts elicited during a subsequently vacated "plea taking" were inadmissible at a subsequent trial because the "plea taking [was] . . . a nullity." *Id*. at 404-408. The Court, citing "Uniform Rules of Evidence, rule 410," stated that its holding was "consistent with modern thought on the topic." *Id*. at 408. Although *George* foreshadowed the adoption of MRE 410, here, the prosecutor is not seeking to introduce any statements from the plea hearing, and the plain language of MRE 410 controls.

The nonbinding decisions cited by defendant are not persuasive, or point to our conclusion. For example, in *State v Jackson*, 325 NW2d 819, 820 (Minn, 1982), the trial court "accepted the plea *subject to a presentence investigation*." (Emphasis added.) The court stated:

> Both the in-court and the out-of-court statements are integral parts of the plea proceedings and cannot realistically be separated. Here the out-of-court statements were made pursuant to a presentence investigation ordered by the trial court, in which the defendant was expected to cooperate, and which statements were to be used in determining whether or not the court would accept the plea and plea agreement. [*Id*. at 822.]

Also distinguishable is *State v Amidon*, 185 Vt 1, 2; 2008 VT 122; 967 A2d 1126 (2008), because in that case the plea agreement encompassed sentencing. The court noted that the presentence investigation was a part of the plea procedure. *Id*. at 11. Likewise, in *Gillum v State*, 681 P2d 87, 88-89 (Okla Crim App, 1984), the statements given to investigators were, once again, a part of the actual plea procedure and were given "in the reasonable subjective belief that they were part of the plea bargain." None of the foreign decisions cited by defendant provides an analysis of facts similar to those present here.

V. MCL 791.229

With regard to the statements in the PSIR, defendant argues that MCL 791.229 bars their admission. MCL 791.229 states:

> Except as otherwise provided by law, all records and reports of investigations made by a probation officer, and all case histories of probationers shall be privileged or confidential communications not open to public inspection. Judges and probation officers shall have access to the

> records, reports, and case histories. The probation officer, the assistant director of probation, or the assistant director's representative shall permit the attorney general, the auditor general, and law enforcement agencies to have access to the records, reports, and case histories and shall permit designated representatives of a private contractor that operates a facility or institution that houses prisoners under the jurisdiction of the department to have access to the records, reports, and case histories pertaining to prisoners assigned to that facility. The relation of confidence between the probation officer and probationer or defendant under investigation shall remain inviolate.

The prosecutor contends that this statute does not apply to defendant's statements in the PSIR and that the rest of the report could be redacted. But the letter containing defendant's statements is set forth in a section of the PSIR labeled, in bold typeface, "Defendant's Description of the Offense."[5] Clearly, even though the statements are conveyed in the form of a letter to the court by defendant, they are an integral part of the report. There is no rational basis for viewing the statements set forth in this section of the report differently from the information set forth in other sections of the report. In addition, *Cowhy* clarifies that admissibility in connection with MRE 410 does not "trump" privileges. The *Cowhy* Court concluded that the statements to the social worker were inadmissible because of the psychologist-patient privilege and that the statements to the attorney were inadmissible because of the attorney-client privilege. *Cowhy*, 330 Mich App at 472, 474.

Citing *People v Hooper*, 157 Mich App 669; 403 NW2d 605 (1987), the prosecutor contends that the PSIR evidence was available not just for impeachment

---

[5] Other sections include "Agent's Description of the Offense" and "Victim's Impact Statement."

but also for the prosecutor's case-in-chief. However, regarding the PSIR information *and* the statements made at the sentencing hearing,[6] the prosecutor has not filed a cross-appeal. As stated in *Bank of America, NA v Fidelity Nat'l Title Ins Co*, 316 Mich App 480, 518; 892 NW2d 467 (2016), "[a]lthough an appellee need not file a cross-appeal in order to assert an alternative ground for affirmance, an appellee that has not sought to cross appeal cannot obtain a decision more favorable than was rendered by the lower tribunal." (Quotation marks and citation omitted.) Hence, the arguments that the contested evidence be admitted as part of the prosecutor's case-in-chief are not properly before us.

VI. CONCLUSION

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

MARKEY and RIORDAN, JJ., concurred with MURRAY, C.J.

---

[6] The prosecutor argues that these statements, too, should be admissible in the prosecutor's case-in-chief.

GRADY v WAMBACH

Docket No. 354091. Submitted July 8, 2021, at Detroit. Decided November 18, 2021, at 9:05 a.m. Leave to appeal denied 511 Mich 887 (2023).

Davina Grady filed an action in the Wayne Circuit Court under the no-fault act, MCL 500.3101 *et seq*., against her insurer, Meemic Insurance Company, and others. Grady was injured in a motor vehicle accident and was treated for her injuries by Mercyland Health Services PLLC. Mercyland sought reimbursement from Meemic, but Meemic refused to pay personal protection insurance (PIP) benefits on behalf of Grady on the ground that Mercyland was owned by Dr. Mohammed Abraham, who was not licensed to practice medicine in Michigan when Grady was treated. Grady filed suit, and Mercyland obtained an assignment of rights from Grady. Meemic later moved for summary disposition on the basis that Mercyland had not "lawfully rendered" treatment to Grady as required under MCL 500.3157. Meemic further argued that Mercyland had violated MCL 450.4904(2) of the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et seq*. The trial court, Leslie Kim Smith, J., granted summary disposition in favor of Meemic, concluding that MCL 450.4904 required Abraham to be authorized to practice medicine in Michigan in order for Mercyland's treatment of Grady to be lawfully rendered. Mercyland appealed.

The Court of Appeals *held*:

A statutory-standing inquiry asks whether the Legislature has given an injured plaintiff the right to sue the defendant to redress the injury. If a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits. In *Miller v Allstate Ins Co*, 481 Mich 601 (2008), the insurance company moved for summary disposition against the medical provider who had treated its insured, arguing that it did not have to pay PIP benefits because the medical provider was improperly incorporated under the Business Corporation Act (BCA), MCL 450.1101 *et seq*. The Court held that the insurance company lacked standing to sue a medical provider who had treated the insured because only the Attorney General has

authority to challenge corporate status under the BCA. Similarly, in this case, Meemic did not have standing to assert an affirmative defense that challenged Mercyland's formation under the MLLCA because such challenges may only be raised by the state. Meemic tried to reframe the issue on appeal by arguing that Mercyland's medical services to Grady were not lawfully rendered because of Mercyland's improper corporate formation. However, this argument reached the merits of Meemic's affirmative defense without first answering the threshold question of whether Meemic had standing to assert it. Therefore, the trial court erred by considering the merits of Meemic's affirmative defense and by granting summary disposition for Meemic.

Decision reversed and case remanded.

SAWYER, P.J., dissenting, asserted that the majority had erroneously viewed the case as presenting a question of whether Meemic had standing to challenge Mercyland's corporate status when, in fact, the essential question was whether the fact that Mercyland's sole member and manager was not licensed to practice medicine in Michigan precluded Mercyland from lawfully rendering medical services. Judge SAWYER was not persuaded that *Miller* was controlling, noting that there was an additional factor in the present case that was not at issue in *Miller*: the requirement in MCL 450.4904(2) that all members and managers of the PLLC must be licensed in Michigan. Therefore, the resolution of this case depended on the interaction between MCL 450.4904(2) and MCL 450.4904(5), which allows a person who is licensed in another jurisdiction to become a member of a PLLC so long as they do not personally provide any services in Michigan until they are licensed in Michigan. According to Judge SAWYER, the specific provision of MCL 450.4904(2) controlled over the more general provision of MCL 450.4904(5). Further, when read in conjunction with MCL 450.4904(3) and (4), which include requirements regarding which health professionals may jointly form a PLLC, it was clear that if the Legislature had wanted to allow health professionals from foreign jurisdictions to become members and managers of a Michigan PLLC, it would have specifically provided for that. Therefore, because the failure to be properly licensed in Michigan results in the services provided by a PLLC not being lawfully rendered, services provided by such PLLCs are not subject to reimbursement under the no-fault act pursuant to MCL 500.3157.

MICHIGAN LIMITED LIABILITY COMPANY ACT — INCORPORATION — CHALLENGES TO CORPORATE STATUS — STANDING.

The state possesses sole authority to question whether a corporation has been properly incorporated under the Michigan Limited Liability Company Act, MCL 450.4101 *et seq*.; therefore, only the Attorney General has standing to challenge a business entity's corporate status.

Paul G. Valentino, JD, PC (by *Paul G. Valentino*) for Mercyland Health Services PLLC.

Secrest Wardle (by *Sidney A. Klinger* and *Daniel T. Rizzo*) for Meemic Insurance Company.

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

CAMERON, J. In this first-party claim under the no-fault act, MCL 500.3101 *et seq*., a medical provider treated an insured for her injuries and later sought reimbursement from defendant insurance company. Defendant insurer refused to pay personal protection insurance (PIP) benefits, and the provider sued. In the trial court, the insurer justified its refusal to pay PIP benefits because the medical provider was improperly owned by a person who does not hold a license to practice medicine in Michigan as required by MCL 450.4904(2); thus, the medical services were not "lawfully rendered" under the no-fault act. Ultimately, the trial court granted summary disposition in favor of insurer on this ground. Consistently with *Miller v Allstate Ins Co*, 481 Mich 601; 751 NW2d 463 (2008), and *Sterling Hts Pain Mgt, PLC v Farm Bureau Gen Ins Co of Mich*, 335 Mich App 245; 966 NW2d 456 (2020), we hold that defendant insurer lacks statutory standing to challenge the alleged improper formation of a Michigan professional limited liability company (PLLC). We therefore reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Mercyland Health Services PLLC provided medical treatment to Davina Grady after she was injured in a motor vehicle accident. Mercyland's sole member and manager, Dr. Mohammed Abraham, was not licensed to practice medicine in Michigan when Mercyland provided treatment to Grady. Grady's insurer, Meemic Insurance Company, refused to pay PIP benefits related to Mercyland's services, and Grady filed suit. Mercyland obtained an assignment of rights from Grady, and Meemic filed an answer to the intervening complaint and generally denied liability.

Meemic later moved for summary disposition, arguing that Mercyland had not lawfully rendered treatment to Grady as required under MCL 500.3157. Specifically, Meemic argued that Mercyland had violated the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et seq*., which requires that all members and managers of a PLLC be licensed to render the same professional service as the corporate entity, MCL 450.4904(2). Mercyland responded that Meemic did not have standing to challenge whether Mercyland was properly incorporated or organized and that all of the treatment rendered to Grady was provided by licensed physicians. Mercyland also argued that Meemic had waived any argument concerning Mercyland's corporate status by failing to raise it as an affirmative defense. The trial court granted summary disposition in favor of Meemic, concluding that MCL 450.4904 required Dr. Abraham to be licensed or otherwise legally authorized to practice medicine in Michigan in order for Mercyland's treatment of Grady to be "lawfully rendered."

II. ANALYSIS

Mercyland argues that the trial court erred by granting summary disposition in favor of Meemic because, under *Miller*, Meemic lacks standing to challenge whether it is properly incorporated. We agree.

We review de novo a trial court's decision regarding a motion for summary disposition. *Buhl v Oak Park*, 507 Mich 236, 242; 968 NW2d 348 (2021).

> When reviewing a motion brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition is appropriate when no genuine issues of material fact exist. A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. [*Id*. (quotation marks and citations omitted).]

"Whether a party has standing is reviewed de novo as a question of law." *Wilmington Savings Fund Society, FSB v Clare*, 323 Mich App 678, 684; 919 NW2d 420 (2018). Questions of statutory standing require analyzing the statutory language to determine legislative intent, and "[q]uestions of statutory interpretation are reviewed de novo." *Miller*, 481 Mich at 606-607. "The primary rule of statutory construction is to effectuate the intent of the Legislature, and where the statutory language is clear and unambiguous, it is generally applied as written." *Slocum v Farm Bureau Gen Ins Co of Mich*, 328 Mich App 626, 638; 939 NW2d 717 (2019) (quotation marks and citation omitted).

In *Miller*, our Supreme Court recited the following relevant principles regarding standing:

> Our constitution requires that a plaintiff possess standing before a court can exercise jurisdiction over that plaintiff's claim. This constitutional standing doctrine is longstanding and stems from the separation of powers in our constitution. Because the constitution limits the judiciary to the exercise of judicial power, the Legislature encroaches on the separation of powers when it attempts to grant standing to litigants who do not meet constitutional standing requirements.
>
> Although the Legislature cannot *expand* beyond constitutional limits the class of persons who possess standing, the Legislature may permissibly *limit* the class of persons who may challenge a statutory violation. That is, a party that has constitutional standing may be precluded from enforcing a statutory provision, if the Legislature so provides. This doctrine has been referred to as a requirement that a party possess statutory standing. Statutory standing simply entails statutory interpretation: the question it asks is whether the Legislature has accorded *this* injured plaintiff the right to sue the defendant to redress his injury. [*Miller*, 481 Mich at 606-607 (quotation marks, citations, and brackets omitted).]

"The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits." *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013).

Mercyland relies on *Miller* to argue that summary disposition in favor of Meemic was improper. In *Miller*, the insured underwent physical therapy at PT Works, Inc., after he was injured in two different motor vehicle accidents. *Miller*, 481 Mich at 604. PT Works billed the insurance company, but the insurance company refused to pay. *Id*. at 605. After PT Works filed suit, the insurance company moved for summary disposition,

alleging that it did not have to pay PIP benefits because PT Works was improperly incorporated under the Business Corporation Act (BCA), MCL 450.1101 *et seq*. *Miller*, 481 Mich at 605. According to the insurance company, PT Works was required to incorporate under the Professional Services Corporations Act, MCL 450.221 *et seq*., replaced by 2012 PA 569. *Miller*, 481 Mich at 605. The trial court denied the insurance company's motion for summary disposition on the basis of its determination that PT Works was not a professional services corporation and therefore could incorporate under the BCA. *Id*.

Ultimately, the matter reached our Supreme Court, which concluded that the relevant question was whether the BCA granted the insurance company statutory standing to challenge PT Works's corporate status. *Id*. at 610. The *Miller* Court noted that MCL 450.1221 of the BCA provides the following: "The corporate existence shall begin on the effective date of the articles of incorporation . . . . Filing is conclusive evidence that . . . the corporation has been formed under [the BCA], except in an action or special proceeding by the attorney general." MCL 450.1221; *Miller*, 481 Mich at 610. The Court held that, "[b]y naming only the Attorney General . . . , the Legislature has indicated that the Attorney General alone has the authority to challenge corporate status[.]" *Id*. at 611. "In essence, MCL 450.1221 prevents any person—other than the Attorney General—from bringing any challenge to corporate status under the BCA: every such challenge would be doomed to failure, because the mere filing of articles of incorporation constitutes '*conclusive* evidence' of the corporation's legality." *Id*. at 611-612. Thus, the *Miller* Court held that the insurance company lacked the requisite "statutory standing to assert that PT Works was improperly incorpo-

rated[.]" *Id*. at 616. The *Miller* Court further held that because the insurance company was barred from bringing an original suit against PT Works, "it would be illogical" to permit the insurance company to challenge PT Works's incorporation as an affirmative defense. *Id*. at 610 n 5.

Mercyland argues that under *Miller*'s holding, Meemic lacks standing to challenge whether Mercyland is in compliance with the MLLCA. Meemic counters that *Miller* is inapplicable because it is not challenging Mercyland's corporate status. Instead, Meemic argues that the MLLCA requires that all members and managers of a PLLC must be licensed and, because Mercyland's sole member is not licensed to practice medicine in Michigan, any treatment rendered by Mercyland was not lawfully rendered under the no-fault act. This identical argument was recently addressed and rejected by this Court in *Sterling Heights Pain Mgt*, 335 Mich App at 247-253.

In *Sterling Heights Pain Mgt*, the insured was injured in a motor vehicle accident and received services from the provider. *Id*. at 248. The provider filed suit after the insurer refused to pay PIP benefits. *Id*. The insurer moved for summary disposition, arguing that the provider had "violated the MLLCA's requirement that all members and managers of a [PLLC] be licensed to render the same professional service as the corporate entity." *Id*., citing MCL 450.4904(2). In response, the provider "argued that [the insurer] did not have standing to challenge whether [the provider] was properly incorporated or organized and that all treatment rendered to [the insured] was performed by licensed physicians." *Id*. After the trial court granted summary disposition in favor of the insurer, the provider appealed and argued that, under *Miller*, the

insurance company lacked statutory standing to challenge its formation. *Id*. at 250. This Court agreed because

> [t]he MLLCA contains a provision that is identical to the one relied on in *Miller*. MCL 450.4202(2) provides in part:
>
> > Filing is conclusive evidence that all conditions precedent required to be performed under this act are fulfilled and that the company is formed under this act, except in an action or special proceeding by the attorney general.
>
> The filing of the required documents of incorporation was conclusive evidence that plaintiff met the conditions precedent for formation of a [PLLC], including the requirement that all members and managers be licensed persons. Only the Attorney General has standing to contest that presumption. Therefore, although the alleged incorporation defect is different than the one alleged in *Miller*, [the] defendant lacks statutory standing for the reasons stated in that opinion. [*Id*. at 251-252.]

We conclude that, like the insurer in *Sterling Heights Pain Mgt*, Meemic does not have standing to assert an affirmative defense that challenges Mercyland's formation under the MLLCA. As noted by our Supreme Court in *Miller*,

> Michigan courts have long held that the state possesses the sole authority to question whether a corporation has been properly incorporated under the relevant law.
>
> * * *
>
> Indeed, if the legality of every Michigan corporation were subject to continual assault by any person, it would be difficult to see how a stable economic climate could ever exist. Relevant to this case, no insured person could obtain medical treatment without undertaking a laborious inquiry into whether the entity providing treatment has complied with every applicable corporate statute and

> regulation. Whether an insured person could obtain benefits would largely depend on the ingenuity of lawyers in ferreting out aspects of corporate non-compliance with applicable statutes. However, the Legislature has deemed it fit that residents of Michigan may depend on the corporate status of any corporation formed under the BCA and approved by the state, and we do nothing more here than enforce that policy decision—a decision rooted in relevant statutes and in longstanding judicial practice. [*Miller*, 481 Mich at 615-616.]

Meemic and the dissent assert that the issue is not whether Meemic has standing to assert its affirmative defense. Instead, they assert Mercyland's medical services to Grady were not "lawfully rendered" because of Mercyland's improper corporate formation. By reframing the issue on appeal, Meemic and the dissent would extend this Court's holding in *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51; 744 NW2d 174 (2007), to affirm summary disposition. But in *Healing Place*, the insurer unquestionably had standing to defend its refusal to pay PIP benefits when neither the provider nor the medical institution were properly licensed to perform the services rendered. *Id*. at 57-59. But this is not the case here where the individuals who provided treatment to Grady were properly licensed. Nor is the issue, as the dissent argues, whether Mercyland itself was properly licensed. Indeed, Meemic did not even argue that Mercyland was required to be licensed to provide certain services[1] or that the individuals who provided Grady with medical care were not licensed to render the

[1] Although Meemic argues that "as the sole member and manager of Mercyland, [Dr. Abraham] is in a real sense the institution," Meemic stops short of arguing that Mercyland is required to be licensed. Moreover, Meemic's attempt to blend the identities of Mercyland and Dr. Abraham is unpersuasive.

services provided. Simply put, the dissent puts the cart before the horse when it reaches the merits of Meemic's affirmative defense, which depends on a successful attack on the corporate formation of Mercyland, without first answering the threshold question of whether Meemic has standing to assert it. We therefore conclude that Meemic's arguments must fail under *Miller* and *Sterling Heights Pain Mgt*, which hold that the Attorney General alone has standing to challenge incorporation defects.

In sum, we conclude that the trial court erred by considering the merits of Meemic's affirmative defense and by granting summary disposition in favor of Meemic. See *Miller*, 481 Mich at 608; *Sterling Heights Pain Mgt*, 335 Mich App at 252. Because Meemic lacks standing to challenge Mercyland's alleged improper formation, it would be improper for us to consider whether the alleged violation of the MLLCA rendered Mercyland's treatment to Grady unlawful. See *Jawad A Shaw, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 201; 920 NW2d 148 (2018) (noting that this Court generally does not decide moot issues). We also need not consider whether Meemic waived an affirmative defense as to whether the services provided by Mercyland were unlawful[2] and whether the trial court erred by declining to grant summary disposition in favor of Mercyland under MCR 2.116(I)(2).

---

[2] Before oral argument on the motion for summary disposition, Meemic filed amended affirmative defenses, including a new defense that the services provided by Mercyland were unlawful. Meemic did so without leave of the trial court. At oral argument, the trial court concluded that, if Meemic had filed a motion for leave to amend the affirmative defenses, the motion would have been granted.

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

LETICA, J., concurred with CAMERON, J.

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

The majority erroneously views this case as simply presenting a question of standing. Rather, the essential question presented is whether the fact that Mercyland Health Services PLLC's sole member and manager, Mohammed Abraham, is not licensed to practice medicine in Michigan precludes Mercyland from lawfully rendering medical services, a requirement under the no-fault act.[1]

I find that the case relied upon by the majority and Mercyland, *Miller v Allstate Ins Co*,[2] is not controlling.[3] In *Miller*, the insurer, Allstate, argued that it was not obligated to pay no-fault benefits to the medical provider, PT Works, because the treatment provided by PT Works to the insured had not been lawfully rendered under the no-fault act.[4] Allstate asserted that PT Works had incorrectly incorporated under the

---

[1] MCL 500.3101 *et seq*.

[2] 481 Mich 601; 751 NW2d 463 (2008).

[3] Mercyland also relies on a number of unpublished decisions of this Court. Not only do those decisions lack precedential value, MCR 7.215(C)(1), but they also rely on this Court's decision in *Miller*, which the Supreme Court's decision vacated. Moreover, I find those cases distinguishable from the case before us for the same reason that I find the decision in *Miller* itself distinguishable.

[4] 481 Mich at 605.

Business Corporation Act (BCA)[5] rather than under the Professional Services Corporations Act.[6]

The Supreme Court in *Miller*[7] determined that Allstate lacked standing to challenge the corporate status of PT Works:

> Here, the initial question is whether defendant Allstate may challenge the incorporation of PT Works under the BCA. Because the relevant question is whether the BCA authorizes defendant to make such a challenge, the issue presented is properly characterized as one of statutory standing.
>
> MCL 450.1221 of the BCA states:
>
> > The corporate existence shall begin on the effective date of the articles of incorporation as provided in [MCL 450.1131]. Filing is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general.
>
> This statute indicates that once articles of incorporation under the BCA have been filed, such filing constitutes "conclusive evidence" that (1) all the requirements for complying with the BCA have been fulfilled and (2) the corporation has actually been formed in compliance with the BCA. Thus, the statute generally creates an irrebuttable presumption of proper incorporation once the articles of incorporation have been filed. The statute then creates a single exception to this general rule by granting the Attorney General the sole authority to challenge whether a corporation has been properly incorporated under the BCA. That is, only the Attorney General is not affected by the irrebuttable presumption in favor of legal-

[5] MCL 450.1101 *et seq*.

[6] Former MCL 450.221 *et seq*., repealed by 2012 PA 569; *Miller*, 481 Mich at 605.

[7] *Id*. at 610-611.

> ity. By naming only the Attorney General in this respect, the Legislature has indicated that the Attorney General alone has the authority to challenge corporate status, under the principle *expressio unius est exclusio alterius*, that is, "the expression of one thing is the exclusion of another." *Miller v Chapman Contracting*, 477 Mich 102, 108 n 1; 730 NW2d 462 (2007). Thus, the filing of the articles of incorporation serves as "conclusive evidence" that PT Works has been properly formed, and this Court cannot, under the terms of MCL 450.1221, conclude otherwise, except as a consequence of a suit brought by the Attorney General.

Mercyland points to MCL 450.4202(2) of the Michigan Limited Liability Company Act (MLLCA)[8] that similarly vests in the Attorney General the authority to challenge whether an LLC has been properly formed. This Court extended the *Miller* analysis to professional limited liability companies (PLLCs) in *Sterling Hts Pain Mgt, PLC v Farm Bureau Gen Ins Co of Mich*.[9]

Nonetheless, there is an important additional factor present in the case before us, namely, the requirement of MCL 450.4904(2) that all members and managers of the PLLC be licensed in the state of Michigan. This creates an additional licensing requirement that was not at issue in *Miller* nor addressed in *Sterling Hts*. That is, ultimately, Meemic Insurance Company's argument does not attack Mercyland's status as a PLLC in the same way that the insurer in *Miller* attacked the corporate status of the provider. Rather, Meemic's argument more directly focuses on a requirement that

---

[8] MCL 450.4101 *et seq*.

[9] 335 Mich App 245; 966 NW2d 456 (2020). That opinion, however, also erroneously focused on the standing question rather than the true issue raised, i.e., whether failure to comply with the licensing requirement of the MLLCA by members of a PLLC prevented the PLLC's services from being lawfully rendered.

members and managers of PLLCs that provide services under the Public Health Code[10] must themselves be individually licensed to provide those services.

Two statutes are relevant to the resolution of this case. The first is a provision of the no-fault act. MCL 500.3157(1), at the time relevant to this case,[11] provided, in pertinent part, as follows:

> A physician, hospital, clinic or other person or *institution lawfully rendering* treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered. [Emphasis added.]

The second statute is MCL 450.4904 of the MLLCA:

> (1) Except as provided in this section or otherwise prohibited, a professional limited liability company may render 1 or more professional services, and each member and manager must be a licensed person in 1 or more of the professional services rendered by the company.
>
> (2) Except as provided in subsection (3) or (4), if a professional limited liability company renders a professional service that is included within the public health code, 1978 PA 368, MCL 333.1101 to 333.25211, then all members and managers of the company must be licensed or legally authorized in this state to render the same professional service.
>
> (3) One or more individuals licensed to engage in the practice of medicine under part 170, the practice of osteopathic medicine and surgery under part 175, or the practice of podiatric medicine and surgery under part 180 of article 15 of the public health code, 1978 PA 368, MCL

---

[10] MCL 333.1101 *et seq*.

[11] MCL 500.3157, as enacted by 1972 PA 294. This provision was amended by 2019 PA 21, effective June 11, 2019, but still includes the requirement of "lawfully rendering treatment."

333.16101 to 333.18838, may organize a professional liability company under this article with 1 or more other individuals licensed to engage in the practice of medicine under part 170, the practice of osteopathic medicine and surgery under part 175, or the practice of podiatric medicine and surgery under part 180 of article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838.

(4) Subject to section 17048 of the public health code, 1978 PA 368, MCL 333.17048, 1 or more individuals licensed to engage in the practice of medicine under part 170, the practice of osteopathic medicine and surgery under part 175, or the practice of podiatric medicine and surgery under part 180 of article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838, may organize a professional limited liability company under this article with 1 or more physician's assistants licensed under article 15 of the public health code, 1978 PA 368, MCL 333.16101 to 333.18838. Beginning on July 19, 2010, 1 or more physician's assistants may not organize a professional limited liability company under this act that will have only physician's assistants as members.

(5) A licensed person of another jurisdiction may become a member, manager, employee, or agent of a professional limited liability company, but shall not render any professional services in this state until the person is licensed or otherwise legally authorized to render the professional service in this state.

(6) A limited liability company may engage in the practice of architecture, professional engineering, or professional surveying in this state if not less than $^2/_3$ of the members or managers of the limited liability company are licensed in this state to render 1 or more of the professional services offered. A professional limited liability company organized under this article may engage in the practice of architecture, professional engineering, or professional surveying in this state if all of the members and managers of the professional limited liability company organized under this article are licensed in this state to render 1 or more of the professional services offered.

> (7) A professional limited liability company organized under this article may engage in the practice of public accounting, as defined in section 720 of the occupational code, 1980 PA 299, MCL 339.720, in this state if more than 50% of the equity and voting rights of the professional limited liability company are held directly or beneficially by individuals who are licensed or otherwise authorized to engage in the practice of public accounting under article 7 of the occupational code, 1980 PA 299, MCL 339.720 to 339.736.

Resolution of this case depends on how Subsections (2) and (5) interact with each other. Subsection (2) clearly provides that, for a PLLC that renders services under the Public Health Code, such as Mercyland, "all members and managers of the company must be licensed or legally authorized in this state to render the same professional service." This provision creates two requirements: (1) that all members must be licensed to render the same professional service[12] and (2) that all members are licensed in this state. Because Abraham is not licensed in this state, Mercyland does not fulfill this requirement.[13]

Our decision in *Healing Place at North Oakland Med Ctr v Allstate Ins Co*[14] supports Meemic's position that services are not compensable if they were not

---

[12] Subsections (3) and (4) do allow certain health professions in different disciplines to join together.

[13] Mercyland maintains that, because Abraham is licensed in another jurisdiction and does not provide services to patients in Michigan, Subsection (5) allows him to be a member and manager of Mercyland. Subsection (5) does allow a "licensed person of another jurisdiction" to become a member or manager of a PLLC provided that they do not render professional services in Michigan until they become licensed in Michigan. But, as explained below, I do not find Mercyland's argument compelling.

[14] 277 Mich App 51; 744 NW2d 174 (2007).

legally rendered.[15] In that case, the services were not legally rendered because the providers were required to be licensed but were not.[16] In this case, it is not a question of Mercyland's licensure, but the licensure status of its sole member and manager.

While the issue in *Healing Place* was that the providers, rather than the members, were not licensed, this Court noted that if both the individual rendering the service and the institution of which the individual was an agent were required to be licensed and either one was not licensed, then the service has not been lawfully rendered.[17] And, as noted above, the MLLCA requires that the members and managers of a PLLC that renders services under the Public Health Code be licensed. Moreover, MCL 450.4201 requires compliance with MCL 450.4904: "A limited liability company formed to provide services in a learned profession, or more than 1 learned profession, shall comply with article 9."[18]

The same principle that this Court applied in *Healing Place* also applies here, albeit in a slightly different context: when licensure is required, a lack of such licensure means that the service was not legally rendered. In *Healing Place*, the providers were not licensed as required by law. Here, the member and manager of the PLLC lacks a Michigan license. Moreover, in *Healing Place*, this Court specifically considered and rejected the applicability of *Miller*, concluding that the question at issue was different than merely considering whether there were defects in the forma-

[15] *Id.* at 58.

[16] *Id.*

[17] *Id.* at 60.

[18] Article 9 runs from MCL 450.4901 to MCL 450.4910.

tion of the corporation.[19] The same is true here; we are not merely dealing with a potential defect in the formation of the PLLC. Simply put, this case does not present an issue of standing to challenge the formation of the PLLC because that is not the issue presented. The issue that must be addressed concerns the licensing requirement of a member and manager of a PLLC.

So, it must be determined whether it is required that Abraham, the sole member and manager, be licensed in Michigan or whether being licensed in a foreign jurisdiction is sufficient. I conclude that MCL 450.4904 requires that all members and managers of a PLLC that renders services under the Public Health Code be licensed in the state of Michigan. Moreover, any such PLLC that includes a member or manager not licensed in Michigan is not lawfully rendering services.

This issue involves how Subsection (2) and Subsection (5) of MCL 450.4904 interact. I begin by looking to the relevant principles of statutory construction. First, when a specific provision in a statute is inconsistent with a more general provision, the specific provision controls.[20] Second, we do not give an interpretation that would render any language in the statute to be mere surplusage.[21]

With respect to the first rule, if the PLLC renders services under the Public Health Code, MCL 450.4904(2) specifically requires that "all members and managers of the company must be licensed or legally authorized in this state to render the same professional service." This is a very specific provision. On the other hand, MCL 450.4904(5) generally provides that a

---

[19] 277 Mich App at 61.

[20] *Miller*, 481 Mich at 613.

[21] *Healing Place*, 277 Mich App at 59.

professional licensed in another jurisdiction may become a member or manager of a PLLC. Because the specific provision of Subsection (2) is in conflict with the general provision of Subsection (5), the requirement of Subsection (2) must control.

The second rule of statutory construction further supports this interpretation. If we were to interpret Subsection (5) as holding that all professionals licensed in another jurisdiction may become a member or manager of a Michigan PLLC without also being licensed in Michigan, it would render the requirement of Subsection (2) meaningless. That is, if Subsection (5) grants the right of all foreign-licensed professionals to be members and managers of any Michigan PLLC, then the requirement of Subsection (2) that "all members and managers of the company must be licensed or legally authorized in this state to render the same professional service" would have no meaning.

The only logical construction of the statute that is consistent with these principles of statutory interpretation is that the Legislature, while generally intending to allow professionals licensed in other jurisdictions to become members and managers of a Michigan PLLC, specifically decided that it did not want this to be the case when the profession involved fell under the Public Health Code. Indeed, this conclusion is further supported by a third principle of statutory construction, *expressio unius est exclusio alterius*, i.e., the express mention of one thing excludes another thing.[22] MCL 450.4904(3) and (4) expressly set forth which health professionals from different healthcare disci-

[22] *Miller*, 481 Mich at 611.

plines may jointly form a PLLC,[23] with specific references to the provisions of Michigan law under which they must be licensed. The Legislature clearly focused on which health professionals, and in what combinations, could form PLLCs and further emphasized the need for Michigan licensure. It is clear to me that if the Legislature wanted to allow health professionals from foreign jurisdictions to become members and managers of a Michigan PLLC, it would have specifically included that. I can only conclude that the Legislature intentionally decided to exclude such foreign-licensed health professionals.

In conclusion, this case does not present a question of standing to challenge the formation of the PLLC. Rather, it presents an issue of the licensing requirements imposed upon members and managers of healthcare PLLCs in order for the PLLC to lawfully render services. I interpret MCL 450.4904 as requiring the members and managers of PLLCs that provide services under the Public Health Code to be licensed in the state of Michigan. The failure to have such licensure results in the services provided by the PLLC not being lawfully rendered. And that means that services provided by such PLLCs are not subject to reimbursement under the no-fault act because of the limitation contained in MCL 500.3157. Accordingly, the trial court properly granted summary disposition in favor of Meemic.

I would affirm.

---

[23] Specifically, doctors of medicine, osteopathy, and podiatry, along with physician's assistants.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR A FINANCING ORDER APPROVING THE SECURITIZATION OF QUALIFIED COSTS

Docket No. 356058. Submitted November 3, 2021, at Lansing. Decided November 18, 2021, at 9:10 a.m.

Consumers Energy Company filed in the Public Service Commission (the PSC) an application for a financing order approving the securitization of qualified costs related to the retirement of two coal-fired plants. Hemlock Semiconductor Operations, LLC (HSC) intervened in the action. HSC challenged the imposition of the securitization charge on it and argued that it should not be required to pay a charge related to the retirement of the two coal-fired power plants because HSC had a long-term industrial load retention rate (LTILRR) contract with Consumers Energy that was not associated with the retired facilities. After an evidentiary hearing and briefing, the PSC entered an order approving Consumers Energy's request for the securitization of qualified costs. HSC appealed.

The Court of Appeals *held*:

1. In accordance with MCL 460.10i(1), 460.10k(2), and 460.10h(i), the PSC authorized a financing order imposing a nonbypassable securitization charge on HSC, related to the retirement of two coal-fired plants, that HSC would be subject to while taking electric services under its LTILRR contract with Consumers Energy. MCL 460.10gg(1) provides that the PSC "may establish long-term industrial load rates for industrial customers" on the basis of one or more supply sources, while MCL 460.10gg(2) provides that "[a] long-term industrial load rate may contain other terms and conditions proposed by the electric utility." HSC's contention that it should not have to pay the securitization charge because its rate under the LTILRR contract was to be based on the costs of a different Consumers Energy plant was inconsistent with the unambiguous text of MCL 460.10gg(1) and 460.10gg(2) and the LTILRR contract. The fact that MCL 460.10gg(1) provides that the rate is *based on* one or more power supply resources does not mean that it is *limited to* costs associated with those power supply resources. In fact, MCL

460.10gg(2) expressly allows the imposition of other terms and conditions. One such condition in the LTILRR contract was § 4.2.7 of the contract, which required HSC to pay "applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer." HSC's contractual obligation to pay applicable surcharges associated with the provision of electric service to HSC constituted a permissible term or condition of the rate in accordance with MCL 460.10gg(2). Accordingly, the securitization charge constituted an applicable surcharge associated with the provision of electric service to HSC, and HSC did not establish that the PSC's financing order, including its imposition of the securitization charge on HSC while HSC was taking electric service under the LTILRR contract, was unlawful or outside the PSC's authority.

Affirmed.

PUBLIC SERVICE COMMISSION — INDUSTRIAL CUSTOMERS — LONG-TERM INDUSTRIAL LOAD RATES — OTHER TERMS AND CONDITIONS.

MCL 460.10gg states that the Public Service Commission may establish long-term industrial load rates for industrial customers based on one or more specifically designated power supply resources and that a long-term industrial load rate may contain other terms and conditions proposed by the electric utility; the fact that MCL 460.10gg provides that the rate is based on one or more power supply resources does not mean that it is limited to costs associated with those power supply resources given that a long-term industrial load rate may contain other terms and conditions.

Fraser Trebilcock Davis & Dunlap, PC (by *Jennifer Utter Heston*) for Hemlock Semiconductor Operations, LLC.

Michael C. Rampe and *Ian F. Burgess* for Consumers Energy Company.

Dana Nessel, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey*, *Spencer A. Sattler*, *Amit T. Singh*, and *Nicholas Q. Taylor*, Assistant Attorneys General, for the Michigan Public Service Commission.

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

PER CURIAM. Appellant, Hemlock Semiconductor Operations, LLC (HSC), appeals as of right a financing order entered on December 17, 2020, by appellee the Michigan Public Service Commission (the PSC) approving the request of appellee Consumers Energy Company (Consumers Energy) for the securitization of qualified costs. On appeal, HSC argues that it was unlawful or unreasonable for the PSC to require HSC, an industrial customer of Consumers Energy, to pay a securitization charge related to the retirement of certain coal-fired power plants. According to HSC, it is not required to pay this securitization charge because HSC has a long-term industrial load retention rate (sometimes referred to as an LTILRR) contract with Consumers Energy. HSC's argument is unavailing. We affirm.

I. BACKGROUND

On September 18, 2020, Consumers Energy filed in the PSC an application for a financing order approving the securitization of qualified costs. Consumers Energy noted that, as part of a settlement agreement approved by the PSC in another case on June 7, 2019, Consumers Energy had agreed that two coal-fired power plants known as Karn Units 1 and 2 (sometimes referred to collectively as Karn) would be retired in 2023.[1] Consumers Energy had also agreed to file an application in the PSC seeking recovery of the unrecovered book balance for Karn by no later than May 31, 2023. In conformance with that agreement, Consumers Energy

[1] That settlement agreement was approved by the PSC in PSC Case No. U-20165, in which Consumers Energy requested approval of what is called an Integrated Resource Plan.

filed the instant application for a financing order under 2000 PA 142 (Act 142), which sets forth legislative provisions governing securitization of qualified costs for electric utilities.

Consumers Energy argued that it satisfied the requirements set forth in MCL 460.10i for the approval of a financing order. MCL 460.10i(1) states:

> Upon the application of an electric utility, if the commission finds that the net present value of the revenues to be collected under the financing order is less than the amount that would be recovered over the remaining life of the qualified costs using conventional financing methods and that the financing order is consistent with the standards in subsection (2), the commission shall issue a financing order to allow the utility to recover qualified costs.

MCL 460.10i(2) provides:

> In a financing order, the commission shall ensure all of the following:
>
> (a) That the proceeds of the securitization bonds are used solely for the purposes of the refinancing or retirement of debt or equity.
>
> (b) That securitization provides tangible and quantifiable benefits to customers of the electric utility.
>
> (c) That the expected structuring and expected pricing of the securitization bonds will result in the lowest securitization charges consistent with market conditions and the terms of the financing order.
>
> (d) That the amount securitized does not exceed the net present value of the revenue requirement over the life of the proposed securitization bonds associated with the qualified costs sought to be securitized.

MCL 460.10i(3) states, "The financing order shall detail the amount of qualified costs to be recovered and

the period over which the securitization charges are to be recovered, not to exceed 15 years."

Consumers Energy asked for a financing order authorizing securitization of up to $702.8 million of qualified costs. Consumers Energy planned to create a special-purpose entity and to transfer certain securitization property to that entity to: minimize bankruptcy risks to securitization bondholders; minimize the interest rate paid on the securitization bonds; and maximize the ratings on the securitization bonds. The application also asked the PSC to approve securitization charges to be collected from Consumers Energy's customers as well as the use of a periodic true-up mechanism comparable to that used in an earlier case to ensure that customers were paying an appropriate amount.

On October 8, 2020, HSC filed a petition to intervene in this matter. HSC noted that it is a large industrial entity that purchases significant quantities of electricity from Consumers Energy; HSC said that it is Consumers Energy's largest single ratepayer.[2] HSC further noted that, in a separate application in PSC Case No. U-20697, Consumers Energy was seeking approval of a new LTILRR contract between Consumers Energy and HSC.[3] Hence, as a ratepayer, HSC had a direct interest in the instant case. At an October 13, 2020 prehearing conference, HSC's petition to intervene was granted without objection.

---

[2] In particular, according to HSC witness Amanda M. Alderson, "HSC is a manufacturer of semiconductor and solar grade polycrystalline silicon and related chemicals headquartered in Hemlock, Michigan. HSC is a very large consumer of electric energy, and is [Consumers Energy's] largest single site customer."

[3] This contract is sometimes referred to by witnesses and parties as "the HSC contract," "the LTILRR contract," and "the HSC LTILRR contract."

On November 13, 2020, an evidentiary hearing on Consumers Energy's instant application was held. The testimony of all witnesses had been prepared in writing and was bound into the record, and cross-examination was waived.

To understand some of the testimony presented at the evidentiary hearing, it is necessary to set forth relevant provisions of MCL 460.10gg, which is part of 2018 PA 348 (Act 348). Those provisions govern the LTILRR contract between Consumers Energy and HSC. MCL 460.10gg(1) states that the PSC "may establish long-term industrial load rates for industrial customers as provided in this section." A long-term industrial load rate is based on one or more specifically designated power supply resources. See MCL 460.10gg(1)(a) and (e). MCL 460.10gg(1)(e) provides:

> If the resource designated in a contract executed under the long-term industrial load rate is a utility-owned resource, then the proposed long-term industrial load rate is based on all of the following:
>
> (*i*) The electric utility's levelized cost of capacity, including fixed operation and maintenance expense, associated with the designated power supply resource at the time the customer contract is executed.
>
> (*ii*) The electric utility's actual variable fuel and actual variable operation and maintenance expense based on the customer's actual energy consumption and associated with the designated power supply resource.
>
> (*iii*) The electric utility's actual energy and capacity market purchases, if any, based on the customer's actual consumption. The amount of capacity needed to serve a qualifying long-term industrial load is based on the capacity needed by the electric utility to comply with its regional transmission organization's load-serving resource requirement based on the amount of contractual firm and interruptible capacity supplied to the industrial customer.

Further, MCL 460.10gg(2) states, "A long-term industrial load rate may contain other terms and conditions proposed by the electric utility."

HSC witness Amanda M. Alderson testified that, under the proposed LTILRR contract between Consumers Energy and HSC, HSC's industrial load rate would be based on Consumers Energy's Zeeland generating plant for a period of 20 years beginning on January 1, 2021. Alderson testified that, in discovery in this case, Consumers Energy had made clear its position that the Karn securitization charge, which was to take effect in 2023, would be imposed on HSC. In Alderson's view, the Karn securitization charge should not apply to HSC while it is taking service under the LTILRR contract. Alderson held this view because, under the LTILRR contract, HSC's power supply costs were based on the Zeeland generating unit. Hence, securitization charges related to the Karn assets were not applicable. Alderson explained that Consumers Energy's "proposal to assess Karn-related costs to HSC under the LTILRR would not occur under conventional financing and cost recovery methods for Karn abandoned plant costs. Therefore, Karn securitization charges should not apply under the unconventional cost recovery method, i.e., securitization." HSC would incur an additional cost of approximately $42 million because of the Karn securitization charge. Unlike other customers of Consumers Energy, HSC would not receive a bill credit in its base rate to offset the Karn securitization charge, thereby shifting costs regarding Karn from other ratepayers to HSC.[4] Alderson encapsulated her position as follows:

---

[4] Alderson explained that "[b]eginning with the advent of the securitization charges in 2023, certain ratepayers [other than HSC] will receive a bill credit to remove the costs of Karn from base rates. The bill

> Because the rate development for power supply and capacity costs under the HSC LTILRR contract is specifically based on the Zeeland unit only, and given that Act 348 explicitly provides eligible large industrial customers with the ability to receive an electricity rate based on the cost of a designated power supply resource, any costs associated with the Karn units should not be charged to HSC under the HSC LTILRR contract.

Alderson acknowledged that "Section 4.2.7 of the HSC LTILRR contract states that HSC shall pay 'applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer.' " However, Alderson testified that the "Karn securitization charges are not associated with the provision of electric service to HSC." According to Alderson, Consumers Energy and HSC had agreed in the LTILRR contract that HSC would continue to pay a securitization charge related to other retired facilities, but this agreement did not extend to the Karn securitization charge. Alderson explained:

> HSC and Consumers [Energy] have agreed under the bilaterally negotiated HSC contract that HSC would continue to pay the current securitization charge for the BC Cobb, Weadock, and Whiting units approved by the [PSC] in the December 6, 2013 Order in Case No. U-17473. That securitization charge . . . is currently paid by HSC, and was approved by the [PSC] prior to the time the LTILRR is expected to go into effect. In contrast, the Karn securitization charge will not go into effect until 2023, two years after HSC begins taking service under the LTILRR.

Alderson agreed that, under Act 142, securitization charges are "nonbypassable, meaning that the charge is paid regardless of the customer's electric generation

---

credit will remain in effect until [Consumers Energy's] base rates are subsequently adjusted in a future base rate proceeding to remove the Karn costs."

supplier." Nonetheless, Alderson noted that, in an earlier securitization case, the PSC had determined that certain types of customers were not required to pay a securitization charge.

Consumers Energy presented the testimony of its director of corporate strategy, Michael P. Kelly. Kelly disagreed with Alderson's position that the Karn securitization charge should not apply to HSC under the LTILRR contract. Kelly explained:

> The proposed Karn Units 1 and 2 securitization charge is a nonbypassable amount charged for the use or availability of electric service from [Consumers Energy] under [Act 142]. HSC is a full-service electric customer of [Consumers Energy] and will continue to be one under the HSC Contract. The LTILRR and HSC Contract require HSC to pay applicable surcharges, which include securitization charges.

Kelly acknowledged that, in PSC Case No. U-17473, the PSC had excluded so-called "choice customers," also known as Retail Open Access (ROA) customers, i.e., customers served by alternative electric suppliers, from the obligation of paying a securitization charge. However, Kelly explained that "[u]nder the LTILRR and the HSC Contract, HSC is a full-service customer of [Consumers Energy] and is not exempt from paying the securitization charges. As I stated above, both the LTILRR and HSC Contract require HSC to pay applicable surcharges, which include securitization charges."

Kelly further disagreed with Alderson's contention that under conventional financing, HSC would not pay for costs related to the Karn assets. Kelly explained:

> The proposed LTILRR provides that HSC will remain a full-service customer and receive bundled electric service from [Consumers Energy] at a rate calculated using costs

> based on the Zeeland [unit]. HSC is not paying directly for this designated resource. HSC remains a full-service customer of [Consumers Energy] and like all bundled customers receives service from the entirety of [Consumers Energy's] electric supply portfolio. The revenue [Consumers Energy] will receive under the proposed HSC Contract contributes to [Consumers Energy's] total revenue requirement (including for Karn Units 1 and 2), as is the case with revenue that it receives from all other bundled service customers.

Kelly next expressed disagreement with Alderson's assertion that assessing the Karn securitization charge on HSC would violate Act 348. Kelly testified:

> The Karn securitization charge is not based on the designated power supply resource under MCL 460.10gg(1)(e). Applying the Karn securitization charge to HSC under the LTILRR is authorized by MCL 460.10gg(2), which provides [Consumers Energy] the ability to include additional terms and conditions in its proposed LTILRR, and contracts executed under that tariff. Under the LTILRR and the HSC Contract, HSC's rate is calculated based on the designated power supply resource, and that rate is analogous to the power supply rates and charges paid by other full-service customers under [PSC]-approved tariffs. The application of the Karn securitization surcharges to HSC under the HSC Contract is analogous to the application of those securitization charges to [Consumers Energy's] other bundled customers in addition to their power supply charges contained in base rates and power supply cost recovery charges.

Further, HSC's load retention rate under the proposed LTILRR contract was not to be based solely on the Zeeland unit. Kelly explained, "Under the proposed LTILRR, HSC is also provided with an Interruptible Credit, an Excess Capacity Charge, and an Excess Energy Charge, none of which are based on the Zeeland [unit]."

Next, Kelly noted his disagreement with Alderson's position that assessment of the Karn securitization charge on HSC would violate the LTILRR contract. Kelly elaborated:

> Section 4.2.7 of the HSC Contract states that HSC will pay "Applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer, ..." The securitization charge proposed in this case is "applicable" because, pursuant to Act 142, it is required to be a nonbypassable charge, i.e., it is required to be applied to all full-service customers. Accordingly, [Consumers Energy] has requested [PSC] approval in this case to add it as a nonbypassable surcharge to the tariff sheets associated with service under LTILRR. Furthermore, HSC has already agreed, as part of the HSC Contract, that charges of this kind are "applicable" surcharges. Exhibit F of the HSC Contract is a sample invoice and shows the securitization surcharges for the "Classic 7" units (i.e., Consumers Energy's B.C. Cobb, J.C. Weadock, and J.R. Whiting units) apply to HSC's consumption under the HSC Contract. Similarly, the securitization charges for the Karn units approved in this case should apply to HSC's consumption. Ms. Alderson acknowledges that HSC has agreed to pay surcharges of this kind [in] her direct testimony, although she attempts to distinguish HSC's agreement to that charge by suggesting that the Classic 7 securitization charges were approved by the [PSC] before the LTILRR is expected to go into effect. But, nothing in Section 4.2.7 of the HSC Contract limits "applicable" surcharges to those that are approved before the LTILRR goes into effect. Even if it did, however, HSC overlooks the fact that the securitization surcharges in this case would also be approved by the [PSC] before the LTILRR goes into effect. In any case, as I already discussed, securitization surcharges are a kind of surcharge specifically contemplated as part of the HSC Contract to be included in HSC's bills and are clearly applicable surcharges because Act 142 requires them to be applied.

The PSC Staff (the Staff) presented the testimony of Nicholas M. Revere, who works for the PSC as "the Manager of the Rates and Tariff Section of the Regulated Energy Division." Revere testified that the Staff neither agreed nor disagreed with Alderson's overall claim that HSC should not be subject to the Karn securitization charge; in the Staff's view, there were well-reasoned competing arguments on that issue. Nonetheless, the Staff disagreed with certain arguments that Alderson had made in support of her position.

The Staff did not agree with Alderson's contention that, because the LTILRR contract is based on the Zeeland unit, HSC should be excused from paying the Karn securitization charge. Revere noted that, although Act 348 provides for a rate to be calculated on the basis of one or more designated supply resources, Act 348 "also allows for other terms and conditions." One such condition in the LTILRR contract is § 4.2.7, which requires HSC to pay "applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer." Alderson was incorrect when she asserted that the Karn costs were not associated with the provision of electric service to HSC. Revere explained:

> HSC is not actually served by Zeeland, the costs on which the LTILRR is based are merely calculated based on Zeeland. Service to HSC under the LTILRR will still be provided by [Consumers Energy] utilizing all power supply resources used to serve any customer. Absent securitization, costs associated with retired plants that are no longer in use, such as Karn 1 & 2, effectively become general costs of power supply. As HSC will still be served by [Consumers Energy's] standard power supply, these costs will still be costs associated with providing service to

> HSC. Therefore, the [PSC] should not consider this argument as supporting HSC witness Alderson's requested relief.

Revere further testified that the Staff disagreed with Alderson's contention that HSC should be treated the same way that choice or ROA customers were treated in PSC Case No. U-17473. Revere explained that "HSC will still be served by [Consumers Energy] under the LTILRR, so the issues regarding migration under choice contemplated in U-17473 are not analogous to the LTILRR. Therefore, the [PSC] should not consider this argument as supporting HSC witness Alderson's requested relief."

Next, Revere expressed the Staff's disagreement with Alderson's contention that application of the Karn securitization charge to HSC would contravene the requirement for cost-based rates set forth in MCL 460.11. Revere elaborated:

> As discussed earlier, HSC will still be served by [Consumers Energy's] overall power supply resources, only the rates paid under the LTILRR will be based on Zeeland. Therefore, the LTILRR is not based on the power supply costs associated with serving HSC. In effect, Act 348 created an exception to the cost-based requirement under MCL 460.11. Therefore, HSC witness Alderson's argument regarding MCL 460.11 should not be considered as supporting HSC witness Alderson's requested relief.

Revere also noted that MCL 460.11(1)[5] requires only "that rates be cost-based by class. This does not apply to the granularity of individual rate elements."

---

[5] MCL 460.11(1) states, in relevant part, that the PSC "shall ensure the establishment of electric rates equal to the cost of providing service to each customer class. In establishing cost of service rates, the [PSC] shall ensure that each class, or sub-class, is assessed for its fair and equitable use of the electric grid."

After the evidentiary hearing, HSC, Consumers Energy, and the Staff provided briefing setting forth their respective arguments largely based on the testimony of their respective witnesses. On December 17, 2020, the PSC entered its order approving Consumers Energy's request for the securitization of qualified costs.[6] As relevant to this appeal, the PSC found that Consumers Energy's "proposed rate design for the securitization charges in this case should be approved, . . . with the charge applicable to the LTILRR and HSC pursuant to the HSC LTILRR contract . . . ." The PSC stated that it "rejects HSC's position that it should be excused from this nonbypassable charge. The [PSC] finds that the securitization charges in this case are applicable surcharges pursuant to Section 4.2.7 of the HSC LTILRR Contract."[7] This appeal ensued.

II. STANDARD OF REVIEW

With respect to the scope of appellate review of a PSC financing order, MCL 460.10i(8) provides as follows:

---

[6] Although it is not relevant to the issue on appeal, we note that the PSC's approval of the request for securitization regarding the Karn units was for an amount less than what was requested by Consumers Energy. As noted earlier, Consumers Energy asked for a financing order authorizing securitization of up to $702.8 million in qualified costs. In its December 17, 2020 financing order, the PSC authorized the securitization of up to $688.3 million in qualified costs. The PSC authorized the imposition of the Karn securitization charge on Consumers Energy's customers for a period not to exceed eight years.

[7] The PSC addressed other issues regarding the Karn securitization charge that are not pertinent to this appeal. Also, the PSC issued a separate order on December 17, 2020, in PSC Case No. U-20697, approving the LTILRR contract between HSC and Consumers Energy. HSC states that its LTILRR contract with Consumers Energy is the only LTILRR contract in existence so far.

> Notwithstanding any other provision of law, a financing order may be reviewed by the court of appeals upon a filing by a party to the commission proceeding within 30 days after the financing order is issued. All appeals of a financing order shall be heard and determined as expeditiously as possible with lawful precedence over other matters. *Review on appeal* shall be based solely on the record before the commission and briefs to the court and *shall be limited to whether the financing order conforms to the constitution and laws of this state and the United States and is within the authority of the commission under this act*. [Emphasis added.]

Under MCL 460.10i(8), this Court's review of a PSC financing order is "extremely limited." *Attorney General v Pub Serv Comm*, 247 Mich App 35, 42; 634 NW2d 710 (2001).

This Court respectfully considers the PSC's construction of a statute that the PSC is empowered to execute, but the statutory text itself ultimately controls. *In re Implementing Section 6w of 2016 PA 341 for Cloverland Electric Coop*, 329 Mich App 163, 176; 942 NW2d 38 (2019). Issues of statutory interpretation are reviewed de novo, and "our primary obligation is to discern and give effect to the Legislature's intent." *Id*. at 176-177 (quotation marks and citation omitted).

> The language of a statute provides the most reliable evidence of the Legislature's intent. If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. Statutory language is accorded its ordinary meaning within the context in which it

> is used and must be read harmoniously to give effect to the statute as a whole. [*Id*. at 177-178 (quotation marks and citations omitted).]

"Statutes that relate to the same subject matter or share a common purpose are *in pari materia* and must be read together as one law to effectuate the legislative purpose as found in harmonious statutes." *Id*. at 178 (quotation marks and citation omitted). Therefore, "[i]f two statutes lend themselves to a construction that avoids conflict, that construction should control." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

On appeal, HSC presents arguments challenging the PSC's decision to apply the Karn securitization charge to HSC while HSC is taking electric service under the LTILRR contract. HSC's appellate arguments are unavailing.

As explained earlier, Act 142 contains provisions authorizing the PSC to enter a financing order imposing a securitization charge to recover the costs of refinancing qualified debt or equity. See MCL 460.10i. Further, MCL 460.10k(2) provides that "[a] financing order shall include terms ensuring that the imposition and collection of securitization charges authorized in the order are a nonbypassable charge." Under Act 142, the term "securitization charges" is defined as

> nonbypassable amounts to be charged for the use or availability of electric services, approved by the commission under a financing order to fully recover qualified costs, that shall be collected by an electric utility, its successors, an assignee, or other collection agents as provided for in the financing order. [MCL 460.10h(i).]

A "[n]onbypassable charge" is defined as "a charge in a financing order payable by a customer to an electric utility or its assignees or successors regardless of the identity of the customer's electric generation supplier." MCL 460.10h(f).

The PSC's financing order in this case imposed a securitization charge related to the retirement of two coal-fired plants known as the Karn units. The securitization charge is to take effect in 2023. The PSC ruled that HSC would be subject to this charge while taking electric service under its LTILRR contract with Consumers Energy. HSC contends that it should not have to pay the securitization charge because its rate under the LTILRR contract is to be based on the costs of Consumers Energy's Zeeland plant, not the Karn units. But HSC's argument is inconsistent with the unambiguous text of relevant statutory provisions and the LTILRR contract.

Act 348 governs the LTILRR contract between Consumers Energy and HSC. MCL 460.10gg(1) states that the PSC "may establish long-term industrial load rates for industrial customers as provided in this section." A long-term industrial load rate is based on one or more specifically designated power supply resources. See MCL 460.10gg(1)(a) and (e). But MCL 460.10gg(2) is also relevant; it states, "A long-term industrial load rate may contain other terms and conditions proposed by the electric utility." No conflict exists between MCL 460.10gg(1) and (2). MCL 460.10gg(1) provides that the LTILRR is based on one or more power supply resources, and MCL 460.10gg(2) provides that the rate may contain other terms and conditions. The fact that MCL 460.10gg(1) provides that the rate is *based on* one or more power supply resources does not mean that it is *limited to* costs associated with those power supply

resources. This is especially true given that MCL 460.10gg(2) expressly allows the imposition of other terms and conditions. For the same reason, there is no conflict between Act 142 and Act 348, given that the "other terms and conditions" language of MCL 460.10gg(2) allows the imposition of other applicable charges. No language in Act 348 precludes the imposition of securitization charges on LTILRR customers.

Section 4.2.7 of the LTILRR contract between Consumers Energy and HSC contains such a term or condition allowed by MCL 460.10gg(2); that contractual provision requires HSC to pay "applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer." This point was explained at the evidentiary hearing during the testimony of the Staff's witness, Revere. He noted that, although Act 348 provides for a rate to be calculated on the basis of one or more designated supply resources, Act 348 "also allows for other terms and conditions." Revere explained that one such condition in the LTILRR contract is § 4.2.7 of the contract, which requires HSC to pay "applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer."

Testimony at the evidentiary hearing supports the conclusion that the Karn securitization charge constitutes an applicable surcharge associated with the provision of electric service to HSC. As noted, a securitization charge is deemed under Act 142 to be "nonbypassable," meaning that it must be paid "regardless of the identity of the customer's electric generation supplier." MCL 460.10h(f). At the evidentiary hearing, Consumer Energy witness Kelly explained:

> The proposed Karn Units 1 and 2 securitization charge is a nonbypassable amount charged for the use or availabil-

> ity of electric service from [Consumers Energy] under [Act 142]. HSC is a full-service electric customer of [Consumers Energy] and will continue to be one under the HSC Contract. The LTILRR and HSC Contract require HSC to pay applicable surcharges, which include securitization charges.

Kelly further elaborated:

> Section 4.2.7 of the HSC Contract states that HSC will pay "Applicable surcharges included in the Rate Book associated with the provision of electric service to the Customer . . . ." The securitization charge proposed in this case is "applicable" because, pursuant to Act 142, it is required to be a nonbypassable charge, i.e., it is required to be applied to all full-service customers. Accordingly, [Consumers Energy] has requested [PSC] approval in this case to add it as a nonbypassable surcharge to the tariff sheets associated with service under LTILRR. Furthermore, HSC has already agreed, as part of the HSC Contract, that charges of this kind are "applicable" surcharges. Exhibit F of the HSC Contract is a sample invoice and shows the securitization surcharges for the "Classic 7" units (i.e., Consumers Energy's B.C. Cobb, J.C. Weadock, and J.R. Whiting units) apply to HSC's consumption under the HSC Contract. Similarly, the securitization charges for the Karn units approved in this case should apply to HSC's consumption. Ms. Alderson acknowledges that HSC has agreed to pay surcharges of this kind [in] her direct testimony, although she attempts to distinguish HSC's agreement to that charge by suggesting that the Classic 7 securitization charges were approved by the [PSC] before the LTILRR is expected to go into effect. But, nothing in Section 4.2.7 of the HSC Contract limits "applicable" surcharges to those that are approved before the LTILRR goes into effect. Even if it did, however, HSC overlooks the fact that the securitization surcharges in this case would also be approved by the [PSC] before the LTILRR goes into effect. In any case, as I already discussed, securitization surcharges are a kind of surcharge specifically contemplated as part of the HSC Contract to

> be included in HSC's bills and are clearly applicable surcharges because Act 142 requires them to be applied.

Further, although HSC witness Alderson contended that the Karn costs were not associated with the provision of electric service to HSC, Revere expressed a contrary view. Revere explained:

> HSC is not actually served by Zeeland, the costs on which the LTILRR is based are merely calculated based on Zeeland. Service to HSC under the LTILRR will still be provided by [Consumers Energy] utilizing all power supply resources used to serve any customer. Absent securitization, costs associated with retired plants that are no longer in use, such as Karn 1 & 2, effectively become general costs of power supply. As HSC will still be served by [Consumers Energy's] standard power supply, these costs will still be costs associated with providing service to HSC. Therefore, the [PSC] should not consider this argument as supporting HSC witness Alderson's requested relief.

HSC states that the Karn securitization charge was not included in the Rate Book when the LTILRR contract was executed, but HSC fails to explain why this is dispositive under the contractual language. That is, HSC identifies no language in the contract requiring that the surcharge have been included in the Rate Book *when the contract was executed*, as opposed to when the surcharge was imposed later (beginning in 2023), to fall within HSC's contractual obligation to pay applicable surcharges associated with the provision of electric service to HSC. Nor does HSC establish that any alleged error in the PSC's interpretation of the contract would constitute a failure to conform to the law or a failure to act within the PSC's authority, such that the alleged error would fall within this Court's narrow review under MCL 460.10i(8) regarding PSC financing orders. See *Attorney General*, 247

Mich App at 42-43 (concluding that certain alleged errors of the PSC were beyond the "extremely limited" scope of this Court's review under MCL 460.10i(8)).

The above-quoted analyses of Kelly and Revere are consistent with the unambiguous language of the statutory and contractual provisions at issue. HSC's contractual obligation to pay applicable surcharges associated with the provision of electric service to HSC constitutes a permissible term or condition of the rate in accordance with MCL 460.10gg(2). And the testimony supports the determination that the Karn securitization charge is an applicable surcharge associated with the provision of electric service to HSC. The PSC acted within its lawful authority when it decided to impose the Karn securitization charge on HSC while HSC is taking service under the LTILRR contract. HSC has not established that the PSC acted unlawfully or outside its authority.

HSC suggests that interpreting MCL 460.10gg(2) to allow the imposition of the Karn securitization charge on HSC would mean that there is no limit on the amount of costs that could be imposed on an LTILRR customer through a surcharge. However, the only charge at issue in this case is the Karn securitization charge. The imposition of any additional charges on HSC would require the approval of the PSC, and no basis exists to conclude that the PSC would allow Consumers Energy to place unlimited costs into a surcharge applicable to HSC. Indeed, in its brief on appeal, the PSC represents to this Court that it is highly unlikely that the PSC would allow Consumers Energy to place all its costs into a surcharge.

We also find unconvincing HSC's appellate argument attempting to analogize itself to ROA customers who have been excused by the PSC from paying secu-

ritization charges. Unlike ROA customers, who are served by alternative electric suppliers, HSC is a full-service customer of Consumers Energy. HSC is seeking to avoid paying a securitization charge that all other full-service customers of Consumers Energy must pay. Kelly testified that "[u]nder the LTILRR and the HSC Contract, HSC is a full-service customer of [Consumers Energy] and is not exempt from paying the securitization charges. As I stated above, both the LTILRR and HSC Contract require HSC to pay applicable surcharges, which include securitization charges." Revere similarly testified that the Staff disagreed with HSC's contention that it should be treated like ROA customers. Revere explained that "HSC will still be served by [Consumers Energy] under the LTILRR, so the issues regarding migration under choice contemplated in U-17473 are not analogous to the LTILRR. Therefore, the [PSC] should not consider this argument as supporting HSC witness Alderson's requested relief."

HSC's reliance on the cost-based requirement of MCL 460.11 is misplaced. MCL 460.11(1) states, in relevant part, that the PSC "shall ensure the establishment of electric rates equal to the cost of providing service to each customer class. In establishing cost of service rates, the [PSC] shall ensure that each class, or sub-class, is assessed for its fair and equitable use of the electric grid." During his testimony, Revere expressed the Staff's disagreement with HSC witness Alderson's contention that application of the Karn securitization charge to HSC would contravene the requirement for cost-based rates set forth in MCL 460.11(1). Revere elaborated:

> As discussed earlier, HSC will still be served by [Consumers Energy's] overall power supply resources, only the

> rates paid under the LTILRR will be based on Zeeland. Therefore, the LTILRR is not based on the power supply costs associated with serving HSC. In effect, Act 348 created an exception to the cost-based requirement under MCL 460.11. Therefore, HSC witness Alderson's argument regarding MCL 460.11 should not be considered as supporting HSC witness Alderson's requested relief.

Revere also noted that MCL 460.11(1) requires only "that rates be cost-based by class. This does not apply to the granularity of individual rate elements." HSC has failed to refute Revere's explanation for why imposition of the Karn securitization charge on HSC does not violate the cost-based requirement of MCL 460.11(1). As the Staff convincingly explained in the PSC, Act 348 did not change the cost of providing service to a customer such as HSC; rather, Act 348 only changed the amount paid by that customer. HSC's argument regarding costs is unavailing.

Overall, HSC's appellate arguments fail. HSC has not established that the PSC's financing order, including its imposition of the Karn securitization charge on HSC while HSC is taking electric service under the LTILRR contract, is unlawful or outside the PSC's authority.

Affirmed.

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

SHIVERS v COVENANT HEALTHCARE SYSTEM

Docket Nos. 351638, 351795, and 351863. Submitted August 4, 2021, at Detroit. Decided November 18, 2021, at 9:15 a.m.

Gequita Shivers, acting as guardian of minor D'Marrius Shivers, brought a medical malpractice action in the Saginaw Circuit Court against Covenant Healthcare System; Covenant Medical Center, Inc.; Saginaw Cooperative Hospitals, Inc.; and others for injuries suffered by the child before, during, and after his birth. Plaintiff alleged that the child suffered significant neurological injury, developmental and/or cognitive delays, including cerebral palsy, because of the various defendants' alleged negligence during the prenatal, labor-and-delivery, and postnatal periods. Before trial, defendants separately moved to strike the testimony of plaintiff's life care plan expert, Kathy Pouch, and to preclude admission of her report regarding the future treatment needs of the child and the costs associated with that care. Defendants argued that her testimony and the report should be precluded under MRE 703 because her conclusions were based on hearsay—in particular on the out-of-court statements by Dr. Rita Ayyangar, which were not in evidence. At the hearing on the motions, plaintiff's counsel stated that Dr. Ayyangar would be testifying at trial and that there would be no need for Pouch to testify as to the doctor's out-of-court statements underlying Pouch's conclusions. The court, Darnell Jackson, J., granted defendants' motions, agreeing with defendant's arguments that Pouch's testimony and report were inadmissible under MRE 703 because her conclusions were based on Dr. Ayyangar's out-of-court statements. Defendants also separately moved for summary disposition and to limit the testimony of plaintiff's causation experts, Dr. O. Carter Snead and Dr. Carolyn Crawford, arguing that their testimony would be speculative. The trial court initially granted the motion to limit the experts' testimony but later granted plaintiff's motion for reconsideration, stating that a review of the record established that the experts were able to establish a causal connection between the child's injuries and the alleged negligence of those defendants involved in the labor-and-delivery and postnatal periods. The court also denied defendants' separate motions for summary disposition, concluding that there

was a genuine issue of material fact whether defendants' alleged negligent treatment was the cause of the child's neurological injuries. In Docket No. 351638, plaintiff appealed the trial court's orders granting defendants' motions in limine to exclude the testimony and related report of Dr. Ayyangar and to amend plaintiff's witness list. In Docket No. 351795, Covenant Healthcare System; Covenant Medical Center, Inc.; and others appealed the trial court's orders denying their motion in limine to limit the testimony of plaintiff's causation experts and their motions for summary disposition. In Docket No. 351863, Saginaw Cooperative Hospitals, Inc., similarly appealed the trial court's orders denying its motion in limine to limit the testimony of plaintiff's causation experts and its motion for summary disposition.

The Court of Appeals *held*:

1. MRE 703 provides that the facts or data in the particular case upon which an expert bases an opinion or inference must be in evidence; a court has the discretion to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter. The rule permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony. It is an error of law for a trial court to preemptively exclude expert testimony before trial on the basis that the expert's opinion is based on hearsay evidence that has not been introduced when the party makes an offer of proof that the evidence on which the expert relies will be introduced at trial; in other words, in that circumstance, expert testimony cannot be excluded under MRE 703 until the offering party has the opportunity to introduce at trial the factual basis underlying the expert's testimony. If a party fails at trial to establish the factual basis underlying the expert's opinion, the trial court may exclude the expert's testimony under MRE 703. In this case, the trial court erred by finding that Pouch's testimony regarding the child's future treatment and needs was precluded on the basis that her opinion was based on inadmissible hearsay that would not be in evidence at trial. The court's ruling was premature because plaintiff's counsel had made an offer of proof that Dr. Ayyangar's testimony at trial would establish a foundation for Pouch's testimony and because the court made the ruling before plaintiff was able to establish the foundation by presenting Dr. Ayyangar's testimony. The court thus made an error of law in its application of MRE 703 because the court could not rule on the admissibility of Pouch's testimony and report, or on whether Pouch's expert testimony would be

allowed, until Dr. Ayyangar actually testified. Because the trial court erred as a matter of law in its application of MRE 703, the trial court necessarily abused its discretion by granting defendants' motion in limine and precluding Pouch's testimony. Similarly, the trial court abused its discretion by prematurely granting defendants' motion in limine to strike the cost data included in Pouch's report on the basis that her opinion regarding the data was based on hearsay. Given that the trial court abused its discretion by granting defendants' motions in limine related to Pouch's testimony and report, it was unnecessary to address whether the court also erred by denying plaintiff's motion to amend her witness list.

2. Given the deposition testimony of Dr. Snead and Dr. Crawford, the trial court did not abuse its discretion by granting plaintiff's motion for reconsideration and allowing the experts to testify regarding the cause of the child's injuries during the labor-and-delivery and postnatal periods; the testimonial evidence was sufficient to support plaintiff's theory of causation; their combined testimony provided a reasonable basis for the conclusion that it was more likely than not that the conduct of defendants was a cause in fact of the injury to the child's thalamus during the labor-and-delivery period and of an additional injury to his cortex during the postnatal period.

3. The trial court did not err by denying defendants' respective motions for summary disposition, which were generally based on their faulty argument that the testimony of Dr. Snead and Dr. Crawford should have been excluded.

In Docket No. 351638, trial court order reversed; in Docket Nos. 351795 and 351863, trial court orders affirmed; case remanded to the trial court for further proceedings.

Mark Granzotto, PC (by *Mark Granzotto*) and *Cochran, Kroll & Associates* (by *Eileen E. Kroll* and *Christopher C. Frayer*) for Gequita Shivers.

Abbott Nicholson, PC (by *Lori A. Barker* and *Carlos A. Escurel*) for Covenant Healthcare System; Covenant Medical Center, Inc.; Valley OB-GYN Clinic, PC; Dr. Julia Walter; Dr. Angie Domingo; Tammy Long; Tammy Kime-McInerney; and Tamera Graham.

Cline, Cline & Griffin (by *José Brown* and *Nancy K. Chinonis*) for Saginaw Cooperative Hospitals, Inc.

Before: SAWYER, P.J., and BOONSTRA and RICK, JJ.

PER CURIAM. In Docket No. 351638, plaintiff, Gequita Shivers, appeals by delayed leave granted the trial court's orders granting defendants'[1] motion in limine to exclude the testimony and related report of plaintiff's life care planning expert and to amend plaintiff's witness list. In Docket No. 351795, the Covenant defendants[2] appeal by leave granted the trial court's order denying their motions in limine to limit the testimony of plaintiff's causation experts and their motions for summary disposition under MCR 2.116(C)(10). Finally, in Docket No. 351863, defendant Synergy[3] appeals by leave granted the same order being appealed in Docket No. 351795. We affirm in part, reverse in part, and remand.

This is a complicated medical malpractice case. Generally, plaintiff's complaint alleged that D'Marrius Shivers suffered "significant neurological injury, developmental and/or cognitive delays, including cerebral palsy" as a result of negligence during the prenatal, labor-and-delivery, and postnatal periods. Plaintiff al-

[1] In Docket No. 351638, the word "defendants" refers to Covenant Healthcare System; Covenant Medical Center, Inc.; Valley OB-GYN Clinic, PC; Dr. Julia Walter; Dr. Angie Domingo; Tammy Long; Tammy Kime-McInerney; Tamera Graham; and Saginaw Cooperative Hospitals, Inc.

[2] In Docket No. 351795, the term "Covenant defendants" refers to Covenant Healthcare System; Covenant Medical Center, Inc.; Valley OB-GYN Clinic, PC; Dr. Julia Walter; Dr. Angie Domingo; Tammy Long; Tammy Kime-McInerney; and Tamera Graham.

[3] Defendant Saginaw Cooperative Hospitals, Inc., is also known as Synergy Medical Educational Alliance, and in Docket No. 351863, that entity is referred to as defendant Synergy.

leged that D'Marrius's damages included physical pain and suffering, disability, mental anguish, fright and shock, denial of everyday social pleasures and enjoyments, embarrassment, humiliation and mortification, loss of good health, disfigurement, disability, and impaired function resulting from the injury to his neurological and respiratory systems with the attendant complications, reasonable cost of necessary medical care and treatment and attendant care for 24 hours a day, seven days a week, loss of future earning capacity, and the possibility of "each and every one of these elements of damage in the future."

Plaintiff alleged multiple acts of negligence during the prenatal period, during the labor-and-delivery period, as well as during the postnatal period. In these interlocutory appeals, the parties allege various errors by the trial court with respect to rulings on whether particular witnesses should be allowed to testify at trial, as well as whether defendants are entitled to summary disposition.

Turning first to plaintiff's appeal, the primary issue is the trial court's ruling that plaintiff's life care planning expert, Kathleen Pouch, would not be permitted to testify regarding her expert opinion because it was based on hearsay, in particular "the out-of-court statements by Dr. [Rita] Ayyangar . . . ." A trial court's decision whether to admit evidence is reviewed for an abuse of discretion, but preliminary legal determinations of admissibility are reviewed de novo. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). "The admission or exclusion of evidence because of an erroneous interpretation of law is necessarily an abuse of discretion." *Id*. To the extent a trial court's decision relies on factual findings, this Court reviews those

factual findings for clear error, meaning it defers to the trial court unless definitely and firmly convinced the trial court made a mistake. *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470-472; 719 NW2d 19 (2006). This Court otherwise reviews de novo the trial court's determinations of law; but any factual findings made by the trial court in support of its decision are reviewed for clear error, and ultimate discretionary decisions are reviewed for an abuse of that discretion. *Id*. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Elher*, 499 Mich at 21 (quotation marks and citation omitted). This Court reviews de novo the interpretation and application of court rules. *In re DMK*, 289 Mich App 246, 253; 796 NW2d 129 (2010).

The trial court's ruling was based on MRE 703, which requires that the facts underlying an expert's opinion be in evidence. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 732-733; 761 NW2d 454 (2008). MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

"This rule permits an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony." *People v Fackelman*, 489 Mich 515, 534; 802 NW2d 552 (2011) (quotation marks and citation omitted).

Our issue with the trial court's holding is that it arose out of a pretrial motion in limine. Each of

plaintiff's lay and expert witness lists,[4] beginning with the preliminary list through the fifth amended witness list, specifically included Dr. Ayyangar as a lay witness as one of the "[a]gents, employees, representatives, doctors, nurses, interns, residents, and/or health practitioners . . . from U of M Physical Medicine Rehab[.]" With respect to expert witnesses, plaintiff "reserve[d] the right to obtain expert medical testimony from any and all of plaintiff's or plaintiff's children's treating physicians, nurses, therapists or any other healthcare provider regarding issues of standard of care, causation and damages." Dr. Ayyangar was D'Marrius's treating physiatrist. In her response to defendants' motions in limine, plaintiff stated that she was in the process of scheduling Dr. Ayyangar for testimony, either at trial or via *de bene esse* deposition. The deposition was taken on June 26, 2019. At the hearing on the motions in limine, plaintiff's counsel told the trial court that Dr. Ayyangar would be testifying at trial and that Pouch would not need to testify as to the doctor's hearsay statements. To the extent that the trial court could find Dr. Ayyangar qualified to testify as to D'Marrius's future needs, the facts or data upon which Pouch based her opinion would be in evidence.

Under these circumstances, the trial court erred by finding that Pouch's testimony as to D'Marrius's future treatment and needs was precluded on the ground that her opinion was based on inadmissible hearsay that would not be in evidence at trial. MRE 703 specifically states that the evidence upon which expert testimony is based can be admitted either before or after the expert testifies. Under MRE 703, the trial court had discretion to deny defendants' motions in limine and to

[4] Plaintiff's lay and expert witness lists include hundreds of witnesses.

allow Pouch to offer expert testimony as to D'Marrius's future needs, subject to the condition that the factual bases of her opinion be admitted in evidence.[5] The trial court's decision to preclude Pouch's testimony with respect to D'Marrius's future needs was premature in light of plaintiff's counsel's offer of proof because she did not have an opportunity to present at trial the testimony of Dr. Ayyangar to lay a foundation for the admission of Pouch's testimony and life care plan. Until plaintiff puts Dr. Ayyangar on the stand to testify regarding the facts establishing a foundation for the admission of Pouch's testimony and life care plan, the court could not make a ruling as to admissibility and therefore could not make a ruling as to whether Pouch's expert testimony will be allowed. The trial court made an error of law in its application of MRE 703 under these circumstances and, therefore, abused its discretion by granting defendants' motions in limine and precluding Pouch's testimony and life care plan on the ground that Dr. Ayyangar's testimony would not be in evidence.

The trial court's ruling also concluded that the cost data included in Pouch's report was based on hearsay. But as with Pouch's testimony and life care plan with respect to D'Marrius's future needs, defendants' motions in limine were essentially motions to exclude evidence that had not yet been offered or introduced. In light of Pouch's deposition testimony, it is not clear whether her expert opinion and life care plan as to

[5] In the event that Dr. Ayyangar's testimony does not provide a foundation for all of Pouch's opinions—for example, if Dr. Ayyangar is determined not to be qualified to offer an opinion as to D'Marrius's future neurological needs and her testimony cannot not provide a foundation for Pouch's opinion that D'Marrius would require "X" number of appointments with a neurologist—defendants could raise the issue via objection at that time.

costs will be admissible, admissible in part, or inadmissible at trial; it is not clear whether any of the costs were based on Pouch's personal knowledge, or whether the facts or data upon which Pouch based her opinion on costs will be in evidence. For the reasons discussed previously, defendants' motions in limine were premature and the trial court abused its discretion by finding that the facts supporting Pouch's opinion and life care plan would not be in evidence, and by granting the motion instead of waiting until trial to consider specific objections to the evidence.

We need not address plaintiff's second issue—whether the trial court erred by denying plaintiff's motion to amend her witness list—because the motion is premised on this Court concluding that the trial court correctly excluded Pouch's testimony.

We next turn to defendants' arguments that the trial court erred by granting plaintiff's motion for clarification regarding the trial court's ruling on motions in limine to limit the testimony of plaintiff's experts regarding causation theories that defendants characterize as being speculative. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for reconsideration. *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). This Court also reviews for an abuse of discretion a trial court's ruling on a motion to exclude expert testimony. See *Gay v Select Specialty Hosp*, 295 Mich App 284, 290; 813 NW2d 354 (2012).

Here, the trial court said that its September 23, 2019 oral ruling to strike the testimony of Dr. O. Carter Snead and Dr. Carolyn Crawford was based on an understanding that the doctors could not establish a causal connection between D'Marrius's injuries and

the alleged negligence of those defendants involved in the labor-and-delivery and postnatal periods. The trial court said that a reexamination of their testimony led it to a different conclusion. The trial court did not abuse its discretion by revisiting the issue under these circumstances. *Macomb Co Dep't of Human Servs v Anderson*, 304 Mich App 750, 754; 849 NW2d 408 (2014).

Defendants argue that the trial court erred by finding that Dr. Snead's and Dr. Crawford's testimony supported plaintiff's theory that D'Marrius suffered additional injuries to his brain as a result of negligence that allegedly occurred during the labor-and-delivery and postnatal periods.[6] They contend that both doctors said that it would be pure speculation to suggest what degree of brain damage, if any, occurred after plaintiff went to the hospital and that Dr. Crawford could not state that the alleged intervention that should have been provided at the hospital would have changed D'Marrius's condition or need for subsequent care.

In this case, Dr. Snead testified that the injury to D'Marrius's thalamus occurred 10 to 40 minutes before D'Marrius was born:

> [M]y reading of the MRI scan of the brain done on the eighth day of life, there was signal changes in the thala-

[6] Defendants argue that the trial court erred by relying on the *de bene esse* deposition testimony of plaintiff's expert radiologist, Dr. Patrick Barnes. Defendants acknowledge that Dr. Barnes identified separate cortical and thalamus injuries, but they contend that Dr. Barnes admitted that he could not determine the date that either of the injuries occurred. *Id*. The trial court's opinion indicates that the court would have made the same decision regarding the testimonies of Dr. Snead and Dr. Crawford regardless of any testimony from Dr. Barnes. The trial court only referred to Dr. Barnes's testimony in a footnote to demonstrate factual support for the premise that D'Marrius sustained brain injuries in two separate regions of the brain.

> mus, which is the neuroradiological signature of an acute near-total hypoxic-ischemic brain injury which occurs, by definition, some people say ten to 30 minutes before delivery, others say ten to 40 minutes. So, within that timeframe approximate to delivery, this child had an acute near-total hypoxic-ischemic brain injury which caused the child's thalamus to be injured.

Given the undisputed evidence that plaintiff was in the labor-and-delivery unit for at least four hours before D'Marrius was born, Dr. Snead's testimony was sufficient to support the theory that an injury occurred on October 9 during the labor-and-delivery period.

Similarly, Dr. Crawford testified that additional injury occurred during the postnatal period at the hospital. The following exchange occurred between counsel for defendants who are no longer involved in this case and Dr. Crawford:

> *Q*. To the extent that D'Marrius requires supportive care, attendant care, supervisory care, can we agree that he was going to require that before his mom came to Covenant Hospital?
>
> * * *
>
> *THE WITNESS*: I can't say that the extent to which he was damaged was entirely present before [plaintiff] came to the hospital. I think there is an evolution of additional damage. Certainly, he had a normal head circumference at birth, and he acquired microencephaly, I think, from the events around the time of birth. *So there is a layer of additional damage that happens to him right around the time of birth and into the neonatal period*. [Emphasis added.]

Dr. Crawford testified that D'Marrius's neurologic injury probably worsened from the time plaintiff arrived at the hospital until D'Marrius was born.

The following exchange occurred between counsel for the Covenant defendants and Dr. Crawford:

> *Q*. Can you parse out the degree of neurologic injury, if any, the youngster sustained from the time mom presented at two o'clock in the morning on October the 9th to the time of the youngster's delivery?
>
> *A*. It would appear that it got worse[.]

Dr. Crawford acknowledged that she could not specifically identify which injuries occurred during the postnatal period but stated that injury more than likely occurred during that time period.

Defendants contend that Dr. Crawford admitted that it would be speculative to opine whether D'Marrius's needs would be different if he had received different care. This contention is not wholly accurate. When the Covenant defendants' counsel asked Dr. Crawford whether injuries that occurred during the labor-and-delivery and postnatal periods on October 9 altered D'Marrius's needs, Dr. Crawford said that it would be "somewhat" speculative to testify regarding changes in needs, as follows:

> *Q*. Whether it would have changed any need in terms of this child's subsequent care and/or intervention, would you agree with me that would also be speculative for you?
>
> *A*. Somewhat.

Counsel did not further question Dr. Crawford. Dr. Crawford's inability to conclude with certainty that D'Marrius's needs would differ as a result of the injuries sustained during the labor-and-delivery and postnatal periods would not render her testimony inadmissible. Rather, this fact would merely relate to the credibility of her testimony. See *Craig v Oakland Hosp*, 471 Mich 67, 89-90; 684 NW2d 296 (2004).

Indeed, Dr. Crawford testified that the fetus had crossed the injury threshold for brain damage before plaintiff arrived at the hospital, but that "the extent to which it evolved, I think, is something that was not present at the time that [plaintiff] came to the hospital and would have been lessened with immediate deliver[y], resuscitation and transfusion." Additionally, taken together, Dr. Snead's and Dr. Crawford's testimony differentiated between the effects of a thalamus injury and the effects of a cortical injury. Dr. Snead testified about a thalamus injury:

> [T]he thalamus is hugely important because it's basically the gatekeeper of every sensation that comes to your brain. Whether it's vision, hearing, smell, taste, it's all filtered through the thalamus and delivered to appropriate cortical regions where it's perceived. And the thalamus also has a memory function and it also has a function involving executive function, so the thalamus is really the gatekeeper and core of the brain function.
>
> And, in a child like this, the more the thalamus is injured, the greater the neurological disability, particularly in terms of cognition.

Dr. Crawford described the effects of a cortical injury by describing injury to the frontal lobe. She testified that an injury to the frontal lobe causes "executive function abnormalities, problems with behavior, attention, hyperactivity, lack of inhibition or inability to inhibit behavior."

Relevant here, Dr. Snead and Dr. Crawford formed their opinions on the basis of facts of record and drew reasonable inferences from the evidence. Dr. Snead and Dr. Crawford identified separate injuries to the thalamus and the cortex that occurred on October 9, 2007, and they explained the differing impairments from each type of injury. Their combined testimony provided a reasonable basis for the conclusion that it is

more likely than not that the conduct of defendants was a cause in fact of the injury to D'Marrius's thalamus during the labor-and-delivery period and of an additional injury to his cortex during the postnatal period. Therefore, a jury would not be left to speculate concerning the cause of D'Marrius's brain injuries during these periods. Under these circumstances, the trial court's decision to allow the causation testimony of Dr. Snead and Dr. Crawford was not outside the range of principled outcomes.[7]

Next, defendants argue that the trial court erred by denying their motions for summary disposition. We disagree. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Crego v Edward W Sparrow Hosp Ass'n*, 327 Mich App 525, 531; 937 NW2d 380 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). When deciding a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. See MCR 2.116(G)(5); *Joseph*, 491 Mich at 206. It must draw all reasonable inferences in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). "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 rea-

[7] It will be up to the jury to determine if and to what extent the alleged negligence during the labor-and-delivery and postnatal periods resulted in the damages claimed.

sonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Defendants' arguments on this issue are essentially the same as the previous issue. That is, their entitlement to summary disposition is based on their argument that the trial court should have excluded the testimony of Dr. Snead and Dr. Crawford with respect to causation. Having concluded that the trial court did not err by eventually concluding that that testimony was admissible, we likewise conclude that the trial court did not err by denying summary disposition.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs, no party having prevailed in full.

SAWYER, P.J., and BOONSTRA and RICK, JJ., concurred.

ELIZABETH A SILVERMAN, PC v KORN (ON REMAND)

Docket No. 350830. Submitted June 10, 2020, at Detroit. Decided October 14, 2021. Approved for publication November 18, 2021, at 9:20 a.m. Leave to appeal denied 509 Mich 933 (2022).

Elizabeth A. Silverman, PC (the law firm) sued Lawrence D. Korn in the Oakland Circuit Court for unpaid attorney fees. Korn counterclaimed against the law firm and the law firm's practitioner, Elizabeth A. Silverman, alleging legal malpractice. The trial court, Rae Lee Chabot, J., granted summary disposition for the law firm and Silverman on both the law firm's claims and Korn's counterclaims and awarded attorney fees to the law firm. Korn appealed in the Court of Appeals, and the Court, TUKEL, P.J., SERVITTO and BECKERING, JJ., vacated the award of attorney fees in an unpublished per curiam opinion on the ground that "actual attorney fees" do not arise when there is no attorney-client relationship. The law firm applied for leave to appeal in the Supreme Court, and in lieu of granting leave, the Supreme Court vacated the Court of Appeals' decision in Docket No. 350830, remanded the case to the Court of Appeals for reconsideration, and directed the Court of Appeals to consider whether the law firm's retainer agreement with Korn allowed the law firm to recover attorney fees. 507 Mich 892 (2022).

The Court of Appeals *held*:

Generally, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception. The Michigan Supreme Court has held that a self-represented lawyer may not collect attorney fees under the fee-shifting provision of the Open Meetings Act, MCL 15.261 *et seq*., because there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees. The Michigan Supreme Court has also held that a law firm may not collect case-evaluation sanctions covering its own member-lawyers' services. However, in the present case, the law firm claimed attorney fees that were incurred while litigating to collect outstanding fees pursuant to a provision in its retainer agreement with Korn, not pursuant to any statute, court rule, or recognized common-law exception to the general rule regarding

attorney fees. The contractual provision stipulated that if "the Attorney," i.e., the law firm, had to commence litigation against defendant to collect outstanding fees, defendant would be responsible for all fees, costs, and attorney fees for the Attorney's actual time expended. In *ABCS Troy LLC v Loancraft LLC*, 337 Mich App 125 (2021), the Court of Appeals held that contractual attorney fees need not be treated the same as statutory or rule-based attorney fees. The freedom to contract is a bedrock principle of American contract law, and contractual fee-shifting provisions are an exception to the American rule that a party must bear its own litigation expenses. This exception extends to a law firm that wishes to guarantee reimbursement for its own members' time devoted to litigating on behalf of the firm for outstanding fees. In this case, the language of the relevant contractual provision did not emulate language from statutes or court rules addressing actual or reasonable attorney fees, thus incorporating established principles applicable to fee-shifting, such as the need for a bona fide attorney-client relationship. Rather, the contract specified that defendant would be liable for the law firm's "actual time expended" if the law firm had to commence litigation to collect outstanding fees, with the understanding that the party claiming outstanding fees and the party expending time and energy to litigate the matter would be one and the same. Therefore, this provision of the contract did not describe a conventional attorney-client relationship apart from the relationship between the law firm and defendant, but rather, it envisioned the law firm pursuing litigation on its own behalf upon finding itself in conflict with defendant over outstanding fees. Because the law firm's entitlement to attorney fees was entirely a matter of contract, the trial court correctly recognized the application of the relevant contractual provision.

Affirmed.

TUKEL, P.J., did not participate.

CONTRACTS — LAW FIRMS — SELF-REPRESENTED LAWYERS — ATTORNEY FEES — FEE SHIFTING PROVISIONS.

Generally, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception; however, contractual attorney fees need not necessarily be treated in the same way as statutory or rule-based attorney fees; contractual fee-shifting provisions are an exception to the American rule that a party must bear its own litigation expenses, and this exception extends to law firms that wish to contractually

apportion responsibility for attorney fees to guarantee reimbursement for their own members' time spent litigating on behalf of the firm for outstanding fees.

Elizabeth A. Silverman, PC (by *Elizabeth A. Silverman*) for Elizabeth A. Silverman, PC.

Schwartz, PLLC (by *Michael Alan Schwartz*) for Lawrence D. Korn.

ON REMAND

Before: TUKEL, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM. In an August 13, 2020 opinion, this Court vacated the trial court's order awarding $78,653.95 in attorney fees to Elizabeth A. Silverman for representing herself and Elizabeth A. Silverman, PC (the firm) in this matter. This case now returns to this Court on remand from our Supreme Court for further proceedings. We now find that the award of attorney fees was appropriate.

This Court's earlier opinion in this case includes a detailed statement of facts. *Elizabeth A Silverman, PC v Korn*, unpublished per curiam opinion of the Court of Appeals, issued August 13, 2020 (Docket Nos. 349331 and 350830), pp 2-3. In brief, the firm sued defendant, Lawrence Korn, for unpaid fees resulting from its representation of defendant in his divorce proceedings, and defendant counterclaimed for legal malpractice against the firm and also claimed malpractice against the firm's practitioner, third-party defendant Elizabeth A. Silverman. The trial court granted the firm and Silverman summary disposition in connection with both the firm's contract claims and defendant's malpractice claims and awarded the firm $78,653.95 in fees, which reflected the amount that was due and

owing for Silverman's work in the underlying divorce case—$47,976.17—plus the costs and fees that had been incurred in this action on the basis of a provision in the retainer agreement. *Id*. at 3.

This Court vacated the award of attorney fees on the ground that "actual attorney fees" do not arise in the absence of an attorney-client relationship. *Id*. at 8-9. The firm sought leave to appeal in the Supreme Court, challenging this Court's decision only insofar as it vacated the award of attorney fees. The Supreme Court, in lieu of granting leave, vacated this Court's judgment in Docket No. 350830 and remanded that case to this Court for reconsideration. *Elizabeth A Silverman, PC v Korn*, 507 Mich 892 (2021). The Supreme Court elaborated as follows:

> Assuming without deciding that the Court of Appeals correctly determined that the term "attorney fee" for purposes of a contract should not be treated differently than it must for purposes of a statute or a court rule . . . , it still must be determined whether the parties' contract in this case otherwise entitled the plaintiff law firm to recover the 'attorney fees' incurred by its member attorney for representing the law firm in this litigation. Of note, the contract contains the following provision: "If Attorney has to commence litigation against [the defendant] to collect outstanding fees, [the defendant] shall be responsible for all fees, costs, and attorney fees *for Attorney's actual time expended*." (Emphasis added.) The term "Attorney" refers to the plaintiff law firm. [*Id*. at 892 (alterations in the original).]

The Supreme Court directed this Court on remand to "consider the import, if any, of the emphasized language and whether the plain language of this provision allows the plaintiff to recover the 'attorney fees' " in accord with its precedents. *Id*. at 892-893, citing *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497

Mich 265, 267; 870 NW2d 494 (2015), and *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 424; 733 NW2d 380 (2007).

"This Court reviews the trial court's decision to award attorney fees for an abuse of discretion." *Featherston v Steinhoff*, 226 Mich App 584, 592; 575 NW2d 6 (1997). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An error of law necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016). However, "questions involving the proper interpretation of a contract or the legal effect of a contractual clause are . . . reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

In our earlier opinion, this Court recited that, " '[a]s a general rule, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception.' " *Elizabeth A Silverman, PC*, unpub op at 8, quoting *Great Lakes Shores, Inc v Bartley*, 311 Mich App 252, 255; 874 NW2d 416 (2015). This Court further noted that in *Omdahl*, our Supreme Court held that a self-represented lawyer may not collect under the fee-shifting provision of the Open Meetings Act[1] because "attorney" indicates an agency relationship, and " 'there must be separate identities between the attorney and the client before the litigant may recover actual attorney fees.' " *Elizabeth A Silverman, PC*, unpub op at 8, quoting *Omdahl*, 478 Mich at 424. Additionally, we cited *Fraser Trebilcock Davis & Dunlap PC*, wherein our Supreme Court

[1] MCL 15.261 *et seq*.; MCL 15.271(4).

held that a law firm may not collect case-evaluation sanctions covering its own member-lawyers' services and "squarely rejected the firm's argument that the fact that the lawyers were representing their firm, rather than themselves, made a difference." *Elizabeth A Silverman, PC*, unpub op at 8-9, citing *Fraser Trebilcock Davis & Dunlap PC*, 497 Mich at 276-280, and MCR 2.403(O)(6)(b). In our prior opinion, this Court saw no reason to depart from the reasoning set forth in *Omdahl* and *Fraser Trebilcock Davis & Dunlap PC* and concluded that, because "the firm did not actually incur any attorney fees for Silverman's representation of it, . . . as a matter of law, the firm is not entitled to recover 'attorney fees' for Silverman's representation of herself or the firm[.]" *Elizabeth A Silverman, PC*, unpub op at 9. Both *Omdahl*'s and *Fraser Trebilcock Davis & Dunlap PC*'s references to "actual attorney fees" and "a reasonable attorney fee" were construed to apply in connection with only attorney-client relationships in which the attorney and the client were wholly separate persons or entities. *Fraser Trebilcock Davis & Dunlap PC*, 497 Mich at 276-280; *Omdahl*, 478 Mich at 424.

In contrast, in this case, the firm claimed attorney fees incurred while litigating to collect outstanding fees on the basis not of any statute, court rule, or recognized common-law exception, but rather on the basis of the following provision in its retainer agreement with defendant: " 'If Attorney has to commence litigation against client to collect outstanding fees, Client shall be responsible for all fees, costs, and attorney fees for Attorney's actual time expended.' " *Elizabeth A Silverman, PC*, unpub op at 8. Given the distinction between *Fraser Trebilcock Davis & Dunlap PC* and *Omdahl* and the instant matter, we find the more recent case of *ABCS Troy LLC v Loancraft LLC*,

337 Mich App 125; 972 NW2d 317 (2021), more instructive regarding the specific matter at hand.

In *ABCS Troy LLC*, this Court acknowledged the default "American rule," according to which attorney fees awarded pursuant to statute, court rule, or other recognized exception are not considered part of the amount in controversy, then also acknowledged that parties may "contract around" that default rule. *Id*. at 131-132. This Court characterized the issue before it as follows:

> If we hold . . . that an award of contractual attorney fees is to be treated no differently than any other instance of "fees, costs, and interest" incurred by a party, then the district court's award to defendant of contractual fees under the lease would not be subject to that court's subject-matter jurisdiction. In that instance, the fee award would not be subject to the $25,000 cap. Alternatively, if we hold . . . that an award of contractual fees is to be treated differently than other instances of "fees, costs, and interest" incurred by a party because it is an award on a claim for general damages, then the district court's fee award would be subject to that court's subject-matter jurisdiction and the $25,000 cap. [*Id*. at 133.]

This Court concluded that "contractual attorney fees are an element of general damages and are to be included in the amount-in-controversy calculation for purposes of a district court's jurisdiction." *Id*. at 140. We thus explicitly held that contractual attorney fees need not necessarily be treated the same as statutory or rule-based attorney fees. In doing so, this Court implicitly held that all facets of contractual attorney fees are functions of the contractual language engendering them, including how they are characterized. We find the reasoning in *ABCS Troy* not only binding under MCR 7.215(C)(2), but also sound.

The freedom of parties to contract as they see fit is a bedrock principle of American contract law, and the courts are to enforce the agreement as written "absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). And contractual fee-shifting provisions are an exception to the American rule that a party must bear its own litigation expenses. *ABCS Troy LLC*, 337 Mich App at 138. Consistently with these holdings, we find that the prerogative to contractually apportion responsibility for attorney fees extends to a law firm wishing to guarantee reimbursement for its own members' time actually devoted to litigating on behalf of the firm for outstanding fees.

The language of the contractual provision at issue does not merely emulate familiar statutory or court-rule language concerning actual or reasonable attorney fees, thus incorporating established principles applicable to fee-shifting situations, such as the need for a bona fide attorney-client relationship. Instead, by specifying that defendant would be liable "for Attorney's actual time expended" in the event that "Attorney has to commence litigation . . . to collect outstanding fees," with the understanding that "Attorney" means the law firm itself, that provision plainly indicates that the party claiming outstanding fees, and the party expending time and energy to litigate the matter, would be one and the same. In other words, the subject contract provision does not impliedly or otherwise envision a conventional attorney-client relationship apart from that between the firm and defendant, but rather envisions the attorney half of that existing relationship striking out on its own, self-sufficiently, upon finding itself in conflict with defendant over outstanding fees.

Because the firm's entitlement to recover attorney fees is entirely a matter of contract, and because the pertinent contract provision clearly envisions the firm acting as its own courtroom advocate in the event of litigation over outstanding fees, the trial court correctly recognized the applicability of that provision in this case. Indeed, the contractual fee-shifting provision left no discretion to the trial court ("Client shall be responsible for all fees, costs, and attorney fees for Attorney's actual time expended.").

We therefore affirm the trial court's award of $78,653.95 in attorney fees to Elizabeth A. Silverman for representing herself and Elizabeth A. Silverman, PC (the firm) in this matter.

SERVITTO and BECKERING, JJ., concurred.

TUKEL, P.J., did not participate.

SKWIERC v WHISNANT

Docket No. 355133. Submitted November 9, 2021, at Detroit. Decided November 23, 2021, at 9:00 a.m.

Jeffrey Skwierc brought an action in the Macomb Circuit Court against Wade A. Whisnant and Meemic Insurance Company, seeking payment for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., following an automobile crash. Skwierc, who had a no-fault automobile insurance policy through Meemic, sought treatment from a chiropractor for lower-back pain. Pursuant to the chiropractor's referral, Skwierc underwent an MRI. Skwierc had completed an assignment of rights to Michigan Head & Spine Institute, PC (MHSI), and MHSI intervened in this case. MHSI filed its own complaint seeking reimbursement from Meemic for services that MHSI had provided to Skwierc and for which Skwierc had assigned his rights to MHSI. MHSI moved for summary disposition against Meemic, arguing that there was no genuine dispute of material fact that it was entitled to compensation for the MRI. MSHI argued that it was entitled to reimbursement for the MRI under MCL 500.3107b(b) because an MRI was within the definition of chiropractic practice under MCL 333.16401 as of January 1, 2009. In response, Meemic argued that it had not wrongfully denied the claim because the MRI was outside the scope of chiropractic practice as of January 1, 2009, and was therefore not compensable under MCL 500.3107b(b). Meemic moved for partial summary disposition under MCR 2.116(I)(2) with respect to MHSI's charges for the MRI. The court, Julie Gatti, J., denied MHSI's motion for summary disposition and granted Meemic's motion, concluding that the MRI was outside the scope of chiropractic practice and that the chiropractor unlawfully engaged in the unauthorized practice of medicine when ordering the MRI. Accordingly, the court held that Meemic was not obligated to reimburse MHSI for the MRI under the no-fault act. MHSI moved for reconsideration, and the trial court denied the motion. MHSI sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

Generally, under the no-fault act, PIP benefits are payable for medical expenses that are lawfully rendered and reasonably necessary for an insured's care, recovery, and rehabilitation. However, as an exception to this general rule, the Legislature enacted 2009 PA 222, which added MCL 500.3107b(b) to the no-fault act. MCL 500.3107b(b) provides that reimbursement or coverage for expenses within PIP coverage under MCL 500.3107 is not required for a practice of chiropractic service rendered before July 2, 2021, unless that service was included in the definition of practice of chiropractic under MCL 333.16401 of the Public Health Code, MCL 333.1101 *et seq*., as of January 1, 2009. To determine whether a chiropractic service falls within the exception in MCL 500.3107b(b), a court must first consider whether the services at issue were lawfully rendered and reasonably necessary for the insured's accident-related care. If so, then the services are within PIP coverage under MCL 500.3107, and the next question is whether each of the services was a practice of chiropractic service for purposes of MCL 500.3107b(b). A service is a practice of chiropractic service for purposes of MCL 500.3107b(b) if that service falls under the *current definition* of "practice of chiropractic" provided by MCL 333.16401. However, even if a service is determined to be within the current definition of "practice of chiropractic," reimbursement is not required under the no-fault act unless the service was included in the definition of practice of chiropractic under MCL 333.16401 as of January 1, 2009. Thus, if a service falls within PIP coverage under MCL 500.3107 and is a practice of chiropractic service under MCL 500.3107b(b), reimbursement is only required under the no-fault act if the service was included in the definition of "practice of chiropractic" under MCL 333.16401 as that statute existed on January 1, 2009. In this case, the trial court did not begin with the threshold questions but instead skipped straight to the question whether the lumbar-spine MRI was within the scope of chiropractic practice on January 1, 2009. The trial court further concluded that the MRI ordered by the chiropractor in this case was unlawful based on the trial court's erroneous conclusion that the MRI was outside the scope of the practice of chiropractic as of January 1, 2009. The trial court erred as a matter of law by concluding that the MRI was unlawful because even if the trial court had correctly determined that the MRI was not within the practice of chiropractic as of January 1, 2009, such a determination does not necessarily render the MRI unlawful. The definition of "practice of chiropractic" provided by MCL 333.16401 on January 1, 2009, included diagnosis, including spinal analysis, to determine the existence of spinal subluxations or misalignments

that produce nerve interference, indicating the necessity for chiropractic care. In this case, the MRI at issue was of Skwierc's lumbar spine. The trial court ruled that the lumbar-spine MRI did not fall within the definition of "practice of chiropractic" provided by MCL 333.16401 on January 1, 2009, because "MRIs are tests that must be interpreted by doctors in determining a patient's condition and reaching a diagnosis; MRIs do not, in and of themselves, constitute a diagnosis." The trial court misunderstood the applicable limits on a chiropractor's diagnostic authority in this context; a chiropractor's diagnostic authority includes the authority to perform spinal analysis, but a chiropractor's authority is limited to the spinal area only. Because the MRI in this case was limited to a portion of the spine, its use was not outside the scope of chiropractic diagnostic authority. The definition of "practice of chiropractic" provided by MCL 333.16401 on January 1, 2009, also included the use of analytical instruments pursuant to MCL 333.16423 and the use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. As of January 1, 2009, the term "analytical instruments" was defined as "instruments which monitor the body's physiology for the purpose of determining subluxated or misaligned vertebrae or related bones and tissues." An MRI is a scanning technology that permits detailed, potentially three-dimensional viewing of soft tissue structures within the body—such as muscles, nerves, and connective tissue—without using ionizing radiation. Accordingly, when used for an analysis of the spine, an MRI falls within the scope of chiropractic practice as it was defined as of January 1, 2009. Furthermore, the trial court erred when it determined that MRIs were not permissible analytical instruments because the statute mentioned x-rays expressly without also mentioning MRIs. The trial court improperly read the statute to mean that x-rays were the only imaging technology that could be used by a chiropractor. The plain language of the statute indicates that x-ray machines *and* analytical instruments may be used. Because an MRI satisfies the definition of "analytical instrument[]," its appropriate use was within the practice of chiropractic as of January 1, 2009. The trial court erred by granting summary disposition in favor of Meemic because its ruling was premised on an incorrect interpretation and application of the relevant statutory language.

Reversed and remanded for further proceedings.

BOONSTRA, J., concurring, agreed with the majority's analysis and the result reached but wrote separately because he believed that neither the appeal nor the motion for summary disposition

properly framed the pertinent issues. The services at issue in this case were MRI services that had been performed not by a chiropractor but rather by an entity composed of medical doctors specializing in radiology. The relevant issue thus was whether those radiologic services performed by medical doctors (as opposed to any services performed by a chiropractor) were properly reimbursable under the no-fault act. The issue that should have been addressed was whether the provision of MRI services by medical doctors constituted "a practice of chiropractic service" or the "practice of chiropractic" as those terms are used in MCL 500.3107b and as the latter is defined in MCL 333.16401 as of January 1, 2009. If not, then this case would have been appropriately resolved on that basis alone. Judge BOONSTRA found it highly questionable to presume that the mere fact that an MRI is ordered by a chiropractor somehow transforms the performance of MRIs (by nonchiropractor medical doctors) into the performance of chiropractic services.

NO-FAULT ACT — PERSONAL PROTECTION INSURANCE — REIMBURSEMENT OR COVERAGE FOR EXPENSES — CHIROPRACTIC SERVICES.

MCL 500.3107b(b) of the no-fault act, MCL 500.3101 *et seq*., provides that reimbursement or coverage for expenses within personal protection insurance (PIP) coverage under MCL 500.3107 is not required for a practice of chiropractic service rendered before July 2, 2021, unless that service was included in the definition of practice of chiropractic under MCL 333.16401 of the Public Health Code, MCL 333.1101 *et seq*., as of January 1, 2009; to determine whether a chiropractic service falls within the exception in MCL 500.3107b(b), a court must first consider whether the services at issue were lawfully rendered and reasonably necessary for the insured's accident-related care; if so, then the services are within PIP coverage under MCL 500.3107, and the next question is whether each of the services was a practice of chiropractic service for purposes of MCL 500.3107b(b); a service is a practice of chiropractic service for purposes of MCL 500.3107b(b) if that service falls under the current definition of "practice of chiropractic" provided by MCL 333.16401; however, even if a service is determined to be within the current definition of "practice of chiropractic," reimbursement is not required under the no-fault act unless the service was included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009.

Miller & Tischler, PC (by *Michael Hervey*) for Michigan Head & Spine Institute, PC.

Garan Lucow Miller, PC (by *Daniel S. Saylor*) for Meemic Insurance Company.

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

BORRELLO, P.J. In this action involving claims under the no-fault act, MCL 500.3101 *et seq*., intervening plaintiff-appellant, Michigan Head & Spine Institute, PC (MHSI), appeals by leave granted[1] the order denying its motion for summary disposition and granting partial summary for defendant-appellee, Meemic Insurance Company (Meemic). For the reasons set forth in this opinion, we reverse and remand for further proceedings that are consistent with this opinion.

I. BACKGROUND

This case arises from an October 11, 2018 automobile crash involving plaintiff, Jeffrey Skwierc, and defendant, Wade Allen Whisnant. Skwierc had a no-fault automobile insurance policy issued by Meemic. After the crash, Skwierc complained of lower-back pain and sought treatment from a chiropractor, Marsh Kroener, D.C. Pursuant to Kroener's referral, Skwierc underwent magnetic resonance imaging (MRI) on his lumbar spine.[2] Skwierc completed an assignment of rights to MHSI.

---

[1] *Skwierc v Whisnant*, unpublished order of the Court of Appeals, entered December 9, 2020 (Docket No. 355133).

[2] The medical records indicate that these services were provided by Premier MRI, which MHSI alleged was one of its affiliated facilities. The exact nature of the relationship between these entities is unclear, but their affiliation appears undisputed. Thus, for purposes of this appeal, we treat them as a single entity.

Skwierc initiated this action by filing a three-count complaint against Whisnant and Meemic.[3] As to Meemic, Skwierc sought payment for personal protection insurance (PIP) benefits under the no-fault act and pursuant to his insurance policy with Meemic. MHSI intervened and filed its own complaint seeking reimbursement from Meemic for services that MHSI had provided to Skwierc and for which Skwierc had assigned his rights to MHSI.

MHSI subsequently moved for summary disposition against Meemic under MCR 2.116(C)(10), arguing that there was no genuine dispute of material fact that it was entitled to compensation for the MRI performed on Skwierc. MHSI alleged that Meemic had "wrongfully denied the claim on the basis that an MRI ordered by a chiropractor is not within the scope of chiropractic medicine and therefore not compensable under the No-Fault Act." MHSI argued that it was entitled to reimbursement for the MRI under MCL 500.3107b(b) because an MRI was within the definition of chiropractic practice under MCL 333.16401 as of January 1, 2009. MHSI maintained that an MRI was an analytical instrument, tool, or method used by chiropractors to diagnose spinal conditions and that Kroener had ordered the MRI in this case to diagnose the source of Skwierc's lower-back pain.

In response, Meemic argued that it had not wrongfully denied the claim because the MRI was outside the scope of chiropractic practice as of January 1, 2009, and was therefore not compensable under MCL 500.3107b(b). Accordingly, Meemic moved for partial summary disposition under MCR 2.116(I)(2) with respect to MHSI's charges for the MRI services.

---

[3] The claims against Whisnant are not at issue in this appeal.

The trial court denied MHSI's motion for summary disposition and granted Meemic's motion. The trial court determined that the MRI was outside the scope of chiropractic practice and concluded that Kroener unlawfully engaged in the unauthorized practice of medicine when ordering the MRI. Thus, the trial court held that Meemic was not obligated to reimburse MHSI for the MRI services under the no-fault act. The trial court denied MHSI's motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When the motion is brought under MCR 2.116(C)(10), the evidence submitted by the parties is viewed in the light most favorable to the nonmoving party, and the moving party is entitled to judgment as a matter of law if the "proffered evidence fails to establish a genuine issue regarding any material fact . . . ." *Id*. at 120. However, "[t]he trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

Michigan is a state where the parameters of chiropractic care have been set not by the profession but rather by politicians. Hence, "[b]ecause the scope of chiropractic is statutorily defined, the question whether a given activity . . . is within the authorized scope of chiropractic is primarily one of statutory

construction to be decided by the court." *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 67; 535 NW2d 529 (1995).

> This Court also reviews de novo questions of statutory interpretation. The first step when addressing a question of statutory interpretation is to review the language of the statute. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. Where the statutory language is clear and unambiguous, a court must apply it as written. [*Measel v Auto Club Group Ins Co*, 314 Mich App 320, 326; 886 NW2d 193 (2016) (quotation marks and citations omitted).]

III. ANALYSIS

The issue presented here is relatively simple. MHSI argues that the trial court erred by concluding that the MRI was outside the scope of chiropractic practice as of January 1, 2009, and by granting summary disposition in favor of Meemic. MHSI maintains that the MRI was within the statutorily defined scope of chiropractic practice as of January 1, 2009.

"Generally, under the no-fault act, personal protection insurance (PIP) benefits are payable for medical expenses that are lawfully rendered and reasonably necessary for an insured's care, recovery, and rehabilitation." *Measel*, 314 Mich App at 326.[4] However, "as an exception to this general rule, the Legislature enacted

[4] See also MCL 500.3107(1)(a) (providing generally that subject to certain exceptions and limitations, PIP benefits are payable for "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation"); MCL 500.3157(1) (generally permitting a "physician, hospital, clinic, or other person that lawfully

2009 PA 222, which added MCL 500.3107b(b) to the no-fault act." *Id*. at 326-327. MCL 500.3107b(b) currently provides:

> Reimbursement or coverage for expenses within personal protection insurance coverage under section 3107 is not required for any of the following:
>
> * * *
>
> (b) A practice of chiropractic service rendered before July 2, 2021, unless that service was included in the definition of practice of chiropractic under section 16401 of the public health code, 1978 PA 368, MCL 333.16401, as of January 1, 2009.

In *Measel*, 314 Mich App at 326-336, this Court set forth the framework for determining whether a chiropractic service falls within the exception in MCL 500.3107b(b) providing that reimbursement is not required under the no-fault act. Under *Measel*, a court must first consider whether the services at issue were lawfully rendered and reasonably necessary for the insured's accident-related care. *Measel*, 314 Mich App at 326, 328. If so, then the services are "within PIP coverage under MCL 500.3107," and the next question is "whether each of the services was '[a] practice of chiropractic service' for purposes of MCL 500.3107b(b)." *Measel*, 314 Mich App at 328 (alteration in original). In *Measel*, 314 Mich App at 329, this Court held that "a service is '[a] practice of chiropractic service' for purposes of MCL 500.3107b(b) if that service falls under the *current definition* of 'practice of chiropractic' provided by MCL 333.16401." (Alteration in original; emphasis added.)

---

renders treatment to an injured person for an accidental bodily injury covered by personal protection insurance" to "charge a reasonable amount for the treatment").

However, even if a service is determined to be within the current definition of "practice of chiropractic," reimbursement is not required under the no-fault act "unless the service 'was included in the definition of practice of chiropractic under [MCL 333.16401] . . . as of January 1, 2009.' " *Measel*, 314 Mich App at 335 (alteration and ellipsis in original), quoting MCL 500.3107b(b). Thus, "if a service falls within PIP coverage under MCL 500.3107 and is '[a] practice of chiropractic service' under MCL 500.3107b(b), reimbursement is only required under the no-fault act if the service was included in the definition of 'practice of chiropractic' under MCL 333.16401 as that statute existed on January 1, 2009." *Measel*, 314 Mich App at 328.

In this case, the trial court did not begin with the initial threshold questions but instead skipped straight to the question whether the lumbar-spine MRI was within the scope of chiropractic practice on January 1, 2009. The trial court resolved this question in the negative. The trial court further concluded that the MRI ordered by the chiropractor in this case was unlawful based on the trial court's erroneous conclusion that the MRI was outside the scope of the practice of chiropractic as of January 1, 2009.

The trial court erred as a matter of law by concluding that the MRI in this case was unlawful because even if the trial court had correctly determined that the MRI was not within the practice of chiropractic as of January 1, 2009, as that term was defined by MCL 333.16401, such a determination does not necessarily render the MRI unlawful. This Court has explained:

> To be sure, only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit. It does not follow,

> however, that an activity is not lawfully rendered, and therefore not subject to payment as a no-fault benefit, merely because it is excluded from the statutory scope of chiropractic. [*Hofmann*, 211 Mich App at 64-65 (citation omitted).]

This is because " '[t]he purpose of the licensing statute is not to prohibit the doing of those acts that are excluded from the definition of chiropractic, but to make it unlawful to do without a license those things that are within the definition.' " *Id*. at 65, quoting *Attorney General v Beno*, 422 Mich 293, 303; 373 NW2d 544 (1985). Accordingly, the trial court's ruling that the MRI was unlawful in this case was clearly erroneous. *Hofmann*, 211 Mich App at 64-65. It appears from the trial court's opinion and order that it primarily relied on its conclusion that the MRI was unlawful to justify granting summary disposition in Meemic's favor. We therefore conclude that the trial court erred in its summary-disposition ruling.

Nonetheless, the trial court also concluded that the MRI was not within the practice of chiropractic as of January 1, 2009, and conceivably could have granted summary disposition on that basis alone. See MCL 500.3107b(b). As this Court stated in *Measel*, 314 Mich App at 335-336:

> The definition of "practice of chiropractic" provided by MCL 333.16401 on January 1, 2009, stated the following:
>
> > (b) "Practice of chiropractic" means that discipline within the healing arts which deals with the human nervous system and its relationship to the spinal column and its interrelationship with other body systems. Practice of chiropractic includes the following:
> >
> > (*i*) Diagnosis, including spinal analysis, to determine the existence of spinal subluxations or mis-

> alignments that produce nerve interference, indicating the necessity for chiropractic care.
>
> (*ii*) A chiropractic adjustment of spinal subluxations or misalignments and related bones and tissues for the establishment of neural integrity utilizing the inherent recuperative powers of the body for restoration and maintenance of health.
>
> (*iii*) The use of analytical instruments, nutritional advice, rehabilitative exercise and adjustment apparatus regulated by rules promulgated by the board pursuant to section 16423, and the use of x-ray machines in the examination of patients for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine. The practice of chiropractic does not include the performance of incisive surgical procedures, the performance of an invasive procedure requiring instrumentation, or the dispensing or prescribing of drugs or medicine. [Quoting MCL 333.16401(1), as amended by 2002 PA 734.]

Resolution of the initial scope question requires us to consider this statutory definition of "practice of chiropractic" and "determine whether the use of a given instrument is allowed under that definition." *Hofmann*, 211 Mich App at 70.

Under Subparagraph (*i*) of the statutory provision, the practice of chiropractic includes "[d]iagnosis, including spinal analysis, to determine the existence of spinal subluxations or misalignments that produce nerve interference, indicating the necessity for chiropractic care." A "chiropractic 'diagnosis' is limited to the determination of existing spinal subluxations or misalignments, which can only be located at their source, i.e., the spine." *Hofmann*, 211 Mich App at 75.

In this case, the MRI at issue was of Skwierc's lumbar spine. The trial court ruled that the lumbar-spine MRI did not fall within Subparagraph (*i*) because

"MRIs are tests that must be interpreted by doctors in determining a patient's condition and reaching a diagnosis; MRIs do not, in and of themselves, constitute a diagnosis."

The trial court appears to have misunderstood the applicable limits on a chiropractor's diagnostic authority in this context, which is essentially defined by the distinction between spinal and nonspinal areas. *Hofmann*, 211 Mich App at 85-87. "[A] chiropractor's diagnostic authority includes the authority to perform 'spinal analysis,' which encompasses 'monitor[ing] the body's physiology for the purpose of determining subluxated or misaligned vertebrae or related bones and tissues,' " but "a chiropractor's authority to analyze and monitor the body's physiology necessarily is limited to the spinal area only . . . ." *Id*. at 86-87 (second alteration in original; citations omitted). Because the MRI in this case was limited to a portion of the spine, its use was not outside the scope of chiropractic diagnostic authority. *Id*. The trial court erred by concluding otherwise.

Subparagraph (*iii*) of the statute additionally provides that the practice of chiropractic includes the "use of analytical instruments . . . regulated by rules promulgated by the board pursuant to section 16423 . . . for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine." As of January 1, 2009, the term "analytical instruments" was defined by rule to mean "instruments which monitor the body's physiology for the purpose of determining subluxated or misaligned vertebrae or related bones and tissues." 2006 Annual Admin Code Supp, R 338.12001(b); see also *Hofmann*, 211 Mich App at 86 (citing an earlier version of this rule that contained the same language). This Court has previously described the nature of an MRI as follows:

> Magnetic resonance imaging is a scanning technology that permits detailed, potentially three-dimensional viewing of soft tissue structures within the body—such as muscles, nerves, and connective tissue—without using ionizing radiation; as distinct from x-rays or CT scans, which do subject the body to ionizing radiation and are much less useful for visualizing soft tissue. [*Chouman v Home Owners Ins Co*, 293 Mich App 434, 442 n 4; 810 NW2d 88 (2011).][5]

Accordingly, when used for an analysis of the spine, it is clear that an MRI falls within the scope of chiropractic practice as it was defined as of January 1, 2009. See *Hofmann*, 211 Mich App at 87-88 (holding that certain dermathermography instruments that "monitor the body's physiology by measuring a person's skin temperature at each spinal level for the purpose of determining subluxated or misaligned vertebrae" were therefore limited to spinal analysis and within the scope of Subparagraphs (*i*) and (*iii*)).

Nonetheless, the trial court determined that MRIs were not permissible analytical instruments because the statute mentioned x-rays expressly without also mentioning MRIs even though the Legislature could have included such a reference to MRIs had it decided to do so. The statute provides that the practice of chiropractic includes the "use of analytical instruments . . . *and* the use of x-ray machines," MCL 333.16401(1)(b)(*iii*), as amended by 2002 PA 734 (emphasis added), thereby indicating that x-ray machines may be used *in addition to* the broader category of "analytical instruments." The trial court improperly read the statute to mean that x-rays were the only imaging technology that could be used by a chiropractor. Contrary to this reading, we conclude that there is

---

[5] We further note that the medical records of the MRI in the instant case also document findings related to Skwierc's lumbar vertebrae.

nothing in the statute prohibiting the use of an MRI or indicating that an x-ray is the only permissible form of imaging technology; the Legislature's decision not to expressly refer to MRIs in the statute when an MRI is clearly within the term "analytical instrument" is irrelevant. Rather than discern legislative intent by confining itself to the plain language of the statute, the trial court erred by attempting to divine legislative intent. We have made clear in the past that the plain language of the statute is the best indicator of legislative intent. *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009). "When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted." *Id*. Here, the plain language of the statute indicates that x-ray machines *and* analytical instruments may be used. Because an MRI satisfies the definition of "analytical instrument[]," its appropriate use is within the practice of chiropractic as of January 1, 2009. The trial court erred by failing to apply the unambiguous statutory language as written. *Measel*, 314 Mich App at 326.

Meemic argues on appeal that MRIs are used for a "variety" of other purposes and can provide detailed imaging of more than the spine alone, including soft-tissue structures. However, the statutory definition of "practice of chiropractic" expressly includes "the human nervous system and its relationship to the spinal column and its interrelationship with other body systems." MCL 333.16401(1)(b), as amended by 2002 PA 734. Moreover, to the extent that an MRI "might reveal a condition that is not amenable to chiropractic treatment does not remove it from the purview of § 16401(1)(b)(iii)." *Hofmann*, 211 Mich App at 72. Thus, Meemic's argument does not change our analysis.

The trial court erred by granting summary disposition in favor of Meemic because its ruling was premised on an incorrect interpretation and application of the relevant statutory language. We therefore reverse the trial court's ruling and remand for further proceedings that are consistent with this opinion.[6]

Reversed and remanded for further proceedings that are consistent with this opinion. We do not retain jurisdiction. Plaintiff, having prevailed, is entitled to costs. MCR 7.219(A).

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

BOONSTRA, J. (*concurring*). I generally agree with the majority's analysis, including its statutory interpretation, and with the result it reaches. I write separately because I believe that neither this appeal nor the motion for summary disposition that is the subject of this appeal properly framed the pertinent issues. Unfortunately, important issues were not raised in the summary-disposition motion or, therefore, in the application for leave to appeal, and this Court's order granting the application unsurprisingly limited the appeal to the issues that were raised in the application and supporting brief.[1] This Court not having been presented with these issues, the majority opinion does not address them; yet I believe they should have been addressed at some point in the proceedings below.

---

[6] In light of our conclusion, we need not address MHSI's additional alternative arguments for reversal because they are moot. "An issue is moot when a judgment, if entered, cannot have any practical legal effect on the existing controversy." *Auto-Owners Ins Co v Seils*, 310 Mich App 132, 163 n 8; 871 NW2d 530 (2015).

[1] *Skwierc v Whisnant*, unpublished order of the Court of Appeals, entered December 9, 2020 (Docket No. 355133).

My concerns derive from the fact that the services at issue in this case (unlike in the pertinent cases cited by the parties) are MRI services that were performed not by a chiropractor, but rather by an entity composed of medical doctors specializing in radiology. The relevant issue thus becomes whether those radiologic services performed by medical doctors (as opposed to any services performed by a chiropractor) are properly reimbursable under the no-fault act. In my judgment, the proper issue first to be addressed is therefore whether the provision of MRI services by medical doctors constitutes "[a] practice of chiropractic service" or the "practice of chiropractic" as those terms are used in MCL 500.3107b and as the latter is defined in MCL 333.16401 (as of January 1, 2009). If not, then this case would appropriately be resolved on that basis alone. As the majority notes, MCL 500.3107b(b) currently provides:

> Reimbursement or coverage for expenses within personal protection insurance coverage under section 3107 is not required for any of the following:
>
> * * *
>
> (b) A practice of chiropractic service rendered before July 2, 2021, unless that service was included in the definition of practice of chiropractic under section 16401 of the public health code, 1978 PA 368, MCL 333.16401, as of January 1, 2009.

It seems clear to me that medical doctors who perform MRIs are not, merely by doing so, performing chiropractic services. And I find it highly questionable to presume that the mere fact that an MRI is ordered by a chiropractor somehow transforms the performance of MRIs (by nonchiropractor medical doctors) into the performance of chiropractic services. In any event, that

is the question that first should have been asked and answered in this case.[2] Instead, the summary-disposition motion—and, consequently, this appeal—skipped over that threshold question and focused both the trial court and this Court on whether a chiropractor may properly order an MRI.[3] While I agree with the majority's analysis of that issue, I do not believe that it is properly the question that we should be answering at this juncture.

---

[2] Additional questions that might properly have been raised include (1) whether medical doctors performing MRIs have a duty to police whether referring providers are acting within the scope of their practice and (2) whether medical doctors who are denied reimbursement under MCL 500.3107b(b) are, in some sense, akin to "innocent third parties," see *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), and what the ramifications of such a status would be in this context.

[3] I note that no party contends (nor is it at issue on appeal) that the *performance* of an MRI (as opposed to the *ordering* of one) falls within the definition of "practice of chiropractic" under MCL 333.16401, and our decision in this case therefore could not properly be construed as reaching such a conclusion.

PEOPLE v BROWN

Docket No. 352001. Submitted May 5, 2021, at Detroit. Decided November 23, 2021, at 9:05 a.m.

Defendant was convicted following a jury trial in the Macomb Circuit Court of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm). He was acquitted of second-degree murder and voluntary manslaughter under a theory of self-defense. Defendant's brother was involved in an altercation outside a barber shop, and he asked defendant to join him in returning to the barber shop to fight. Defendant agreed to accompany his brother and other individuals to the barber shop. Defendant had a firearm in his possession when he joined the group. When they arrived at the barber shop, the group was confronted by Byron Johnson, who came out of the shop brandishing a firearm. Johnson pointed his gun at defendant but was distracted by someone else and turned away. Defendant then shot Johnson, killing him. Defendant was initially charged with first-degree murder, felon-in-possession, and felony-firearm (second offense). The jury found defendant guilty of the two firearms offenses but could not reach a verdict on the murder charge, and the court declared a mistrial. The prosecution filed an amended felony information charging defendant with second-degree murder, and a second trial was held on this charge and the lesser included offense of voluntary manslaughter. Defendant relied on a theory of self-defense and was acquitted of second-degree murder and manslaughter. At sentencing, defense counsel argued that the court could not consider the facts and circumstances surrounding Johnson's death because this was "acquitted conduct" under the Michigan Supreme Court's opinion in *People v Beck*, 504 Mich 605 (2019). The trial court, Michael E. Servitto, J., concluded that it was permitted to consider the circumstances leading up to the killing and sentenced defendant, above the minimum sentence guidelines, to 84 to 240 months in prison for the felon-in-possession conviction, to be served consecutively with the statutory minimum sentence of 60 months in prison for the felony-firearm conviction. Defendant appealed.

The Court of Appeals *held*:

1. The Supreme Court held in *Beck* that the use of "acquitted conduct" at sentencing violates a defendant's right to due process. When a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent, and this presumption extends to sentencing. At sentencing, the presumption shields the defendant from being held criminally responsible for conduct of which the jury has acquitted the defendant. However, whether certain facts and circumstances are off-limits at sentencing as "acquitted conduct" is not a straightforward determination. Although *Beck* defined "acquitted conduct" as conduct that has been formally charged and specifically adjudicated not guilty by a jury, the problem with this definition is that, except in rare circumstances, the jury does not make an affirmative finding of innocence when it acquits a defendant of a particular charge. That is, when a jury acquits a defendant of a particular charge, the jury does not conclude that the defendant is factually innocent of that charge, but rather that the prosecution failed to prove one or more of the elements beyond a reasonable doubt. Therefore, acquitted conduct is a legal term of art referring to evidentiary absence or negation. Adopting a categorical approach to identifying acquitted conduct—in which any evidence that related to any element of the crime of which the defendant was acquitted would be discarded at sentencing—could lead to absurd results. For instance, under the categorical approach, any fact or circumstance related to any element of the acquitted crime would be off-limits at sentencing even if the same fact or circumstance was also related to the convicted crime. A different approach to identifying the facts and circumstances prohibited from consideration at sentencing would focus on what the parties disputed at trial, rather than upon all conceivable grounds upon which a jury could have theoretically acquitted the defendant. Under this approach, the court could also consider facts and circumstances that were not disputed at trial if those facts and circumstances were otherwise consistent with the jury's acquittal on a particular charge. This "rational jury" approach is consistent with *Beck*, given *Beck*'s holding that a trial court is prohibited from relying at sentencing on evidence that a defendant engaged in *conduct* of which the defendant was acquitted. Under this approach, if a fact or circumstance is relevant to both the acquitted charge and the convicted charge, then the trial court may consider that fact or circumstance when sentencing on the convicted charge. This approach creates a workable standard

that trial courts can use when sentencing a defendant who was convicted of one charge but also acquitted of a related charge.

2. In this case, defendant's sentence for the felon-in-possession conviction had to be vacated under the rational-jury approach. The trial court did not err by considering certain facts and circumstances surrounding defendant's conduct underlying his felon-in-possession conviction. For instance, the court did not err by noting that defendant should have been aware of the increased risk of serious violence associated with bringing a firearm to a fight. However, the court erred by holding defendant responsible for Johnson's death. The jury acquitted defendant of second-degree murder and voluntary manslaughter on a theory of self-defense, meaning that defendant was not criminally responsible for Johnson's death. Therefore, the court could not consider the actual shooting and death when sentencing defendant on the felon-in-possession conviction. In sum, in sentencing defendant, the court in this case could consider all the relevant facts and circumstances leading up to the point when Johnson brandished his weapon. Defendant's conduct after that point and Johnson's resulting death fell under *Beck*'s concept of acquitted conduct and were off-limits for purposes of sentencing.

Felon-in-possession sentence vacated and case remanded for resentencing on that conviction.

SENTENCING — ACQUITTED CONDUCT — RATIONAL-JURY APPROACH.

Under *People v Beck*, 504 Mich 605 (2019), the use of "acquitted conduct" at sentencing violates a defendant's right to due process; a court should not use a categorical approach focused on the elements of the crime to identify acquitted conduct; instead, a court may use the rational-jury approach to identify acquitted conduct; that approach focuses on the grounds that the parties put in dispute at trial as well as those facts and circumstances that are consistent with the jury's acquittal on a particular charge; if a specific fact or circumstance is relevant to both the acquitted charge and the convicted charge—i.e., if there was an overlap of relevant conduct—then the trial court may consider that fact or circumstance when sentencing on the convicted charge.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jean Cloud*, Prosecuting Attorney, and *Joshua D. Abbott*, Chief Appellate Attorney, for the people.

Mark G. Butler for defendant.

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

SWARTZLE, J. Defendant shot and killed a man. Defendant brought a firearm to the scene knowing that violence was a distinct, even likely risk, and he brought the firearm to the scene illegally, as he was a felon on probation at the time. Defendant even admitted using deadly force with the intent to injure the man. On these facts, a jury convicted defendant of being a felon in possession and felony firearm. A second jury, however, acquitted defendant of second-degree murder and voluntary manslaughter based on a self-defense theory. At sentencing, the trial court imposed the mandatory minimum of five years on the felony-firearm conviction (second offense), and, on the felon-in-possession conviction, the trial court departed upward from the guidelines range and sentenced defendant to 84 to 240 months of imprisonment. The question on appeal is this—under our Supreme Court's decision in *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019), what factual circumstances involving the shooting could the trial court consider, if any, when sentencing defendant on the felon-in-possession conviction?

Had the prosecutor decided not to retry defendant on the murder charge, defendant's sentence might well have survived appeal. The circumstances surrounding the shooting would not have been shielded under *Beck*, and, given this, the trial court could have taken into account the undisputed observation that the decedent would still have been alive had defendant not violated the law and taken a firearm to the scene, especially knowing the substantial risk of serious violence. And

yet, because defendant was charged with and acquitted on a self-defense theory, the shooting and resulting death fell under *Beck*'s conception of "acquitted conduct" and, therefore, should have been off-limits at sentencing. Accordingly, as explained in more detail below, our Supreme Court's precedent requires that we vacate defendant's felon-in-possession sentence and remand for resentencing.

I. BACKGROUND

This case concerns a shooting outside a barber shop in Warren, Michigan. Earlier on the day of the shooting, Raymond Jones and Lawrence Lewis went to the barber shop, but, because the line was too long, they decided to leave. On the way back to Lewis's vehicle, a group of individuals called out to Jones, asking if he had "a problem" with someone they knew. The group of individuals wanted to fight, and when Jones indicated a willingness to do so, the individuals surrounded him. At some point, Jones got into Lewis's vehicle. Lewis saw one of the individuals "flash[] a bag" at him that he believed may have contained a firearm; Lewis then drove away.

As Lewis drove away, he called several friends and family members, including his brother—defendant—to help him fight the group of individuals from the barber shop. Lewis and Jones subsequently picked up four other individuals, including defendant. Defendant had a firearm in his possession when he joined the group.

The group drove back to the barber shop. During the drive, it was mentioned that there had been a fight between Jones and some other individuals and that one of the individuals may have "flashed" a firearm. When they arrived at the parking lot behind the barber

shop, the group exited the vehicle, and there was evidence that defendant chambered a round in his firearm.

As they approached the front of the barber shop, Jones yelled to the individuals inside. Immediately, Byron Johnson came out brandishing a firearm. Johnson waved the firearm in the air, pointed it at the group, and said, "[W]hat's good, who want it?" Johnson pushed several people, and then he turned and pointed his firearm at defendant. Johnson became distracted by another person, and as he turned away, defendant shot him in the head. Johnson died almost instantly.

Defendant had two criminal jury trials related to the shooting. He was originally charged with first-degree murder, MCL 750.316; felon-in-possession, MCL 750.224f; and felony-firearm (second offense), MCL 750.227b. The jury in the first trial found defendant guilty of the two firearm charges. The jury, however, could not reach a verdict on the first-degree murder charge, which resulted in the trial court declaring a mistrial.

The prosecutor subsequently filed an amended felony information charging defendant with second-degree murder, MCL 750.317. A second trial was held on the charge of second-degree murder and the lesser included offense of voluntary manslaughter, MCL 750.321. Defendant relied on a self-defense theory under the Self-Defense Act, MCL 780.971 *et seq*.

During closing, defense counsel told the jury that defendant had been asked to go to the barber shop because he used to be a boxer and therefore knew how to fight. Counsel further explained: "At no point in this trial did I ever say that Curtis Brown did not shoot Byron Johnson. I wouldn't. It wouldn't be true. He did. At no point in this trial did I ever say that he didn't

intend to hurt Byron Johnson when he shot him. I wouldn't. It's not true. He did. He did it because he thought he was going to get shot." The jury in the second trial acquitted defendant of second-degree murder and voluntary manslaughter.

At sentencing on defendant's firearm convictions, the parties agreed that the conviction for felony-firearm (second offense) required a sentence of five years of imprisonment, to be served consecutively to defendant's sentence on the felon-in-possession conviction. On the latter conviction, the parties further agreed that the advisory sentencing guidelines range was 9 to 46 months of imprisonment. The prosecutor, however, asked for an upward departure on the felon-in-possession conviction, arguing that the trial court should consider the facts and circumstances surrounding Johnson's death.

In response, defense counsel argued that the trial court should not impose an upward departure. Counsel relied primarily on our Supreme Court's decision in *Beck*, 504 Mich 605, and argued that the trial court could not consider any "acquitted conduct." During the colloquy, the trial court asked defense counsel whether it could consider circumstances that were common to the felon-in-possession conviction and the murder acquittal: "[H]ow is this Court going to parse what is acquitted conduct and what is convicted conduct? How can I do that when they overlap?" Defense counsel answered that the trial court could not consider any of the circumstances involving defendant's role in Johnson's death.

The trial court concluded that defense counsel's position was too broad. The trial court believed that it could "certainly . . . consider the circumstances that led up to the taking of a life" and further explained:

> I'm not considering the fact . . . that he was acquitted . . . of this offense and . . . that he should be guilty because he plainly should not be guilty of this offense. It was a reasoned decision by the members of the jury to acquit [defendant]. But had [defendant] not gone to that scene, the fact is Mr. Johnson would still be alive today, and [defendant] had no reason to go to that scene to incite any violence whatsoever, and yet he still proceeded to go to the barber shop armed with a weapon despite being on parole and violating his parole by having a weapon, . . . and it's not as if he didn't just go to the barber shop without knowing that the use of that weapon might occur, he cocked that weapon in the parking lot. He knew very well that his weapon could be used and for good reason, a weapon was displayed earlier. Now, there was testimony that [defendant] never knew . . . that there was a weapon that was displayed, and that may be the case, but the fact is . . . that—as he was approaching the barber shop . . . he cocked that weapon. The Court can consider, as the prosecutor pointed out, this isn't a search warrant being conducted by a parole officer and finding a gun in the house with a parolee that was a felon, this is nothing akin to that. The fact is that he was going to look for at least a fight while armed with a firearm, and he had . . . a firearm of which he had no business, no lawful right to be possessing.

Additionally, the trial court noted defendant's criminal history, stating defendant spent "some of . . . his juvenile life" and "most of his adult life" committing crimes and either being on supervised release or incarcerated, and "despite being a victim of gun violence," he had also "perpetrat[ed] gun violence." The trial court concluded:

> This Court's sentence has to be proportional, it has to be reasonable, and the Court does not believe that the guidelines really encompass . . . the entire picture of [defendant's] life and what he's done. Certainly, as you had indicated that he's done . . . some things perhaps on parole that are commendable . . . in taking care of him and his

> family, but that doesn't absolve him of his history and it doesn't absolve him of the fact that had he not chose . . . to bring this weapon, Mr. Johnson would still be alive. And again, and I can't emphasize it enough, he was acquitted of murder. He doesn't deserve to be sentenced as a murderer, and the Court is not finding in any way, shape or form that is the case, but the Court has to put this crime in context and fashion an appropriate sentence.

The trial court sentenced defendant to 84 to 240 months of imprisonment for his felon-in-possession conviction, to be served consecutively to 60 months of imprisonment for his felony-firearm conviction.

This appeal followed.

II. ANALYSIS

On appeal, defendant challenges only his sentence for his felon-in-possession conviction. He argues that the trial court considered "acquitted conduct" in violation of his constitutional right to due process as announced in *Beck*. We review constitutional claims under a de novo standard. *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). If the claim involves factual findings by the trial court, then we review those findings under a clear-error standard. *People v Schrauben*, 314 Mich App 181, 196; 886 NW2d 173 (2016).

A. *BECK* AND ITS PROGENY

In *Beck*, our Supreme Court held that the use of "acquitted conduct" at sentencing violates a defendant's constitutional right to due process. *Beck*, 504 Mich at 629. In reaching this determination, the *Beck* majority distinguished between "uncharged conduct" on the one hand and "acquitted conduct" on the other: "When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment

prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard." *Id*. at 626. But "when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent." *Id*. The *Beck* Court extended this presumption of innocence to sentencing, where the presumption shields the defendant from being held criminally responsible for the conduct of which the jury acquitted the defendant. *Id*. Prior to trial, the presumption of innocence is a rebuttable one; at sentencing, the presumption is irrebuttable—the trial court cannot sentence the defendant based on any fact or circumstance that would pierce the acquitted-conduct shield. See *id*. at 626-627, 629. This makes the prohibition on the use of acquitted conduct at sentencing somewhat akin to the prohibition on being placed in double jeopardy in a subsequent trial. Cf. *People v Nutt*, 469 Mich 565, 574-575; 677 NW2d 1 (2004).

Although a minority position, some other states have similarly restricted or prohibited the use of acquitted conduct at sentencing. See, e.g., *State v Melvin*, 248 NJ 321, 352; 258 A3d 1075 (2021); *State v Koch*, 107 Hawaii 215, 225; 112 P3d 69 (2005). And when he was on the D.C. Circuit Court, now-Justice Kavanaugh wrote in dissent on this issue: "[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a *matter of appearance* and as a *matter of fairness* . . . ." *United States v Brown*, 892 F3d 385, 415 (DC Cir, 2018) (Kavanaugh, J., dissenting) (emphasis added). From the perspective of fundamental fairness, this minority position concludes that a jury's verdict of not guilty on one charge restricts what the trial court can consider at sentencing on a

jury's verdict of guilty on another charge. Under *Beck*, this position is now the law of this state.

While saying that a trial court cannot use "acquitted conduct" at sentencing seems straightforward, identifying the specific facts and circumstances that are off-limits can sometimes be anything but. The *Beck* majority described "acquitted conduct" as conduct that "has been formally charged and specifically adjudicated [not guilty] by a jury." *Beck*, 504 Mich at 620. But Justice CLEMENT identified several epistemological and practical problems with this definition in her dissent in *Beck*, *id*. at 659-660, 668-669 (CLEMENT, J., dissenting), and these problems were further explored by one of the undersigned in a separate opinion concurring dubitante in *People v Roberts (On Remand)*, 331 Mich App 680, 692-697; 954 NW2d 221 (2020) (SWARTZLE, J., concurring dubitante), rev'd 506 Mich 938 (2020). It has not gone unnoticed that courts have subsequently struggled with the implementation of *Beck*'s holding. See *People v Stokes*, 507 Mich 939, 940 (2021) (MCCORMACK, C.J., concurring) ("Cases such as this one and *Roberts* make plain that the Court of Appeals is struggling with the boundaries of our holding in *Beck*.").

The basic quandary flows from the point that, except in rare circumstances not relevant here, the jury does not make an affirmative finding of innocence when it acquits a defendant of a particular charge. As the United States Supreme Court recognized in *United States v Watts*, 519 US 148, 155; 117 S Ct 633; 136 L Ed 2d 554 (1997): "An acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences . . . ." (Cleaned up.) In

other words, when a jury acquits a defendant on a particular charge, the jury does not conclude that the defendant is factually innocent of that charge; rather, it simply finds that the prosecutor failed to prove one or more of the elements beyond a reasonable doubt. Some courts have taken issue with this observation, see, e.g., *State v Paden-Battle*, 464 NJ Super 125, 147; 234 A3d 332 (2020), but, with due respect, simply as a matter of logic applied to an evidentiary burden, the observation is unassailable.

Thus, a jury's acquittal is not an affirmative factual finding that something did or did not actually occur. Rather, it is a determination that the prosecutor failed to prove the hypothesis of guilt. "Acquitted conduct," therefore, is a concept based not on the existence of sufficient evidence, but rather one based on the absence of such evidence; it is a concept borne not of logical deduction nor evidentiary inference, but rather it is a legal term of art based on evidentiary absence or negation.

One straightforward way of dealing with the epistemological and practical problems associated with identifying "acquitted conduct" would be to adopt a categorical approach based on the elements of the crime. Under this standard, *any evidence* that relates to *any element* of the crime of which the defendant was acquitted would have to be discarded at sentencing. This is a rather mechanical exercise that, because of its sweeping nature, has the virtue of being relatively easy to apply. Some support for this approach can, in fact, be found in *Beck*. At the beginning of its opinion, for example, the *Beck* majority frames the question before it as follows: "[W]hether a sentencing judge can sentence a defendant for a *crime* of which the defendant was acquitted." *Beck*, 504 Mich at 608 (opinion of

the Court) (emphasis added). The *Beck* majority repeats this focus on the "*crime* of which the defendant was acquitted" in several places. *Id*. (emphasis added); see also *id*. at 609. One could infer from these references that any fact or circumstance related to any element of the crime must be jettisoned at sentencing.

But a categorical approach would lead to absurd results in some situations, as explained elsewhere. See *id*. at 659-660, 668-669 (CLEMENT, J., dissenting); *Roberts*, 331 Mich App at 692-697 (SWARTZLE, J., concurring dubitante). In fact, the trial court in this case raised a related concern when it wondered aloud about circumstances involving the acquitted charge that overlapped with circumstances involving the convicted charge. If the categorical approach were to be adopted, then this would mean that any fact or circumstance related to any element of the acquitted crime would be off-limits at sentencing, even if the same fact or circumstance was also related to the convicted crime. The trial court appropriately rejected this approach.

A different way of identifying the facts and circumstances that are prohibited at sentencing centers on what the parties actually disputed at trial. This approach moves away from prohibiting any and all facts and circumstances related to any element of the crime and instead focuses on the key facts and circumstances that the parties argued about during the trial. This approach is similar to the "rational jury" standard used in the double-jeopardy context, which requires examining the record to determine the ground or grounds upon which a rational jury could have acquitted the defendant. *Roberts*, 331 Mich App at 696-697 (SWARTZLE, J., concurring dubitante), citing *Ashe v Swenson*, 397 US 436, 444; 90 S Ct 1189; 25 L Ed 2d 469 (1970). Rather than focus on all of the conceivable

grounds upon which a jury could have theoretically acquitted the defendant—even those grounds, for example, that were conceded by the defense or otherwise uncontested by the parties—the focus would be on the grounds that the parties actually put in dispute at trial. "The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Id*. at 697 (quotation marks and citation omitted).

This rational-jury approach appears to be consistent with *Beck*. Although the *Beck* majority did make broad reference to "the crime" on several occasions, a fair reading of its opinion suggests that the majority had a narrower understanding of its holding. As it explained near the end of its analysis, the majority held that a trial court is prohibited from relying at sentencing on "evidence that a defendant engaged in conduct of which he was acquitted," i.e., "acquitted conduct." *Beck*, 504 Mich at 629 (opinion of the Court). This narrower reading is further confirmed by considering the Supreme Court's recent remand order in *Roberts*. In that case, the prosecutor and defense counsel argued about whether the defendant had passed a firearm to another individual who then shot into a crowd on a city street. The jury acquitted the defendant of aiding and abetting an assault with intent to murder, but convicted him of being a felon in possession of a firearm. In its brief order,[1] our Supreme Court made clear that it was focused on what the parties actually

[1] Peremptory orders from our Supreme Court are precedentially binding "to the extent they can theoretically be understood, even if doing so requires one to seek out other opinions." See *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018); see also *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

put at issue before the jury when it remanded for resentencing. See *Roberts*, 506 Mich at 938 ("As argued by both the prosecution and defense at trial . . . .").

While the distinction drawn between these two approaches might be one without a difference in the mine-run of cases, there will be cases where the distinction makes a difference. Under the categorical approach, any fact or circumstance related to any element—even an element not put in dispute by the parties—would be off-limits at sentencing. In contrast, under the rational-jury approach, the sentencing court could consider facts and circumstances that were not, in a practical sense, put in dispute at trial, as long as those facts and circumstances were otherwise consistent with the jury's acquittal on a particular charge. Moreover, if a specific fact or circumstance was relevant to both the acquitted charge and the convicted charge—i.e., if there was an overlap of relevant conduct—then the trial court could consider that fact or circumstance when sentencing on the convicted charge. This rational-jury standard appears to be consistent with *Beck* and its progeny, and it is a workable standard that trial courts can use when sentencing a defendant who was convicted of a particular charge but also acquitted of another related charge.

B. THE SHOOTING AND RESULTING DEATH ARE "ACQUITTED CONDUCT"

Applying this standard here, we must vacate defendant's sentence on the felon-in-possession conviction. At the conclusion of the first trial, the jury convicted defendant of being a felon in possession of a firearm and felony-firearm. There is no question that defendant knew that, under the law and as a condition of his probation, it was unlawful for him to carry a firearm.

Michigan law prohibits felons, like defendant, from carrying firearms because of the perceived increased risk to society that these individuals pose when armed. *People v Dillard*, 246 Mich App 163, 170; 631 NW2d 755 (2001); *People v Swint*, 225 Mich App 353, 374; 572 NW2d 666 (1997). Then, during the second trial, defense counsel conceded that defendant went to the barber shop looking for a fight. Defendant had a boxing background, and when his younger brother asked him to go to the barber shop to fight, defendant willingly went. There is no question that defendant was carrying a firearm, and there is evidence in the record that he even chambered a round before approaching the barber shop.

When sentencing defendant for the felon-in-possession conviction, the trial court could take into consideration any of these facts and circumstances. Thus, the trial court did not err, for example, by noting that defendant should have been aware of the increased risk of serious violence associated with bringing a firearm to a fistfight. Nor did the trial court err by noting that defendant was not convicted for possessing the firearm in his home, but rather for bringing the firearm to a public place where violence was expected. The trial court could consider any of the relevant facts and circumstances leading up to the confrontation outside of the barber shop when sentencing defendant on the felon-in-possession conviction.

The trial court erred, however, when it held defendant responsible for Johnson's death. The jury acquitted defendant of second-degree murder and voluntary manslaughter on a theory of self-defense. On this theory, although defendant caused Johnson's death, defendant was not criminally responsible for the death. Even though, *ceteris paribus*, Johnson would not have

died outside of the barber shop but for defendant's act of shooting him, the jury concluded that defendant was lawfully justified in committing that act. Once Johnson brandished his own firearm, defendant had the right to defend himself and could not be held criminally responsible for the act of shooting Johnson or Johnson's resulting death. Although the trial court took pains to make clear that it was not holding defendant "accountable" for Johnson's death, the court did mention on several occasions that, but for defendant's actions, Johnson would still be alive. The jury determined that defendant was not criminally responsible for Johnson's death, and as a result, the trial court could not consider the actual shooting and death when sentencing on the felon-in-possession conviction.

It is the case that defense counsel conceded at trial that his client intentionally shot Johnson. Typically, it would be proper for a sentencing court to consider a fact conceded by a defendant, even in the wake of *Beck*. But here, viewing the acquittal through the lens of the rational-jury standard, it is clear that the jury concluded that defendant was justified in shooting Johnson. Under *Beck*, defendant simply cannot be held criminally responsible for Johnson's death in any way, including at sentencing.

In sum, the line to be drawn in this case lies where Johnson brandished his weapon. All of the relevant facts and circumstances leading up to that point can be considered by the trial court when sentencing defendant on the felon-in-possession conviction. Defendant's conduct after that point and Johnson's resulting death fall under *Beck*'s concept of "acquitted conduct" and are off-limits for purposes of sentencing.

Finally, defendant also argues that his felon-in-possession sentence was disproportionate. We decline

to address this issue because the trial court impermissibly considered acquitted conduct at sentencing. Given this, the trial court must readdress sentencing on remand, and, thus, any proportionality analysis at this point would be premature.

III. CONCLUSION

For the reasons set forth above, we vacate defendant's sentence for being a felon in possession, and we remand to the trial court for resentencing on this conviction. We take no position on whether the facts and circumstances of this offender and this offense warrant a departure from the advisory sentencing guidelines. We do not vacate defendant's felony-firearm sentence because the trial court properly sentenced defendant to 60 months in prison as required by statute. We do not retain jurisdiction.

MARKEY, P.J., and M. J. KELLY, J., concurred with SWARTZLE, J.

PEOPLE v STONER

Docket No. 355317. Submitted November 4, 2021, at Detroit. Decided December 2, 2021, at 9:00 a.m.

Merlin L. Stoner pleaded guilty in the Monroe Circuit Court to carrying a concealed weapon (CCW), MCL 750.227. Defendant had approached three people outside a gas station, pointed a handgun at the group, and said, "[Y]ou better watch yourself." Soon thereafter, defendant again approached the group, this time holding the gun in the air above his head. Defendant then drove away. The prosecution charged defendant with one count of CCW, three counts of assault with a dangerous weapon (felonious assault), and five other firearm offenses. In exchange for dismissal of the other charges, defendant pleaded guilty to the single CCW charge. Without objection, the court, Daniel S. White, J., adopted the probation department's recommendation of assessing 25 points for Offense Variable (OV) 12. As a fourth-offense habitual offender, MCL 769.12, Stoner's guidelines minimum sentence range was 22 to 76 months of imprisonment. The court accordingly sentenced defendant to a minimum sentence of 48 months' imprisonment with a statutory maximum sentence of 240 months' imprisonment. Defendant subsequently sought resentencing, arguing that OV 12 was improperly scored. Specifically, defendant contended that he committed only one *act* of pointing a gun at a group of three people, not three separate criminal acts of pointing a gun at three separate people. With no criminal acts contemporaneous to the sentencing offense of CCW, defendant contended that OV 12 should have been assessed zero points. The trial court denied defendant's motion for resentencing, reasoning that at the time defendant committed CCW, he pointed his gun at three separate people. Accordingly, the court found that defendant had committed three separate criminal acts against a person that would not result in separate convictions that could be considered for scoring OV 12. Defendant sought leave to appeal, which the Court of Appeals granted to consider one issue: whether the trial court properly assessed 25 points for OV 12.

The Court of Appeals *held*:

The trial court did not properly assess 25 points for OV 12. OV 12 is governed by MCL 777.42, which provides, in pertinent part, that 25 points should be assigned for OV 12 when three or more contemporaneous felonious criminal acts involving crimes against a person were committed. MCL 777.42 also provides that a felonious criminal act is contemporaneous if both of the following circumstances exist: the act occurred within 24 hours of the sentencing offense, and the act has not and will not result in a separate conviction. Under MCL 777.42, only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts. An individual who fires a gun at a crowd may be guilty of assault upon each person within that crowd; thus, pointing a gun at a group of people may give rise to multiple felonious assault charges. In this case, the trial court reasoned that each victim could have thought that defendant was pointing the gun at them and therefore determined that defendant did point the gun at three individual people, constituting three separate felonious acts for purposes of scoring OV 12. However, the factual record in this case did not indicate that defendant specifically targeted any of the three individuals in the group. Instead, the record only indicated that defendant "pointed [the gun] at them," referring to "the trio" as a whole. The record indicated that defendant continued to approach the group "while holding the gun in the air above his head," as opposed to pointing the gun toward the group or any of its individual members. Accordingly, it was error to consider this to be three separate "acts" or "crimes" based on the presence of three individuals. At most, the court could have found one additional "act" based on defendant's second armed approach of the group. Considering defendant's second approach as one "contemporaneous felonious criminal act," the trial court could have properly assessed only five points for OV 12 under MCL 777.42, reducing defendant's total OV score and his OV level. The guidelines minimum sentence range for this reduced score and level was 14 to 58 months' imprisonment; accordingly, defendant was entitled to resentencing based on corrected guidelines.

Defendant's sentence vacated; case remanded for resentencing.

CRIMINAL LAW — SENTENCING — OFFENSE VARIABLE 12 — CONTEMPORANEOUS FELONIOUS CRIMINAL ACTS.

Offense Variable (OV) 12 is governed by MCL 777.42, which provides, in pertinent part, that 25 points should be assigned for OV 12 when three or more contemporaneous felonious criminal

> acts involving crimes against a person were committed; a felonious criminal act is contemporaneous if both of the following circumstances exist: the act occurred within 24 hours of the sentencing offense, and the act has not and will not result in a separate conviction; under MCL 777.42, only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael Roehrig*, Prosecuting Attorney, and *Alexis M. Hatch*, Assistant Prosecuting Attorney, for the people.

Kershaw, Vititoe & Jedinak, PLC (by *Joel D. Kershaw*) for defendant.

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

PER CURIAM. After Merlin Lee Stoner pleaded guilty to carrying a concealed weapon (CCW), MCL 750.227, the court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 48 to 240 months' imprisonment. We granted Stoner's delayed application for leave to appeal, *People v Stoner*, unpublished order of the Court of Appeals, entered December 2, 2020 (Docket No. 355317), to consider one issue: whether the trial court properly assessed 25 points for Offense Variable (OV) 12. The court did not. We vacate Stoner's sentence and remand for resentencing based on correctly scored guidelines.

I. BACKGROUND

On September 3, 2019, Stoner approached three people outside a gas station, pointed a handgun at the group, and said, "[Y]ou better watch yourself." Soon thereafter, Stoner again approached the group, this time holding the gun in the air above his head. Stoner

then drove away. The prosecution charged Stoner with one count of CCW, three counts of assault with a dangerous weapon (felonious assault), and five other firearm offenses. In exchange for dismissal of the other charges, Stoner pleaded guilty to the single CCW charge. As the factual basis for his plea, Stoner admitted that he had carried a concealed weapon without a permit on the day in question.

Without objection, the sentencing court adopted the probation department's recommendation of assessing 25 points for OV 12. OV 12 is governed by MCL 777.42, which provides, in pertinent part:

> (1) [OV] 12 is contemporaneous felonious criminal acts. Score [OV] 12 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) Three or more contemporaneous felonious *criminal acts* involving *crimes* against a person were committed ..... 25 points
>
> (b) Two contemporaneous felonious criminal acts involving crimes against a person were committed ..... 10 points
>
> * * *
>
> (d) One contemporaneous felonious criminal act involving a crime against a person was committed ..... 5 points
>
> * * *
>
> (g) No contemporaneous felonious criminal acts were committed ..... 0 points
>
> (2) All of the following apply to scoring [OV] 12:
>
> (a) A felonious criminal *act* is contemporaneous if both of the following circumstances exist:
>
> (*i*) The *act* occurred within 24 hours of the *sentencing offense*.

> (*ii*) The act has not and will not result in a separate conviction. [Emphasis added.]

With the 25-point score for OV 12, Stoner's total OV score of 50 points placed him in OV Level V. Stoner's unchallenged prior record variable (PRV) score of 120 placed him in PRV Level F. As a fourth-offense habitual offender, Stoner's recommended minimum sentencing guidelines range was 22 to 76 months. The court sentenced Stoner within that range.

Stoner subsequently sought resentencing, arguing that OV 12 was improperly scored. Specifically, Stoner contended that he committed only one *act* of pointing a gun at a group of three people, not three separate criminal acts of pointing a gun at three separate people. With no criminal acts contemporaneous to the sentencing offense of CCW, Stoner contended that OV 12 should be assessed zero points. Stoner acknowledged that his one criminal act did result in three separate charges of assault, but those charges had been dismissed as part of the plea agreement.

The trial court denied Stoner's motion for resentencing because at the time Stoner committed CCW, he pointed his gun at three separate people. The connected assault charges were dismissed, but were factually supported, the court noted. Accordingly, the court found that Stoner had committed three separate criminal acts against a person that would not result in separate convictions that could be considered for scoring OV 12.

II. ANALYSIS

We review for clear error a trial court's factual determinations at sentencing and ensure that the findings are supported by a preponderance of the

evidence. *People v Carter*, 503 Mich 221, 226; 931 NW2d 566 (2019). "Whether the facts, as found, are adequate to warrant the assessment of points under the pertinent OVs . . . is a question of statutory interpretation" that we review de novo. *Id*.

In relation to MCL 777.42, the Supreme Court has clarified that "[b]ecause the Legislature used the word 'act' in one portion of MCL 777.42(2)(a)(*i*) and the phrase 'sentencing offense' later in the same sentence, we must presume it intended to draw a distinction between the two." *Carter*, 503 Mich at 226-227 (citing the statute's reliance on the number of "felonious criminal *act*[s] . . . occur[ring] within 24 hours of the *sentencing offense*"). *Carter* relied on this Court's earlier opinion in *People v Light*, 290 Mich App 717, 725-726; 803 NW2d 720 (2010), and held that

> a determination of whether an offender has engaged in multiple "acts" for purposes of OV 12 does not depend on whether he or she could have been charged with other offenses for the same conduct. What matters, instead, is whether the "sentencing offense" can be separated from other distinct "acts." [*Carter*, 503 Mich at 227 (citations omitted).]

In *Carter*, the defendant was convicted of one count of assault with intent to do great bodily harm (AWIGBH) for shooting three times at an apartment door behind which hid his intended victim and the victim's family. *Id*. at 224. The question at sentencing was "whether each separate pull of the trigger constitute[d] a separate 'act' " for purposes of scoring OV 12. *Id*. at 223. The Court noted that the term "sentencing offense" had been defined in the context of scoring OVs "as 'the crime of which the defendant has been convicted and for which he or she is being sentenced.' " *Id*. at 227 (citation omitted). In *Carter*, the sentencing

offense was the single AWIGBH conviction. *Id*. The Court "therefore examined the record to determine whether factual support for defendant's AWIGBH conviction was established on the basis of all three gunshots or only one." *Id*. at 227-228. The Court reviewed the evidence and the prosecutor's arguments and concluded that "the prosecution relied on all three gunshots as evidence of defendant's intent to commit murder or inflict great bodily harm . . . ." *Id*. at 229. Therefore, "a finding that two of the gunshots were not part of the sentencing offense cannot be supported by the evidence." *Id*. The Supreme Court reversed this Court's decision to distinguish two of the gunshots from the third, which this Court treated as the sentencing offense. *Id*. However, the Court acknowledged that other factual scenarios might arise that could lead to an opposite conclusion. *Id*. at 229-230.

In *Light*, 290 Mich App at 719, the defendant stole a six-pack of beer and $300 from a grocery store while armed with a knife. The prosecutor charged the defendant with armed robbery, but the defendant pleaded guilty to unarmed robbery. At sentencing, the defendant objected to the assessment of five points for OV 12. *Id*. at 720. The court overruled the objection and found that the defendant "had committed two or more contemporaneous felonious acts":

> The trial court used the carrying of a concealed weapon as one of the two contemporaneous felonious criminal acts because of the knife that [the defendant] carried and then used to commit the robbery. For the second contemporaneous act, the trial court considered both larceny from a person and larceny in a building. [*Id*.]

This Court agreed that larceny from a person was a necessarily included lesser offense of robbery and that larceny from a building was a cognate offense, as

determined by the trial court. *Id*. at 725. However, this Court rejected the OV 12 scoring analysis on factual grounds:

> [F]or OV 12 scoring purposes, [the defendant's] physical act of wrongfully taking [the victim's] money while inside a grocery store is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced [the defendant] for unarmed robbery, [the] sentencing offense included all acts "occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." [MCL 750.530(2).]
>
> Here, the robbery completely subsumed the larceny. The fact that the larceny occurred in a building, and thus could have subjected [the defendant] to multiple convictions, does not change the outcome. Even though the trial court did not convict [the defendant] of either form of larceny, both offenses form the basis of [the defendant's] "sentencing offense" of unarmed robbery. Because [the defendant's] sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase [his] OV 12 score. In other words, the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense. [*Id*. at 725-726 (citation omitted).]

What *Carter* and *Light* make clear is that under MCL 777.42, only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts. To read the statute otherwise would "render [the] statutory language nugatory." *Light*, 290 Mich App at 722 (quotation marks and citation omitted). If the Legislature intended for the number of crimes against a person instead of the underlying acts forming the

basis of those crimes to be considered when scoring OV 12, it would not have modified the word "acts" with the word "involving," nor would it have distinguished "act" from "sentencing offense" or "crime."

Since a criminal act is distinct from the crimes that may arise therefrom for purposes of scoring OV 12, the question becomes whether Stoner's conduct of pointing the gun at the group constituted one act or multiple acts, regardless of the number of resulting crimes. It has long been established that an individual who fires a gun at a crowd may be guilty of assault upon each person within that crowd. *Carter*, 503 Mich at 229 n 28, citing *People v Raher*, 92 Mich 165, 166; 52 NW 625 (1892). Thus, it is also true that pointing a gun at a group of people may give rise to multiple felonious assault charges, as happened here.

A comparison to *Carter* aids our analysis. In *Carter*, the defendant pulled the trigger three times in rapid succession. Depending on the factual context, this could constitute three separate acts or only one. *Carter*, 503 Mich at 227-230. Because the prosecution in *Carter* relied on all three gunshots to support a single AWIGBH act during its closing argument, however, the Court did not need to consider the issue further. None of the three shots could be separated from the sentencing offense, making the conduct ineligible for consideration under OV 12. *Id*. at 229. Although the Court limited its holding to the facts of that case, it indicated that there may be "circumstances under which multiple gunshots may constitute separate 'acts' . . . ." *Id*. at 230. Similarly, there may be circumstances in which pointing a gun at a group of people may constitute separate acts. Perhaps, for example, if the defendant specifically pointed the gun at each individual in the

group. The prosecution and the sentencing court seemed to advance this theory in the trial court.

At the resentencing motion hearing, the prosecution argued that "wav[ing] a gun around at three people" constitutes three separate acts because each individual in the group would feel threatened. The trial court similarly reasoned that each victim could have thought Stoner was pointing the gun at him or her. The trial court therefore determined that Stoner did "point[] the gun at three individual people," constituting three separate felonious acts for OV 12 purposes.

Under a clearer factual record, these arguments might have been persuasive, but we are limited to the record presented below. *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992); MCR 7.210(A). The record in this case does not indicate that Stoner specifically targeted any of the three individuals in the group, as the prosecution and the trial court suggested. Instead, the record only indicates that Stoner "pointed [the gun] at them," referring to "the trio" as a whole. The record indicates that Stoner continued to approach the group "while holding the gun in the air above his head," as opposed to pointing the gun toward the group or any of its individual members. It was error to consider this to be three separate "acts" or "crimes" based on the presence of three individuals. At most, the court could find one additional "act" based on Stoner's second armed approach of the group.

Considering Stoner's second approach as one "contemporaneous felonious criminal act," the trial court could have properly assessed five points for OV 12. MCL 777.42(1)(d). This would reduce Stoner's total OV score to 30 and his OV Level to III. The recommended minimum sentencing guidelines range for a Class E felony for a fourth-offense habitual offender in Cell

III-F is 14 to 58 months' imprisonment. When a scoring error alters the guidelines recommended minimum sentence range, a defendant is entitled to resentencing on the basis of properly scored guidelines, even if the defendant's actual minimum sentence falls within the corrected guidelines range. *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006); MCL 769.34(10). Accordingly, Stoner is entitled to resentencing based on corrected guidelines.

We vacate Stoner's sentence and remand for resentencing that is consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ., concurred.

SUNRISE RESORT ASSOCIATION, INC v CHEBOYGAN COUNTY ROAD COMMISSION

Docket No. 354540. Submitted October 13, 2021, at Grand Rapids. Decided December 2, 2021, at 9:05 a.m. Vacated in part and remanded 511 Mich 325 (2023).

Sunrise Resort Association, Inc., Gregory P. Somers, and others brought an action in the Cheboygan Circuit Court against the Cheboygan County Road Commission, seeking compensatory damages and injunctive relief under the sewage-disposal-system-event exception, MCL 691.1416 through MCL 691.1419, to governmental immunity provided for by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. Plaintiffs owned real property along West Burt Lake Road in Cheboygan County. In 2013, a bicycle trail was constructed on the west side of that road, necessitating modifications to the drain system by defendant. Defendant later modified the drainage system after the bicycle trail washed out in 2014. In 2016, Sunrise warned defendant that modifications in 2015 had caused minor damage to plaintiffs' properties and that more severe damage would likely result. On May 4, 2018, plaintiffs' properties were damaged by an overflow and backup of the storm water drainage system. Plaintiffs filed the instant action in February 2020, seeking monetary damages as well as injunctive relief to abate the alleged ongoing trespass or nuisance. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' sewage-disposal-system-event-exception claim was barred by the relevant three-year statutory period of limitations and by plaintiffs' failure to provide timely notice of their claim as required by MCL 691.1419(1). Plaintiffs asserted that their action was timely because the limitations period began running following the 2018 event, which was the basis of their claim. In addition, plaintiffs argued that MCL 691.1417 did not bar injunctive relief because their request for injunctive relief did not involve physical injuries. The court, Aaron J. Gauthier, J., granted defendant summary disposition, concluding that (1) plaintiffs' claim accrued in 2015 and the claim was therefore not timely, (2) the injunction was not a separate cause of action and could not be premised on untimely

claims, and (3) injunctive relief was not available under MCL 691.1417(2). Plaintiffs appealed.

The Court of Appeals *held*:

1. The GTLA generally provides immunity from tort liability to a governmental agency if the agency is engaged in the exercise or discharge of a governmental function. Under MCL 691.1417(2), a governmental agency is specifically immune from tort liability for the overflow or backup of a sewage disposal system *unless* the overflow or backup is a sewage-disposal-system event and the governmental agency is an appropriate agency. Further, MCL 691.1416 through MCL 691.1419 abrogate common-law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage-disposal-system event regardless of the legal theory. MCL 691.1416(k) defines a "sewage disposal system event" as the overflow or backup of a sewage disposal system onto real property. To avoid governmental immunity under this exception, a claimant must show several things, including that they provided notice to the governmental agency of the claim as set forth in MCL 691.1419. With regard to this requirement, MCL 691.1419(1) provides that a claimant is not entitled to compensation under MCL 691.1417 unless the claimant notified the governmental agency of a claim of damage or physical injury in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. MCL 691.1411(1) also requires that a claim under the sewage-disposal-system-event exception must be timely filed. Relevant here, MCL 600.5805(2) provides that the period of limitation is three years after the time of the injury for all actions to recover damages for injury to property. Under MCL 600.5827, the period of limitations runs from the time a claim accrues, which occurs at the time the wrong upon which the claim is based was done regardless of the time when damage results. That is, a cause of action generally accrues when all the elements of the cause of action have occurred and can be alleged in a proper complaint; damages are one of the elements of a cause of action. For purposes of when a sewage-disposal-system event accrues, each independent sewage-disposal-system event may give rise to a separate claim. In this case, plaintiffs' complaint was based on the specific backup event that occurred on May 4, 2018, and plaintiffs sought to recover for the damages that occurred only on that date. Because plaintiffs could not have brought the claim any earlier, their claim accrued in 2018; therefore, plaintiffs timely

filed their complaint within the three-year limitations period when they filed it in February 2020. Although plaintiffs were precluded from bringing any claim on the basis of the 2015 incident, the statute did not prevent them from maintaining a separate, independent claim for the event that occurred in 2018. The abrogated continuing-wrongs doctrine did not apply to this case because plaintiffs' claims were based on the 2018 event, not the 2015 event, and the 2018 event was an independent sewage-disposal-system event that gave rise to a separate claim. Plaintiffs provided defendant proper notice of the May 4, 2018 event on June 15, 2018, within 45 days after the damage was discovered. Accordingly, the trial court erred when it concluded that plaintiffs' claim was barred by the statute of limitations and when it granted summary disposition in favor of defendant on this issue.

2. *Pohutski v Allen Park*, 465 Mich 675 (2002), established that the GTLA does not contain a trespass-nuisance exception to governmental immunity. *Pohutski* did not specifically address whether a trespass-nuisance action that merely seeks abatement of the nuisance is barred by governmental immunity. Instead, the Court clearly stated that MCL 691.1407 did not permit a trespass-nuisance exception to governmental immunity. However, even when a statutory private cause of action for monetary damages does not exist, a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief. Therefore, governmental immunity does not bar a claim for an injunction to prevent future nuisance or a judgment to abate an existing nuisance. MCL 691.1417(2) states that MCL 691.1416 through MCL 691.1419 provide the sole remedy for obtaining any form of relief for damages or physical injuries for a sewage-disposal-system event. In turn, MCL 691.1417(3) provides that a claimant may seek compensation for property damage or physical injury from a governmental agency. Thus, MCL 691.1417 does not address injunctive relief but, instead, only limits the remedy available for damages or physical injuries caused by a sewage-disposal-system event to compensatory damages. However, MCL 691.1418(4) provides that *unless the act provides otherwise*, a party to a civil action brought under MCL 691.1417 has all applicable common-law and statutory defenses ordinarily available in civil actions and *is entitled to all rights and procedures available under the Michigan Court Rules*. Relevant here, MCR 3.310 allows for injunctive relief. The plain language of MCL 691.1417(2) does not bar injunctive relief; reading that provision in context with MCL 691.1418(4) and MCR 3.310, injunctive relief is an available remedy for a sewage-disposal-system event. The trial court erred to the extent it concluded that plaintiffs'

claim for injunctive relief was barred by *Pohutski*. In addition, the trial court erred by concluding that injunctive relief was not an available remedy for plaintiffs' claim.

Reversed and remanded for further proceedings.

1. GOVERNMENTAL IMMUNITY — EXCEPTIONS TO IMMUNITY — SEWAGE-DISPOSAL-SYSTEM EVENTS — PERIOD OF LIMITATIONS — ACCRUAL OF CLAIMS.

Under MCL 691.1417(2), a governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage-disposal-system event and the governmental agency is an appropriate agency; a sewage-disposal-system-event claim accrues for purposes of the period of limitations at the time the wrong upon which the claim is based was done regardless of the time when damage results (MCL 600.5827).

2. GOVERNMENTAL IMMUNITY — EXCEPTIONS TO IMMUNITY — SEWAGE-DISPOSAL-SYSTEM EVENTS — AVAILABLE REMEDIES.

Injunctive relief is an available remedy for a sewage-disposal-system event (MCL 691.1417; MCL 691.1418(4); MCR 3.310).

Molosky & Co (by *Jennifer J. Schafer*) for plaintiffs.

Henn Lesperance PLC (by *William L. Henn*, *Benjamin M. Dost*, and *Andrea S. Nester*) for defendant.

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM. In this action alleging real property damages as a result of modifications to a storm water drainage system, plaintiffs, Sunrise Resort Association, Inc. (Sunrise), Gregory P. Somers, Melissa L. Somers, and Karl Berakovich, appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(7) (statute of limitations) in favor of defendant, Cheboygan County Road Commission. On appeal, plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition because (1) their claim under the sewage-disposal-

system-event exception to governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., was not barred by the statute of limitations and (2) their request for injunctive relief was not untimely and was an available remedy. Pertinent to this appeal is the question regarding when a claim accrues under the sewage-disposal-system-event exception, MCL 691.1416 through MCL 691.1419, which is an issue of first impression involving the interpretation of statutory provisions. MCR 7.215(B)(2). We reverse and remand to the trial court for further proceedings.

I. BACKGROUND

This case involves plaintiffs' claim that defendant made modifications to a storm water drainage system that resulted in a backup and overflow and caused damage to their real property.[1]

Plaintiffs are owners of real property located on West Burt Lake Road in Cheboygan County. Defendant operates a public storm water drainage system in Cheboygan County, which diverts drainage through plaintiffs' properties to Burt Lake by way of ditches and culverts.

In 2013, a bicycle trail was constructed on the west side of West Burt Lake Road, which necessitated various modifications to the drainage system. In 2014, the bicycle path was washed out and defendant made further modifications to the drainage system. In early 2016, Sunrise warned defendant that modifications made in 2015 had caused minor damage to plaintiffs and that more severe damage would likely result. On

[1] The facts are summarized from plaintiffs' first amended complaint, which defendant accepts as true for purposes of this appeal.

May 4, 2018, plaintiffs' properties sustained significant damage caused by an overflow and backup of the storm water drainage system.

On February 20, 2020, plaintiffs filed the instant action against defendant and subsequently filed an amended complaint on April 27, 2020. Their complaint alleged that minor damage first occurred in 2015 when the modifications were made and that significant damage occurred on May 4, 2018, as the result of an overflow and backup. Plaintiffs sought monetary damages under the sewage-disposal-system-event exception to governmental immunity, as well as injunctive relief to abate the ongoing trespass or nuisance.

Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' sewage-disposal-system-event-exception claim was barred by the applicable three-year statutory period of limitations and by plaintiffs' failure to provide timely notice of their claim, as required by MCL 691.1419(1). Defendant also argued that injunctive relief was not available under MCL 691.1417, that defendant had not abused its discretion because it had the authority to install and maintain the roads and culvert near plaintiffs' properties, and that therefore defendant's discretionary actions were not subject to judicial review. Plaintiffs responded that their claim was not time-barred because the statutory limitations period did not begin to run until the 2018 "event" and that the minor damage that occurred in 2015 was not the basis of any claim. Plaintiffs also asserted that injunctive relief was not barred by MCL 691.1417 because their request for injunctive relief did not involve physical injuries. Lastly, plaintiffs asserted that they were not requesting that the court interfere with defendant's discretionary authority.

Following a hearing on the motion, the trial court granted summary disposition under MCR 2.116(C)(7) in favor of defendant. The trial court ruled that plaintiffs' claim accrued in 2015 and, therefore, was not timely. The trial court further ruled that an injunction was not a separate cause of action and could not be premised on untimely claims. It also concluded that injunctive relief was not permitted under MCL 691.1417(2).

This appeal followed.

II. STANDARDS OF REVIEW

We review de novo a trial court's decision to grant summary disposition, "including whether a cause of action is barred by a statute of limitations[.]" *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 335; 941 NW2d 685 (2019). Under MCR 2.116(C)(7), "all well-pleaded allegations must be both accepted as true and construed in the light most favorable to the nonmoving party." *Id*. at 335-336. Additionally, the court "must consider all of the documentary evidence submitted by the parties . . . ." *Id*. at 336.

Whether governmental immunity applies is a question of law that is also reviewed de novo. *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 416-417; 934 NW2d 805 (2019). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Id*. at 417. Likewise, questions of statutory interpretation are reviewed de novo. *Sabbagh*, 329 Mich App at 335.

> The rules of statutory interpretation are well established. Our primary goal when interpreting a statute is to discern the Legislature's intent, and the specific language used is the most reliable evidence of its intent. When the

> language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and ordinary meaning of its words. [*Pike v Northern Mich Univ*, 327 Mich App 683, 696; 935 NW2d 86 (2019) (citation omitted).]

III. STATUTE OF LIMITATIONS

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant on the basis that their claim under the sewage-disposal-system-event exception to governmental immunity is barred by the statute of limitations. We agree.

"The [GTLA] generally provides immunity from tort liability to a 'governmental agency' if the agency 'is engaged in the exercise or discharge of a governmental function.' " *Id*. at 691, quoting MCL 691.1407(1). However, "[t]here are several exceptions to the broad grant of immunity . . . ." *Id*. "The scope of governmental immunity is construed broadly, while exceptions to it are construed narrowly." *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 112; 729 NW2d 883 (2006).

The sewage-disposal-system-event exception is set forth at MCL 691.1416 through MCL 691.1419. *Cannon Twp v Rockford Pub Sch*, 311 Mich App 403, 415; 875 NW2d 242 (2015). "The Legislature, in adopting MCL 691.1416 through MCL 691.1419, intended to provide limited relief to persons who suffer damages as a result of a sewage disposal system event." *Willett v Waterford Charter Twp*, 271 Mich App 38, 46; 718 NW2d 386 (2006) (cleaned up). MCL 691.1417(2) provides:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate

> governmental agency. [MCL 691.1416] to [MCL 691.1419] abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

As this Court explained in *Willett*, 271 Mich App at 48:

> The Legislature promulgated MCL 691.1416 through MCL 691.1419 to afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages caused by a sewage disposal system event. Under MCL 691.1417(2), a governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. A "sewage disposal system event" is defined, in pertinent part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). An "appropriate governmental agency" is defined as "a governmental agency that, at the time of [a] sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage . . . ." MCL 691.1416(b). [Cleaned up.]

To avoid governmental immunity under the sewage-disposal-system-event exception, a claimant must establish the following:

> (1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event;
>
> (2) that the governmental agency against which the claim is made is "an appropriate governmental agency," which is defined as "a governmental agency that, at the time of a sewage disposal system event, owned or oper-

> ated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury";
>
> (3) that the sewage disposal system had a defect;
>
> (4) that the governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect;
>
> (5) that the governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect;
>
> (6) that the defect was a substantial proximate cause of the event and the property damage or physical injury;
>
> (7) reasonable proof of ownership and the value of any damaged personal property; and
>
> (8) that the claimant provided notice as set forth in MCL 691.1419. [*Linton*, 273 Mich App at 113-114 (cleaned up).]

Additionally, MCL 691.1411(1) provides, "Every claim against any governmental agency shall be subject to the general law respecting limitations of actions except as otherwise provided in this section." Accordingly, a claim under the sewage-disposal-system-event exception must also be timely filed.

The parties do not dispute that the applicable statute of limitations is MCL 600.5805, which provides, in relevant part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> (2) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death

> or injury for all actions to recover damages for the death of a person or for injury to a person or property. [MCL 600.5805(1) and (2).]

MCL 600.5827 defines when a claim accrues and provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in [MCL 600.5829] to [MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

It is "clearly established that the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 388; 738 NW2d 664 (2007) (cleaned up).

Plaintiffs argue that the trial court erred by finding that the 2015 incident started the running of the statutory limitations period. Plaintiffs contend that each sewage-disposal-system event gives rise to a cause of action that restarts the statutory limitations period and that, therefore, their claim accrued on May 4, 2018. The question regarding when a claim accrues under the sewage-disposal-system-event exception is an issue of first impression.

Under MCL 600.5827, the period of limitations runs from the time *the claim* accrues. A cause of action generally "accrues when all of the elements of the cause of action have occurred and can be alleged in a proper complaint." *Connelly v Paul Ruddy's Equip Repair & Serv Co*, 388 Mich 146, 150; 200 NW2d 70 (1972); see also *Moll v Abbot Laboratories*, 444 Mich 1,

15-16; 506 NW2d 816 (1993).[2] In *Connelly*, our Supreme Court observed that damages were one of the elements of a cause of action. *Connelly*, 388 Mich at 151. A claim under the sewage-disposal-system-event exception requires a "sewage disposal system event," which is defined, in part, as an "overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). Such a claim also requires damages to have occurred. *Linton*, 273 Mich App at 113. A plain reading of plaintiffs' complaint shows that it is premised on a specific, discrete backup event that occurred on May 4, 2018, and that plaintiffs are seeking to recover for damages that occurred only on that occasion. Because the event upon which plaintiffs' claim is based did not occur until 2018, and plaintiffs suffered no harm from that event until 2018, they could not have brought their claim any earlier. Accordingly, plaintiffs' claim accrued in 2018. See *Connelly*, 388 Mich at 151; *Trentadue*, 479 Mich at 388. Therefore, under the three-year limitations period, plaintiffs timely filed their complaint on February 20, 2020.

The trial court concluded that plaintiffs' claim accrued in 2015 because plaintiffs alleged that they were first harmed in 2015.[3] Although plaintiffs are now precluded from bringing any claim on the basis of the 2015 incident because they did not bring an action within three years of that incident, nothing in the statute precludes them from maintaining a separate claim for the event that occurred in 2018.

---

[2] Although *Connelly* and *Mol* involved claims for personal injury, we find this analysis broadly applicable.

[3] We note that plaintiffs alleged that "minor damage" occurred in 2015. Plaintiffs did not allege that an overflow or backup occurred in 2015. Nonetheless, as discussed later, whether the 2015 incident constituted an "event" is not relevant to plaintiffs' claim based on the 2018 event.

Defendant asserts that plaintiffs are attempting to apply the now-abrogated common-law "continuing-wrongs doctrine." Under the continuing-wrongs doctrine, "when the nuisance is of a continuing nature, the period of limitations does not begin to run on the occurrence of the first wrongful act; rather, the period of limitations will not begin to run until the continuing wrong is abated." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). This doctrine, however, was completely abrogated, including in nuisance and trespass cases. *Id*. at 288. In *Marilyn Froling Revocable Living Trust*, this Court explained:

> Subsequent claims of additional harm caused by one act do not restart the claim previously accrued. For the purposes of accrual, there need only be one wrong and one injury to begin the running of the period of limitations. In sum, the accrual of the claim occurs when both the act and the injury first occur, that is when the "wrong is done." [*Id*. at 291.]

Plaintiffs argue that the continuing-wrongs doctrine does not apply in this case and that a plaintiff can allege multiple claims based on discrete acts or omissions. See *Kincaid v Cardwell*, 300 Mich App 513, 525; 834 NW2d 122 (2013) (noting that "it is possible for the plaintiff to allege multiple claims of malpractice premised on discrete acts or omissions—even when those acts or omissions lead to a single injury—and those claims will have independent accrual dates determined by the date of the specific act or omission at issue"). Plaintiffs assert that each sewage-disposal-system event is a discrete and separate occurrence.

We conclude that the abrogation of the continuing-wrongs doctrine has no relevance in this case. The abrogation of the continuing-wrongs doctrine means

that plaintiffs are prohibited from relying on the harm caused by the 2018 event to argue that any claim based on the 2015 incident is timely, or from arguing that any continuing harm arising from the 2015 incident operates to extend the limitations period for any claim based on the 2015 incident. This doctrine, however, is not applicable to plaintiffs' claim based on the 2018 event, which was timely filed in 2020.

Plaintiffs also argue that in order to conclude that the 2015 incident started the statutory limitations period, the trial court necessarily found that the 2015 incident met all the requirements of an "event." However, because plaintiffs' claim is based on the 2018 event, whether the 2015 incident constituted an event is not relevant. Accordingly, additional discovery regarding whether the 2015 incident constituted an "event" is not necessary.

Defendant also contends that, even if plaintiffs' claim had been timely filed, dismissal was proper because plaintiffs failed to provide proper notice of their claim. As stated earlier, MCL 691.1419(1) provides, in relevant part:

> [A] claimant is not entitled to compensation under [MCL 691.1417] unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered.

Defendant argues that plaintiffs failed to provide notice within 45 days after the 2015 incident. Plaintiffs respond that they properly provided notice within 45 days of the damage on May 4, 2018. As discussed, the 2018 event was an independent sewage-disposal-system event that gave rise to a separate claim. Plaintiffs' failure to provide notice after the 2015 incident

has no relevance to whether they provided proper notice after the 2018 event. According to their complaint, plaintiffs provided proper notice of the May 4, 2018 event on June 15, 2018, which defendant does not dispute.

Therefore, because plaintiffs timely filed their complaint, we conclude that the trial court erred by concluding that plaintiffs' claim was barred by the statute of limitations and by granting summary disposition under MCR 2.116(C)(7) in favor of defendant.

IV. INJUNCTIVE RELIEF

Plaintiffs also argue that their claim for injunctive relief is permitted by MCL 691.1417(2) and not prohibited by the elimination of the trespass-nuisance exception to governmental immunity under *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). We agree.

In *Pohutski*, *id*. at 689-690, the Court held that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity."[4] In *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 284; 717 NW2d 391 (2006), this Court stated: "*Pohutski* did not specifically address whether a trespass-nuisance action that merely seeks abatement of the nuisance is barred by governmental immunity. Instead, the Court clearly stated that MCL 691.1407 did not permit a trespass-nuisance exception to governmental immunity." However, our Supreme Court subsequently held that, even when "a statutory private cause of action for

[4] We note that the claim in *Pohutski* occurred before the enactment of the sewage-disposal-system-event exception under MCL 691.1417, which took effect January 2, 2002. See 2001 PA 222; *Pohutski*, 465 Mich at 679, 697 n 2.

monetary damages does not exist, a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief." *Mich Ass'n of Home Builders v Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019); see also *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (concluding that the plaintiff could have enforced the statute by seeking injunctive relief under MCR 3.310 or declaratory relief under MCR 2.605(A)(1) despite the plaintiff's argument that a private cause of action for damages was the only mechanism to enforce the statute). Therefore, governmental immunity does not bar a claim for an injunction to prevent future nuisance or a judgment to abate an existing nuisance. Accordingly, the trial court erred to the extent that it concluded that *Pohutski* barred plaintiffs' claim for injunctive relief.

However, the trial court also concluded that plaintiffs could only seek compensatory damages under MCL 691.1417(2), which provides:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. [*MCL 691.1416*] *to* [*MCL 691.1419*] *abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory*. [Emphasis added.]

Defendant contends that under the plain language of this provision, injunctive relief is not permitted for an alleged sewage-disposal-system event.

"When the language of a statute is unambiguous, no judicial construction is permitted and the statute must be enforced as written in accordance with the plain and

ordinary meaning of its words." *Pike*, 327 Mich App at 696. "A court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Mich Ass'n of Home Builders*, 504 Mich at 212 (cleaned up). Additionally, "the provisions of a statute should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

MCL 691.1417(2) reads that MCL 691.1416 through MCL 691.1419 provide the *sole remedy* for obtaining *any form of relief* for *damages or physical injuries*. MCL 691.1417(3) provides, in relevant part, that a claimant "may seek compensation for the property damage or physical injury from a governmental agency . . . ." See also MCL 691.1418(1). MCL 691.1417 does not explicitly address injunctive relief. Rather, this provision only limits the remedy available for "*damages or physical injuries* caused by a sewage disposal system event" to compensatory damages. MCL 691.1417(2) and (3) (emphasis added); see also MCL 691.1418(1).

Plaintiffs argue that injunctive relief is permitted on the basis of MCL 691.1418(4) and MCR 3.310. MCL 691.1418(4) provides, "*Unless this act provides otherwise*, a party to a civil action brought under [MCL 691.1417] has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules." (Emphasis added.) The Michigan court rules permit injunctive relief under MCR 3.310.

In this case, plaintiffs requested injunctive relief to avoid damages caused by a future sewage-disposal-system event. Plaintiffs did not seek injunctive relief to compensate for existing damages or physical injuries

as a result of the 2018 event. The plain language of MCL 691.1417(2) does not bar injunctive relief as a remedy. Rather, read in context with MCL 691.1418(4) and MCR 3.310, injunctive relief is an available remedy. Our holding is further supported by *Mich Ass'n of Home Builders*, 504 Mich at 225, and *Lash*, 479 Mich 180 at 196, in which our Supreme Court concluded that declaratory and equitable relief are available even if a statutory private cause of action for monetary damages does not exist.

Therefore, the trial court erred by concluding that injunctive relief was not an available remedy to plaintiffs' claim.

Defendant argues that even if injunctive relief is permitted, plaintiffs' request for injunctive relief is barred by the statute of limitations because the underlying claim (the sewage-disposal-system-event claim) is barred by the statute of limitations. For the reasons discussed, plaintiffs' claim under MCL 691.1416 through MCL 691.1419 was timely with respect to the alleged 2018 event. Therefore, plaintiffs' claim is not barred by the statute of limitations.[5]

---

[5] Defendant also argues that plaintiffs' claim for injunctive relief is, in substance, a claim for a writ of mandamus. We determine the nature of a claim by examining its substance rather than its label. *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011). However, we are persuaded that plaintiffs are not seeking to compel the performance of a ministerial act to which plaintiffs have a clear legal right and that defendant has a clear legal obligation to perform. See *Taxpayers for Mich Constitutional Gov't v Michigan*, 508 Mich 48, 81-82; 972 NW2d 738 (2021). We therefore disagree that plaintiffs are pursuing a writ of mandamus in disguise. We do not otherwise address the gravamen of defendant's argument that plaintiffs are not entitled to the *particular* injunctive relief specified in their complaint. That argument may be reasserted on remand.

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

RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ., concurred.

CAJ v KDT

Docket No. 355433. Submitted October 13, 2021, at Grand Rapids. Decided December 9, 2021, at 9:00 a.m.

Petitioner sought an ex parte nondomestic personal protection order (PPO) in the Kent Circuit Court against respondent, who was petitioner's neighbor, for what petitioner deemed harassing and intimidating behavior under MCL 600.2950a(1). The trial court reviewed and granted petitioner's request for an ex parte PPO; however, the order did not include specific findings of fact or reasoning as to why the court issued the ex parte PPO even though judicial findings were required under MCL 600.2950a and MCR 3.705(A)(2). Respondent moved to terminate the PPO, and a proceeding on respondent's motion was held with a family-court referee, not a trial court judge. The referee presided over a hearing that was more akin to a family-court mediation or alternative dispute resolution as opposed to a formal court hearing. Other than evaluating credibility, the referee made no factual findings on the record and denied respondent's motion to terminate the PPO. The trial court, J. Joseph Rossi, J., entered an order adopting the referee's denial to terminate the PPO; the order authorized respondent to request a hearing challenging the trial court's order, and respondent appealed the denial of his motion to terminate the PPO and requested a de novo hearing. The trial court denied respondent's motion and affirmed the referee's denial without holding a de novo hearing. However, a show-cause hearing for alleged PPO violations was held, at which the trial court found respondent guilty of civil contempt. The trial court then held an impromptu "de novo review hearing" despite its earlier "de novo" order denying respondent relief. Neither party had notice of the de novo hearing; consequently, neither party had witnesses available to testify. Nevertheless, the trial court again denied respondent's motion to terminate the PPO, essentially affirming its initial ruling. Respondent appealed.

The Court of Appeals *held*:

The trial court failed to comply with the proper procedures for nondomestic PPO proceedings as required under Subchapter 3.700 of the Michigan Court Rules. MCR 3.707(A)(2) provides

that the court must schedule and hold a hearing on a motion to terminate a PPO within 14 days of the filing of the motion. The PPO in this instance was issued ex parte; accordingly, respondent was entitled to request a hearing challenging the merits of the PPO, and the trial court erred by denying respondent's request for a hearing. Additionally, this case involved a nondomestic dispute between neighbors. Therefore, the trial court plainly erred by allowing a referee to initially hear the PPO proceedings under MCR 3.215, which provides procedures for domestic-relations proceedings. There was no basis of authority for the referee to review or provide recommendations on respondent's motion to terminate the PPO. Furthermore, although the trial court signed the ex parte PPO order, the court failed to state in writing the specific reasons for issuance of the order, which was required by MCR 3.705(A)(2). Finally, respondent never received proper notice about the "de novo hearing" on his motion to terminate the PPO, and the trial court failed to afford respondent and petitioner their procedural due-process rights because the process lacked a meaningful time and manner in which to be heard. Accordingly, the trial court abused its discretion by failing to follow the required procedures under MCR 3.700 and other governing rules and statutes, and the trial court also failed to afford respondent and petitioner their procedural due-process rights because neither party had notice of the de novo review hearing.

Trial court order denying respondent's motion to terminate vacated; case remanded to the trial court for the court to enter an order terminating the PPO and to amend its procedures to comply with MCR 3.700 and other governing rules as outlined in this opinion.

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jordan M. Ahlers*) for respondent.

Cheryl A. Johnson *in propria persona*.

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

PER CURIAM. In this nondomestic ex parte personal protection order (PPO) case, respondent, KDT, appeals as of right the trial court order denying his motion to

terminate the PPO granted to petitioner, CAJ, and his request for a review of the referee's decisions regarding the PPO. We vacate the trial court's orders granting an ex parte PPO and denying respondent's motion to terminate the PPO, and we instruct the trial court to amend its procedures regarding nondomestic PPOs to comport with MCR 3.700 and other governing rules as discussed in this opinion.

I. BACKGROUND

Petitioner and respondent are neighbors with an exceptionally contentious relationship. On August 3, 2020, petitioner sought an ex parte nondomestic PPO against respondent for what she deemed harassing and intimidating behavior by respondent under MCL 600.2950a(1).

On August 3, 2020, the trial court reviewed and granted petitioner's request for an ex parte PPO. The order did not include specific findings or reasoning as to why the court issued the ex parte PPO, even though judicial findings are statutorily required pursuant to MCL 600.2950a as well as mandated by MCR 3.705(A)(2).

A. MOTION TO TERMINATE THE PPO

On August 17, 2020, respondent moved to terminate the PPO. Respondent asserted that petitioner's allegations were false. A proceeding on respondent's motion to terminate was held on September 2, 2020, with a family-court referee, not a trial court judge.

The referee presided over a hearing that was more akin to a family-court mediation or alternative dispute resolution as opposed to a formal court hearing. Other than evaluating credibility, the referee made no other

factual findings on the record. At the conclusion of the hearing, the referee denied respondent's motion to terminate to the PPO.

On September 9, 2020, the trial court entered an order adopting the referee's denial to terminate the PPO. The order stated, in pertinent part, "IT IS ORDERED that the Respondent's Motion to Object or Modify Ex-Parte Personal Protection Order entered by this Court on AUGUST 3, 2020, is **DENIED, and the Personal Protection Order shall stay in place for reasons stated on the record.**" The order stated that it was based on the referee's findings and recommendations. The order authorized respondent to request a hearing challenging the trial court's order within 21 days by filing a motion with the circuit court clerk and Friend of the Court's office. While the Friend of the Court plays many important roles in helping families in crisis, it is unclear from the record why a party in a nondomestic matter would be required to serve the Friend of the Court with a motion to terminate a PPO.

On October 2, 2020, respondent appealed the referee's denial of his motion to terminate the PPO in the circuit court and requested a de novo hearing.

On October 23, 2020, the trial court denied respondent's motion and affirmed the referee's denial of the termination motion without holding a de novo hearing. The order stated, "This matter having come before the Court pursuant to Respondent's request of a *De Novo* Hearing pursuant to MCR 3.215(E) regarding Referee Kmetz, on 9/2/2020 ruling regarding a PPO. After review of the transcript, the motion is denied."

B. SHOW-CAUSE AND REVIEW HEARING

On August 18, 2020, petitioner filed a motion to show cause for alleged violations of the PPO. A show-

cause hearing for the alleged PPO violations was held on October 30, 2020. The trial court found, by clear and convincing evidence, that respondent was guilty of civil contempt. After respondent was held in contempt, the trial court held an impromptu "de novo review hearing" on October 30, 2020, despite its earlier "de novo" order denying respondent relief. Neither party had prior notice of the de novo hearing, and consequently, neither had witnesses available to testify. Nevertheless, the trial court held a hearing and again denied respondent's motion to terminate the PPO, essentially affirming its initial ruling. This appeal followed.

On appeal, respondent argues that the trial court failed to comply with the procedures set forth under MCR 3.700 and that the trial court abused its discretion by granting the PPO and denying his motion to terminate the PPO. Respondent also argues that he was not afforded his procedural due-process rights as a result of the trial court's defective procedure. We agree.

II. PRESERVATION AND STANDARD OF REVIEW

An issue is preserved if it is raised in the trial court and pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Respondent did not argue that the trial court failed to follow the appropriate procedure in granting or reviewing the PPO or that the referee lacked the authority to hear PPO proceedings. Therefore, this issue is unpreserved.

"A PPO constitutes injunctive relief." *Brown v Rudy*, 324 Mich App 277, 288; 922 NW2d 915 (2018). This Court reviews a trial court's decision to grant or deny a PPO, including a respondent's motion to terminate a PPO, for an abuse of discretion. *Id*. "An abuse of discretion occurs when the court's decision falls outside

the range of principled outcomes." *Id*. "A court necessarily abuses its discretion when it makes an error of law." *TM v MZ (On Remand)*, 326 Mich App 227, 235-236; 926 NW2d 900 (2018) (cleaned up). A trial court's findings of fact underlying a PPO ruling are reviewed for clear error. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made." *Arbor Farms, LLC v GeoStar Corp*, 305 Mich App 374, 386-387; 853 NW2d 421 (2014) (cleaned up). "The interpretation and application of court rules present questions of law to be reviewed de novo using the principles of statutory interpretation." *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012). "Whether due process has been afforded is a constitutional issue that is reviewed de novo." *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013). Unpreserved issues are reviewed for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). "Generally, an error affects substantial rights if it caused prejudice, i.e., it affected the outcome of the proceedings." *Id*. at 9.

III. PROCEDURE FOR NONDOMESTIC PPO PROCEEDINGS

Respondent first argues that the trial court utilized improper procedure and did not comply with MCR 3.705 and MCR 3.707, and respondent further challenges the authority of the referee to hear nondomestic PPO proceedings. Respondent also asserts that the procedural error violated his due-process rights and created an error requiring reversal. We agree.

The trial court failed to comply with the proper procedure for nondomestic PPO proceedings as required under Subchapter 3.700 of the Michigan Court Rules. Subchapter 3.700 of the Michigan Court Rules governs the procedures of personal protective orders. MCR 3.705(A) provides:

> (1) The court must rule on a request for an ex parte order within one business day of the filing date of the petition.
>
> (2) If it clearly appears from specific facts shown by verified complaint, written petition, or affidavit that the petitioner is entitled to the relief sought, an ex parte order shall be granted if immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will itself precipitate adverse action before a personal protection order can be issued. In a proceeding under MCL 600.2950a, the court must state in writing the specific reasons for issuance of the order. A permanent record or memorandum must be made of any nonwritten evidence, argument or other representations made in support of issuance of an ex parte order.

MCR 3.707(A)(2) provides, in relevant part, "The court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion . . . ."

The PPO in this instance was issued ex parte. Accordingly, respondent was entitled to request a hearing challenging the merits of the PPO. A family-court referee presided over respondent's first motion to terminate the PPO, which the referee denied. The referee made no findings of fact. The trial court then entered an order based on the referee's nonexistent findings of fact and conclusions and continued the PPO "for reasons stated on the record." Subsequently, respondent appealed the denial of his motion to terminate the PPO in the circuit court and requested a hearing. The trial

court denied respondent's motion and request for a de novo hearing and affirmed the referee's denial of the termination motion without holding a hearing.

Respondent argues that the referee did not have the authority to hear a challenge to the PPO and that the trial court failed to follow the proper procedures for PPO proceedings. Respondent also argues that the trial court abused its discretion by denying his request for a de novo hearing under MCR 3.707(A)(2). Although the trial court subsequently held an impromptu hearing after denying respondent's request to terminate the PPO, respondent argues that the court failed to apply de novo review. Additionally, respondent asserts that he was not provided notice of the de novo hearing and, as a result, was denied the opportunity to present witnesses. We agree with respondent and further note that petitioner was also denied an opportunity to present witnesses.

The trial court's October 23, 2020 order suggests that the referee acted under the authority of MCR 3.215(E). Subchapter 3.200 of the Michigan Court Rules governs domestic-relations actions and applies to:

> (1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, support under MCL 552.451 *et seq*. or MCL 722.1 *et seq*., the custody of minors or parenting time under MCL 722.21 *et seq*. or MCL 722.1101 *et seq*.,
>
> (2) an expedited proceeding to determine paternity or child support under MCL 722.1491 *et seq*., or to register a foreign judgment or order under MCL 552.2101 *et seq*. or MCL 722.1101 *et seq*., and to
>
> (3) proceedings that are ancillary or subsequent to the actions listed in subrules (A)(1) and (A)(2) and that relate to

> (a) the custody of minors,
>
> (b) parenting time with minors, or
>
> (c) the support of minors and spouses or former spouses. [MCR 3.201(A).]

MCR 3.215(B) generally provides that domestic-relations motions can be initially heard by a referee.[1]

MCR 3.705(A)(1) requires that "[t]he court . . . rule on a request for an ex parte order . . . ." MCR 3.707(A)(2) also requires the court to "hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion . . . ." This Court gives the language of court rules their "plain and ordinary meaning." *Lamkin*, 295 Mich App at 709 (cleaned up). "If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Id*. (cleaned up).

This case involved a nondomestic dispute between neighbors. The record does not reflect that there was a domestic-relations action or issue. Therefore, the trial court plainly erred by allowing the referee to initially hear the PPO proceedings, including respondent's motion to terminate the PPO, under MCR 3.215. The trial court also erred by denying respondent's request for a hearing. There is no provision in the court rules or

[1] Under the Michigan Court Rules, referees have authority to hear matters in two areas. Under MCR 3.207, a court may issue "protective orders against domestic violence" as provided under MCR 3.700. MCR 3.207(A). A trial court may refer such matters to a referee under MCR 3.215(B). The rules also provide that, in the family division of the circuit court in cases filed under the Juvenile Code, MCR 3.901(A)(1), "the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions," MCR 3.913(A)(1).

statute that permitted this outcome. There was no basis of authority for the referee to review or provide recommendations on respondent's motion to terminate the PPO. MCR 3.707(A)(2) clearly states, in relevant part, "[t]he court must schedule and hold a hearing on a motion to modify or terminate a personal protection order within 14 days of the filing of the motion . . . ." Therefore, the trial court was required to hold a hearing regarding the termination of the PPO. The trial court denied respondent's request for a hearing. It subsequently held a "de novo hearing" during the PPO-violation hearing. However, the notice provided to respondent regarding the hearing was in relation to the show-cause hearing, not for a reexamination of the PPO. Therefore, respondent never received the proper notice about the "de novo hearing" on his motion to terminate. As our Supreme Court recognized:

> [A]t a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard. To comport with these procedural safeguards, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. [*Bonner v Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014) (cleaned up).]

In addition to failing to follow the proper procedure under MCR 3.700 and because neither party received notice of the "de novo hearing" regarding respondent's motion to terminate the PPO, the trial court failed to afford respondent and petitioner their procedural due-process rights under the law. In other words, because the process lacked a meaningful time and manner in which to be heard, respondent was deprived of his right to procedural due process.

Respondent has established plain error affecting his substantial rights because the error affected the out-

come of the proceedings. See *In re Utrera*, 281 Mich App at 8-9. The trial court, not the family-court referee, was required to rule on the ex parte PPO petition, MCR 3.705(A), and hold the requested termination hearing, MCR 3.707(A)(2). Therefore, the court erred by allowing the referee to do so and by denying respondent's request for a hearing regarding his motion to terminate. Additionally, we note that although the trial court signed the ex parte PPO order, it failed to comply with MCR 3.705(A)(2), which requires the court to "state in writing the specific reasons for issuance of the order." The order contains no such reasoning. Further, respondent was entitled to notice of the trial court's de novo review of the PPO at the show-cause hearing. See *Bonner*, 495 Mich at 235.

MCR 2.613(A) provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Because respondent was not properly afforded the opportunity to be heard by the trial court for his motion to terminate as required by the court rules, the trial court should have, as an initial matter, heard respondent's motion to terminate the PPO. Further, because the trial court also failed to comply with MCR 3.705(A)(2), we vacate the PPO for the court's error in failing to comply with the procedures set forth under MCR 3.700.

Because we find that the process used by the trial court in this case was defective and violative of the

governing statutory provisions and court rules, we need not address the remaining issues raised by respondent.

We appreciate the challenges trial courts face with respect to time guidelines, as well as the unique and sometimes frightening facts that petitioners may present when they request PPOs. We do not take those circumstances lightly. There are instances when ex parte relief is necessary. There are also instances when a respondent must and should be held accountable when they have violated the trial court's order. However, we feel compelled to express concern about a process that fails to comport with the requirements of the law.

In conclusion, the trial court abused its discretion by failing to follow the required procedures under MCR 3.700 and other governing rules and statutes as indicated in this opinion. The trial court also failed to afford respondent and petitioner their procedural due-process rights because neither party had notice of the de novo review hearing. Therefore, we vacate the trial court's order denying respondent's motion to terminate and instruct the trial court to enter an order terminating the PPO forthwith and to amend its procedures to comply with MCR 3.700 and other governing rules as outlined in this opinion.

Vacated and remanded for proceedings that are consistent with this opinion. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ., concurred.

MATHIS v AUTO OWNERS INSURANCE

Docket No. 354824. Submitted November 3, 2021, at Grand Rapids. Decided November 9, 2021. Approved for publication December 9, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 1072 (2022).

Gary Mathis filed an action in the Berrien Circuit Court against Auto Owners Insurance, Home-Owners Insurance Company, and the Michigan Property & Casualty Guaranty Association (the MPCGA), seeking to recover from Home-Owners personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*., or from the MPCGA worker's disability compensation benefits for the injuries he suffered when he fell while alighting from his employer's semitruck while working; Auto-Owners Insurance was later dismissed from the action by stipulation. At the time he was injured, plaintiff's employer had a worker's disability compensation insurance policy through Guaranty Insurance and a no-fault insurance policy through Home-Owners. Plaintiff applied for workers' compensation benefits from Guaranty Insurance under the Worker's Disability Compensation Act, MCL 418.101 *et seq*.; Guaranty Insurance paid plaintiff benefits until Guaranty Insurance became insolvent, at which point the MPCGA assumed responsibility for plaintiff's workers' disability compensation claim. Thereafter, the MPCGA refused to pay plaintiff benefits under the workers' disability insurance policy, asserting that Home-Owners, the no-fault insurer, was first in priority for plaintiff's injury; Home-Owners disagreed, arguing that the MPCGA was first in priority. The MPCGA and Home-Owners separately moved for summary disposition. While Home-Owners argued that it did not have priority under MCL 500.3106(2)(b), the MPCGA argued that Home-Owners had priority for plaintiff's benefits under MCL 500.7931. In addition, Home-Owners requested a stay of the Worker's Disability Compensation Board of Magistrates' adjudication of an associated case that had been filed with the Board of Magistrates involving this same injury. The court, Donna B. Howard, J., granted summary disposition in favor of the MPCGA and held that Home-Owners' no-fault policy was first in priority, reasoning that under the Property and Casualty Guaranty Association Act (the Guaranty Act), MCL 500.7901 *et seq*., plaintiff had to exhaust benefits from every other insurance policy before he

would be entitled to benefits from the MPCGA. The trial court also ruled that Home-Owners' motion to stay the action in the Worker's Disability Compensation Board was moot. Home-Owners appealed.

The Court of Appeals *held*:

1. The MPCGA was created by, and operates under, the Guaranty Act. Under MCL 500.7911(1), the MPCGA is a legislatively created means of paying and discharging the obligations of insolvent insurers. The purpose of the Guaranty Act is to protect against financial losses to either policyholders or claimants because of the insolvency of insurers; the act does not require the MPCGA to step into the shoes of insolvent insurers but, instead, protects those persons who have the right to rely on the existence of an insurance policy, who would otherwise have no remedy because of an insurer's solvency. The role of the MPCGA is that of an insurer of last resort, to whom the insured of an insolvent insurer can look for coverage only if there is no other insurance company to turn to for coverage; thus, the MPCGA is not merely a reinsurer that simply assumes the obligations of an insolvent insurer. For that reason, the MPCGA is liable for the payment of personal protection insurance benefits only if there is no solvent insurer at any level of priority. In addition to the MPCGA being subject to the Guaranty Act, MCL 500.7911(3) provides that the MPCGA is subject to the laws of Michigan to the extent it would be subject to those laws if it were an insurer organized and operating under Chapter 50 of the Insurance Code, MCL 500.100 *et seq*., but only to the extent that those laws are consistent with the Guaranty Act. The Guaranty Act defines "covered claims" in MCL 500.7925(1), but MCL 500.7931(3) provides that the MPCGA is not obligated to pay benefits for all covered claims. In particular, MCL 500.7931(3) provides that the MPCGA will receive a credit against a covered claim if damages or benefits are recoverable by a claimant or insured under an insurance policy other than a policy of the insolvent insurer. MCL 500.7931(3) provides that it does not limit the liability of the guaranty association or the insured under a policy of the insolvent insurer for benefits provided under the Worker's Disability Compensation Act. The provision does not mean that the MPCGA cannot receive a credit for any claims under the Worker's Disability Compensation Act. Instead, the provision merely provides that the obligation of the MPCGA with respect to workers' compensation benefits cannot be reduced by an amount greater than that set forth in MCL 418.354 of the Worker's Disability Compensation Act; it does not replace the priority scheme otherwise set forth in the

Guaranty Act. Under MCL 500.3105(a) of the no-fault act, an insurer is liable only to pay for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. MCL 500.3106(2)(b) provides that accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the Worker's Disability Compensation Act are available to an employee who sustains the injury in the course of his or her employment while alighting from the vehicle; the exclusionary provision was enacted to prevent an injured person from receiving duplicative benefits under both the no-fault act and workers' compensation. In this case, it was undisputed that plaintiff's claim was a covered claim for purposes of the Guaranty Act. When Guaranty Insurance became insolvent and plaintiff could no longer collect benefits under the workers' compensation policy, plaintiff could turn to Home-Owners' no-fault insurance policy for benefits. Thus, under MCL 500.7931(3), the MPCGA was entitled to a credit—i.e., a reduction in its obligation—to the extent Home-Owners was available to pay benefits to plaintiff. This result precluded plaintiff from receiving benefits from both Home-Owners and the MPCGA as required by MCL 500.3106. The trial court correctly concluded that under the Guaranty Act, Home-Owners was the first-in-priority insurer and that MPCGA was the insurer of last resort. Accordingly, the trial court correctly granted summary disposition in favor of the MPCGA on this issue.

2. The issue in this case concerned whether Home-Owners or the MPCGA was first in priority under the Guaranty Act and the no-fault act. Because the trial court's analysis was controlled by those two acts and did not involve the Worker's Disability Compensation Act, under MCL 418.841(1), the issue was not within the exclusive jurisdiction of the Workers' Disability Compensation Board of Magistrates. Accordingly, the trial court did not abuse its discretion when it denied Home-Owners' motion to stay.

Affirmed.

Straub, Seaman & Allen, PC (by *Dale L. Arndt*) for Home-Owners Insurance Company.

Scott L. Feuer and *Jennifer E. Bruening* for Michigan Property & Casualty Guaranty Association.

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM. Defendant Home-Owners Insurance Company (Home-Owners) appeals as of right an order granting codefendant Michigan Property & Casualty Guaranty Association (MPCGA) summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. FACTS AND PROCEEDINGS

Plaintiff, Gary Mathis, was injured while alighting from a semitruck during his employment. At the time of the injury, plaintiff's employer had a worker's disability compensation insurance policy through Guaranty Insurance, as well as a no-fault insurance policy for the semitruck through Home-Owners. Plaintiff applied for and received benefits from Guaranty Insurance. While Guaranty Insurance was in the course of paying plaintiff's benefits, it became insolvent. As a result of Guaranty Insurance's insolvency, the MPCGA assumed responsibility for plaintiff's claim.

The MPCGA then refused to pay plaintiff's benefits under the worker's disability compensation insurance policy and asserted that Home-Owners, the no-fault insurer, had priority for plaintiff's injury. Home-Owners disagreed, and this lawsuit ensued.[1] Both the MPCGA and Home-Owners moved for summary disposition. The MPCGA argued that it was entitled to a declaration that Home-Owners had priority for plaintiff's benefits under MCL 500.7931. Home-Owners, on the other hand, argued that it did not have priority under MCL 500.3106(2)(b). Home-Owners also requested a stay of the Worker's Disability Compensation

[1] Plaintiff originally filed suit against Auto Owners Insurance and Home-Owners; however, Auto Owners was later dismissed by stipulation.

Board of Magistrates' adjudication of an associated case that had been filed with the Board of Magistrates involving this same injury. Following a hearing, the trial court granted summary disposition in favor of the MPCGA, ruled that the Home-Owners policy had priority, and ruled that Home-Owners' motion to stay the case was moot. Home-Owners now appeals.

II. SUMMARY DISPOSITION

Home-Owners first argues that the trial court erred when it granted the MPCGA's motion for summary disposition and denied Home-Owners' motion for summary disposition. We disagree. A trial court's decision whether to grant a motion for summary disposition is reviewed de novo. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

The MPCGA was created by, and operates under, the Property and Casualty Guaranty Association Act (the Guaranty Act), MCL 500.7901 *et seq*. See MCL 500.7911. The MPCGA is a legislatively created means of paying and discharging the obligations of insolvent insurers. See *Young v Shull*, 149 Mich App 367, 373; 385 NW2d 789 (1986). The MPCGA is an association of all insurers authorized to engage in the business of insurance in Michigan, excluding life or disability insurance. MCL 500.7911(1). Each insurer is "a member of the association as a condition of its authority to transact insurance in this state." *Id*. In addition to the Guaranty Act, the MPCGA is subject to the laws of Michigan to the extent that it would be subject to those laws if it were an insurer organized and operating under Chapter 50 of the Insurance Code, MCL 500.100

et seq., but only to the extent that those laws are consistent with the Guaranty Act. MCL 500.7911(3).

The Guaranty Act defines "covered claims" for which the MPCGA may be responsible. MCL 500.7925(1). The MPCGA is not obligated to pay benefits for all "covered claims." MCL 500.7931(3). The credit provision of the Guaranty Act provides that the MPCGA shall receive a credit against a covered claim if damages or benefits are recoverable by a claimant or insured under an insurance policy other than a policy of the insolvent insurer. *Id*.

No-fault insurance policies are governed by the no-fault act, MCL 500.3101 *et seq*. Under the no-fault act, an insurer is liable only to pay benefits for "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle[.]" MCL 500.3105(1). Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the Worker's Disability Compensation Act, MCL 418.101 *et seq*., are available to an employee who sustains the injury in the course of his or her employment while alighting from the vehicle. MCL 500.3106(2)(b). The Legislature's purpose for creating the no-fault exclusion found in MCL 500.3106(2) was to prevent an injured person from receiving duplicative benefits under both no-fault insurance and workers' compensation. *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173, 188; 870 NW2d 731 (2015).

The purpose of the Guaranty Act is to protect against financial losses to either policyholders or claimants because of the insolvency of insurers. *Yetzke v Fausak*, 194 Mich App 414, 418; 488 NW2d 222 (1992). The purpose of the Guaranty Act is not for the MPCGA to step into the shoes of insolvent insurers

but, instead, "to protect those persons who have a right to rely on the existence of an insurance policy, who otherwise would be rendered helpless because of an insurer's insolvency." *Id*. at 422.

"[T]he role of the MPCGA is that of an insurer of last resort," which an insured of an insolvent insurer can look to for coverage "only if there is no other insurance company to turn to for coverage." *Auto Club Ins Ass'n v Meridian Mut Ins Co*, 207 Mich App 37, 41; 523 NW2d 821 (1994). *Auto Club Ins Ass'n* rejected the notion that the MPCGA is merely a reinsurer that simply assumes the obligations of an insolvent insurance company. *Id*. at 40. Emphasizing this point, the *Auto Club Ins Ass'n* Court stated that the MPCGA "would be liable for the payment of personal protection insurance benefits only if there were no solvent insurer at any level of priority." *Id*. at 42.

In the instant case, the trial court determined that the MPCGA does not "stand in the exact shoes" of the insolvent insurer but instead that the MPCGA is an insurer of last resort whose purpose is to protect insureds against financial loss due to insurer insolvency. The trial court also determined that when the MPCGA satisfies "covered claim" obligations of the insolvent insurers, it does so under the Guaranty Act, not the Worker's Disability Compensation Act or the no-fault act, so MCL 500.3106(2)(b) does not preclude coverage by Home-Owners. The trial court stated that plaintiff must first exhaust the benefits from every other insurance policy before he is entitled to benefits from the MPCGA. Thus, the trial court granted the MPCGA's motion for summary disposition and ruled that plaintiff was required to first exhaust policy

benefits from Home-Owners before the MPCGA would be required to pay benefits. We generally agree with that analysis.

It is undisputed that plaintiff's claim is a "covered claim" as defined by the Guaranty Act. See MCL 500.7925. However, under MCL 500.7931(3), the MPCGA is not obligated to pay all benefits on all covered claims. Rather, the MPCGA is entitled to a credit for any covered claim if damages or benefits are recoverable by plaintiff from a solvent insurer. See MCL 500.7931(3); *Auto Club Ins Ass'n*, 207 Mich App at 41-42.[2] In this case, when Guaranty Insurance became insolvent and plaintiff could no longer collect benefits under that policy, plaintiff could turn to Home-Owners' no-fault insurance policy for benefits. In other words, the MPCGA was entitled to a "credit," i.e., a reduction in its obligation, to the extent that Home-Owners was available to pay benefits to plaintiff. Simply put, the MPCGA can only be an insurer of last resort and, therefore, cannot be the first-priority insurer ahead of Home-Owners. See *Auto Club Ins Ass'n*, 207 Mich App at 41-42.

We also note that MCL 500.3106 is intended to preclude double recovery by injured persons under both no-fault insurance and workers' compensation insurance. See *Adanalic*, 309 Mich App at 188. By determining that the MPCGA is obligated only to pay benefits once all other potential benefits have been paid and that the MPCGA is entitled to a credit for all

[2] Specifically, MCL 500.7931(3) provides, in relevant part, that "[i]f damages or benefits are recoverable by a claimant other than from any disability policy or life insurance policy owned or paid for by the claimant or by a claimant or insured under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter."

benefits paid by other insurers, there is no possibility that plaintiff could receive benefits from both Home-Owners and the MPCGA.[3]

Home-Owners additionally argues that the MPCGA is precluded from receiving a credit for a claim arising out of the Worker's Disability Compensation Act by the final sentence of the credit provision of the Guaranty Act. See MCL 500.7931(3). This sentence states that

> [i]f the claims made arise under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941, this subsection does not provide credits in excess of those specified in section 354 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.354, and does not limit the liability of the guaranty association or the insured under a policy of the insolvent insurer for benefits provided under the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941. [MCL 500.7931(3).]

Home-Owners contends that this sentence, which states that MCL 500.7931(3) "does not limit the liability of the guaranty association or the insured under a policy of the insolvent insurer for benefits provided under the worker's disability compensation act," means that the MPCGA cannot receive a credit for any claims under the Worker's Disability Compensation Act. Home-Owners therefore concludes that the MPCGA cannot receive a credit for plaintiff's claim

---

[3] MCL 500.3106(2) provides that "[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the [Worker's Disability Compensation Act] . . . are available to an employee . . . ." Home-Owners argues that in this case, benefits under the Worker's Disability Compensation Act *are* available through the MPCGA. We agree with the trial court that the MPCGA is created and governed by the Guaranty Act and, therefore, that the MPCGA provides benefits to an insured under the Guaranty Act, not the Worker's Disability Compensation Act. Thus, MCL 500.3106(2) does not preclude coverage by Home-Owners.

because his benefits are provided under the Worker's Disability Compensation Act. This argument misses the mark. "MCL 418.354 provides for the coordination of benefits, reducing an employer's obligation to pay weekly wage benefits under the [Worker's Disability Compensation Act] when an employee simultaneously receives payments in accordance with specified benefit programs." *Smitter v Thornapple Twp*, 494 Mich 121, 130; 833 NW2d 875 (2013). The sentence of MCL 500.7931(3) in question merely provides that the obligation of the MPCGA with respect to workers' compensation benefits cannot be reduced by an amount greater than that set forth in MCL 418.354. It does not replace the priority scheme otherwise set forth by the Guaranty Act.

Given the authorities cited previously, the trial court properly held that Home-Owners is the first-priority insurer in this matter and the MPCGA is the insurer of last resort.

III. MOTION FOR ADMINISTRATIVE STAY

Home-Owners next argues that the trial court erred when it denied Home-Owners' motion for an administrative stay. We disagree. A trial court's denial of a motion to stay is reviewed for an abuse of discretion. *People v Bailey*, 169 Mich App 492, 499; 426 NW2d 755 (1988). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Detroit Edison Co v Stenman*, 311 Mich App 367, 384-385; 875 NW2d 767 (2015).

Under MCL 418.841(1), "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable."

Whether a claim is a "covered claim" under the Guaranty Act is a determination for the Board of Magistrates to make when the underlying question is whether claimant is entitled to workers' compensation benefits and the employer-employee relationship is more than tangentially involved in the case. See *Mich Prop & Cas Guaranty Ass'n v Checker Cab Co*, 138 Mich App 180, 182-183; 360 NW2d 168 (1984). The Board of Magistrates has exclusive jurisdiction to decide whether injuries suffered by an employee were sustained in the course of employment, but trial courts "retain jurisdiction to determine more 'fundamental' issues, and to adjudicate claims not based on the employer-employee relationship." *Westchester Fire Ins Co v Safeco Ins Co*, 203 Mich App 663, 669; 513 NW2d 212 (1994). *Westchester* held that a matter was properly before the trial court when the employment relationship was merely incidental to the contractual claim for reimbursement. *Id*. at 670-671. *Westchester* noted that when the rights of an employee in a pending claim are not at stake, many commissions disavow jurisdiction and send the parties to the trial courts for relief. *Id*. at 670. This may happen "when the question is purely one between two insurers." *Id*. (quotation marks and citation omitted).

In the instant case, the ultimate issue before the trial court was whether Home-Owners or the MPCGA had priority under the Guaranty Act and the no-fault act. The MPCGA does not dispute on appeal, and did not dispute in the trial court, that plaintiff's claim is a "covered claim" under the Guaranty Act. The trial court's analysis was controlled by the no-fault act and the Guaranty Act, and it did not involve the Worker's Disability Compensation Act. Therefore, the issue is not within the exclusive jurisdiction of the Board of Magistrates. See MCL 418.841(1). The trial court

consequently did not abuse its discretion when it denied Home-Owners' motion to stay.

IV. CONCLUSION

The trial court did not err by granting summary disposition in favor of the MPCGA or by denying Home-Owners' motion to stay. Accordingly, we affirm.

MURRAY, C.J., and MARKEY and RIORDAN, JJ., concurred.

In re ESTATE OF KINZIE RENEE CARLSEN

Docket No. 352026. Submitted December 10, 2021, at Detroit. Decided December 16, 2021, at 9:00 a.m.

Appellants, Mindy Carlsen and Allen Carlsen, as copersonal representatives of the estate of their decedent daughter, filed a petition in the Van Buren Probate Court, seeking to strike the notice of contingent claim filed by appellee Southwest Michigan Emergency Services, PC, claiming that it was untimely. On January 25, 2013, appellants served appellee with notice of the estate's intent to file a medical malpractice action against appellee for its treatment of their daughter before she died. Thereafter, on July 25, 2013, appellants filed the medical malpractice action against several defendants in the Kalamazoo Circuit Court; appellee filed its answer and requested costs and fees on September 10, 2013. Appellee was the sole remaining defendant by the time the case reached trial, and on June 14, 2019, the jury in the circuit court action returned a verdict of no cause of action in appellee's favor. Appellee moved in the circuit court for costs under MCR 2.625(A)(1) as the prevailing party; on July 1, 2019, appellee filed in the probate court a notice of contingent claim against the estate, citing the judgment of no cause of action and its requests for costs in the circuit court. The circuit court, Alexander C. Lipsey, J., ultimately granted appellee's motion for costs and ordered the estate to pay in excess of $166,000. One week after the circuit court entered the order granting appellee's request for costs, appellee presented a notice of claim to the probate court for those costs. Appellants moved to strike the claim, asserting that the contingent claim was barred because appellee failed to file it within four months after the claim arose as required by MCL 700.3803(2)(b). With regard to timing, appellants argued that (1) appellee's contingent claim arose on January 25, 2013, when appellee was served with the estate's notice of intent to sue because that was the time when appellee knew or should have known it might have a claim for costs and fees, (2) the claim arose on July 25, 2013, when the estate filed its medical malpractice action, or (3) the claim arose, at the latest, by September 10, 2013, when appellee filed its answer to the complaint and requested costs and fees. Appellee

opposed the motion to strike, arguing that the contingent claim arose when the circuit court entered the judgment of no cause of action in favor of appellee. The probate court, David J. DiStefano, J., denied appellants' motion to strike, concluding that appellee's notice of contingent claim was timely because the contingent claim arose when the jury returned its verdict of no cause of action in the circuit court on June 14, 2019, and appellee filed its notice of contingent claim on July 1, 2019. The contingency was removed when the circuit court granted appellee's request for taxable costs, and appellee filed a notice of claim with two weeks after that order was entered. Appellants appealed by leave granted. 507 Mich 892 (2021).

The Court of Appeals *held*:

1. MCL 700.3801(1) requires that, upon appointment, a personal representative of an estate must publish notice notifying the creditors of the estate to present their claims against the estate within four months or be forever barred. With regard to claims against a decedent's estate that *arise after* the decedent's death, MCL 700.3803(2) provides, in part, that a claim against a decedent's estate that arises at or after the decedent's death, whether absolute or contingent, is barred against the estate, the personal representative, and the decedent's heirs and devisees unless presented within one of two time limits. Specifically, under MCL 700.3803(2)(a), for a claim based on a contract with the personal representative, within four months after performance by the personal representative. Relevant here, MCL 700.3803(2)(b) provides that for a claim to which Subdivision (a) does not apply, within four moths after the claim arises or the time specified in MCL 700.3803(1)(a), whichever is later. A "contingent claim" is a claim that has not yet accrued and is dependent on some future event that may never happen, while the term "arise," for purposes of MCL 700.3803(2)(b), can be defined as to originate and as to stem from. The fair-contemplation test, used by bankruptcy courts to determine whether a creditor's claim arose before the potential debtor filed a bankruptcy petition, is not applicable to determining when a claim arises for purposes of MCL 700.3803(2)(b).

2. MCR 2.625(A)(1) provides that costs will be allowed to the prevailing party in an action, unless prohibited by statute or by the Michigan Court Rules or unless the court directs otherwise, for reasons stated in writing and filed in the action. In this case, there was no dispute that appellee's claim arose after the death of appellants' daughter and that to be timely under MCL 700.3803(2)(b), the claim had to be submitted within four months after the claim arose. Appellants failed to provide a factual basis

to support their assertion that appellee knew or should have known that it had a contingent claim in 2013 when appellants filed the medical malpractice claim; appellee's contingent claim could not be supported by its confidence that it might prevail and that appellants' claims were frivolous. Instead, the factual basis for appellee's claim for taxable costs was the June 14, 2019 jury verdict of no cause of action in appellee's favor. Appellee filed its notice of contingent claim approximately two weeks after the jury rendered its verdict, within the four-month time limit set by MCL 700.3803(2)(b); the claim was contingent because the trial court had discretion under MCR 2.625(A)(1) to award appellee costs, as the prevailing party, or to direct otherwise. Because appellee filed its notice of contingent claim within four months after the claim first arose, the probate court correctly denied appellants' petition to strike.

Affirmed.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger* and *Sima G. Patel*) for petitioner.

Collins Einhorn Farrell PC (by *Michael J. Cook* and *Trent B. Collier*) for respondent.

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

JANSEN, J. Appellants, Mindy Carlsen and Allen Carlsen, as copersonal representatives of the estate of their daughter, appeal by leave granted[1] the probate court order denying their petition to strike the notice of contingent claim filed by appellee, Southwestern Michigan Emergency Services, PC. The contingent claim was appellee's request for prevailing-party costs and fees under MCR 2.625(A)(1), after a jury in the underlying medical malpractice action rendered a verdict of no cause of action in appellee's favor. The sole issue on appeal is whether appellee presented its contingent claim within four months after it arose, as required by MCL 700.3803(2)(b). We affirm.

[1] See *In re Carlsen Estate*, 507 Mich 892 (2021).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from the Kalamazoo Circuit Court's award of taxable costs to appellee after it prevailed in a medical malpractice case involving the death of seven-month-old Kinzie Renee Carlsen, appellants' daughter. Kinzie died at Bronson Methodist Hospital of staphylococcal sepsis and meningitis. Appellants, as copersonal representatives of Kinzie's estate, filed a medical malpractice complaint against several defendants involved in Kinzie's medical treatment, including appellee.[2] By the time the case reached trial, the only remaining defendant was appellee. On June 14, 2019, a jury returned a verdict of no cause of action in appellee's favor.[3]

As the prevailing party in the medical malpractice case, appellee moved in the circuit court for costs and fees under MCR 2.625(A)(1) and filed a notice of contingent claim in the probate court. Appellants petitioned the probate court to strike appellee's notice of contingent claim, arguing that MCL 700.3803(2)(b) barred the claim because it had not been filed within four months after it arose. Appellants initially argued that appellee's contingent claim arose after the September 4, 2012 publication of notice to the estate's creditors. Ultimately, appellants contended that appellee's contingent claim arose on January 25, 2013, when appellee had

[2] Appellee is a corporation that runs Bronson's emergency room. *Carlsen Estate v Southwestern Mich Emergency Servs, PC*, 338 Mich App 678, 685 n 2; 980 NW2d 785 (2021).

[3] Appellants appealed this decision as of right. This Court issued a published decision affirming in part, reversing in part, and remanding for further proceedings. *Id*. at 684. Relevant to the instant appeal, this Court affirmed the circuit court's award of taxable costs to appellee but reversed the amount of some of the costs awarded and remanded for an evidentiary hearing on others. *Id*. at 711.

been served the estate's notice of intent to sue and knew that it might have a claim for costs and fees. Accordingly, appellants argued, the four-month period during which appellee was required to present a contingent claim expired on May 25, 2013. In addition, appellants argued that appellee knew or should have known that it had a contingent claim by July 25, 2013, when the estate filed its medical malpractice complaint, or at the latest, by September 10, 2013, when appellee answered the complaint and requested costs and fees.

Appellee's position was that it did not have a valid contingent claim until it won the medical malpractice suit and the circuit court entered the judgment of no cause of action. Appellee presented its notice of contingent claim to the probate court. After the circuit court granted its motion for prevailing-party costs and ordered the estate to pay in excess of $166,000, the contingency disappeared, and appellee presented a notice of claim to the probate court a week after entry of the costs award.

Alternatively, appellee noted that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., provides that written notices of claims may be presented to the personal representative of the estate or filed with the probate court. If filing the medical malpractice complaint gave rise to a contingent claim, then appellee's answer, indicating that it thought the claim was frivolous and requesting costs and fees, was sufficient to present notice of a contingent claim to the personal representatives.

The probate court concluded that appellee's contingent claim arose when the jury returned its verdict of no cause of action in the circuit court on June 14, 2019, and ruled that appellee's July 1, 2019 notice of contin-

gent claim was timely. The probate court further found that the contingency was removed when the circuit court issued its order granting appellee's request for taxable costs and that appellee filed a notice of claim within 14 days after that order was entered. The probate court pronounced itself satisfied that this met the definition of "claim" in MCL 700.1103(g)[4] and issued a corresponding order denying the petition to strike.

Appellants filed, and the probate court denied, a motion for reconsideration, and appellants sought leave to appeal in this Court. This Court denied appellants' application for leave to appeal "for lack of merit in the grounds presented." *In re Carlsen Estate*, unpublished order of the Court of Appeals, entered April 24, 2020 (Docket No. 352026). Appellants moved for reconsideration of this Court's order, arguing that, on the basis of recent precedent,[5] it was improper to deny an interlocutory appeal "for lack of merit in the grounds presented" because doing so was, in effect, a " 'peremp-

[4] Under MCL 700.1103(g), the term "claim"

> includes, but is not limited to, in respect to a decedent's or protected individual's estate, a liability of the decedent or protected individual, whether arising in contract, tort, or otherwise, and a liability of the estate that arises at or after the decedent's death or after a conservator's appointment, including funeral and burial expenses and costs and expenses of administration. Claim does not include an estate or inheritance tax, or a demand or dispute regarding a decedent's or protected individual's title to specific property alleged to be included in the estate.

[5] *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 144; 946 NW2d 812 (2019) (explaining that, although this Court may dismiss an application for leave to appeal from a final order for "lack of merit on the grounds presented," when it comes to interlocutory applications for leave to appeal from nonfinal orders, this Court generally does not express an opinion on the merits).

tory affirmance' and operate[d] as an order on the merits." This Court denied appellants' motion for reconsideration. *In re Carlsen Estate*, unpublished order of the Court of Appeals, entered May 28, 2020 (Docket No. 352026). Subsequently, appellants sought leave to appeal this Court's decision in the Michigan Supreme Court. In lieu of granting the application, the Supreme Court remanded the case to this Court for consideration as on leave granted. *In re Carlsen Estate*, 507 Mich 892 (2021).

II. ANALYSIS

Appellee's claim arose when the jury rendered a no-cause verdict in its favor in the underlying medical malpractice case. Appellee presented its notice of contingent claim in the probate court less than a month later. Because appellee presented its contingent claim for prevailing-party costs within four months after the claim arose, the probate court did not err by denying appellants' petition to strike.

This Court reviews de novo whether a probate court properly interpreted and applied the relevant statute. See *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). In *In re Weber Estate*, 257 Mich App 558, 561; 669 NW2d 288 (2003), this Court explained the primary goal of statutory interpretation as follows:

> The primary goal when interpreting statutes is to ascertain and give effect to the intent of the Legislature. Statutory language should be construed reasonably and in accord with the purpose of the statute. If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. If a term is not defined in a statute, a court may consult dictionary definitions. [Quotation marks and citations omitted.]

Upon appointment, a personal representative of an estate must publish notice notifying the creditors of the estate to present their claims against the estate within four months or be forever barred. MCL 700.3801(1). Generally, a claim against a decedent's estate that arose before the decedent's death is barred unless the creditor gave notice of the claim within four months of the published notice. MCL 700.3803(1)(a). Before this Court is a question of first impression that asks when a contingent claim arises under MCL 700.3803(2). Specifically, the parties dispute whether appellee presented its notice of contingent claim within four months after the claim arose.

Regarding claims against a decedent's estate that arise after the decedent's death, MCL 700.3803(2) provides:

> *A claim against a decedent's estate that arises* at or *after the decedent's death*, including a claim of this state or a subdivision of this state, *whether* due or to become due, *absolute or contingent*, liquidated or unliquidated, or based on contract, tort, or another legal basis, *is barred* against the estate, the personal representative, and the decedent's heirs and devisees, *unless presented within 1 of the following time limits*:
>
> (a) For a claim based on a contract with the personal representative, within 4 months after performance by the personal representative is due.
>
> (b) For a claim to which subdivision (a) does not apply, *within 4 months after the claim arises* or the time specified in subsection (1)(a), whichever is later. [Emphasis added.]

There is no dispute that appellee's claim for costs arose after Kinzie's death and that the claim had to be presented "within 4 months after the claim" arose or else be barred. *Id*.

Although EPIC defines "claim" in MCL 700.1103(g), EPIC does not define "contingent claim" or "arises." The Michigan Supreme Court has defined "contingent claim" as "one where the liability depends upon some future event which may or may not happen, and, therefore makes it now wholly uncertain whether there ever will be a liability." *In re Jeffers Estate*, 272 Mich 127, 136; 261 NW 271 (1935); see also *Black's Law Dictionary* (11th ed), p 312 (defining "contingent claim" as "[a] claim that has not yet accrued and is dependent on some future event that may never happen"). As to "arises," *Black's Law Dictionary* (11th ed) lists modern usages of "arise," the root of "arises," as "**1.** To originate; to stem (from) <a federal claim arising under the U.S. Constitution>. **2.** To result (from), <litigation routinely arises from such accidents>. **3.** To emerge in one's consciousness; to come to one's attention <the question of appealability then arose>." See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "arise" as "**1**: "to get up: RISE **2 a**: to originate from a source **b**: to come into being or to attention **3**: ASCEND *syn* see SPRING"). The parties fundamentally agree on the definitions of "contingency" and "contingent claim" but rely on different definitions of "arise." Appellants stress the definition "to emerge in one's consciousness," while appellee relies on the definition quoted by our Supreme Court in *People v Johnson*, 474 Mich 96, 100; 712 NW2d 703 (2006) (quoting the 1997 edition of *Random House Webster's College Dictionary*'s definition of "arise" as " 'to result; spring or issue' ").[6]

---

[6] Appellee relies on *Lumley v Bd of Regents for Univ of Mich*, 215 Mich App 125, 130-131; 544 NW2d 692 (1996), to argue that, in the present case, "arises" is synonymous with "accrues" and that, therefore, its claim first "accrued" when the jury returned its verdict. This Court declines to equate "arises" with "accrues" for purposes of MCL 700.3803(2). As this

Appellants contend that appellee's contingent claim arose in 2013, when appellants filed the underlying medical malpractice complaint. As its answer to the complaint shows, that was when appellee first contemplated that it could win the case and that it might be entitled to prevailing-party costs. Appellants contend that the same conclusion results from application of the "fair contemplation" test, a test used by bankruptcy courts to determine whether a creditor's claim arose before the potential debtor filed a bankruptcy petition. Appellants urge this Court to adopt and apply the fair-contemplation test in the present case. We decline to do so. Federal bankruptcy law is not binding on this Court, *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007), and appellants make no argument that the language of the bankruptcy statutes is similar to the language of the relevant provisions of EPIC.

Appellants' position fails to identify a proper factual basis to support its conclusion that appellee's contingent claim arose in 2013. A contingent claim must have a factual basis that is capable of being proved. See *Clark v Davis*, 32 Mich 154, 159 (1875) (indicating that claimants who cannot prove their claims as a debt owed can present their contingent claims to the probate court, along with the proper proofs). Even appli-

---

Court observed in *Lumley*, the use of a word in a statute "presents a question of legislative intent." *Lumley*, 215 Mich App at 129. Among the Legislature's stated purposes for EPIC is "[t]o promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c). In some instances, a contingent claim may arise for purposes of MCL 700.3803 before it accrues to the point that an action can be alleged in a complaint. MCL 700.3810 addresses arrangements that can be made to provide for the future payment of contingent claims, consistent with the goals of EPIC.

cation of the fair-contemplation test requires an underlying act, or factual basis, that gives rise to the "fair contemplation" that one has a claim. See *Sanford v Detroit*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued December 4, 2018 (Case No. 17-13062), p 5 (indicating that the underlying facts giving rise to the plaintiff's claim against the city of Detroit and certain Detroit police officers were his personal knowledge and experience that his confession was falsely obtained). A party's "contemplation" is "fair" because it arises from discernable facts that would support a claim, even if the claim depends on a future event that might not happen (such as a convicted criminal's exoneration, as in *Sanford*). When arguing that appellee knew or should have known that it had a contingent claim in 2013, appellants do not point to any discernable, underlying facts to support that claim, other than appellee's assessment of the medical malpractice complaint. But whatever confidence appellee had that it might prevail and that appellants' claims were frivolous, these are not facts of the sort that support a contingent claim. It is the jury that provided the factual basis for appellee's claim for prevailing-party costs.

Appellee's claim for taxable costs arose under MCR 2.625(A)(1) ("Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action."). The factual basis for appellee's claim against the estate for taxable costs was the June 14, 2019 jury verdict of no cause of action in its favor. Appellee filed its notice of contingent claim approximately two weeks after the jury rendered its verdict, well within the time limit set by MCL 700.3803(2)(b). Appellee's claim was contingent because the trial court had the discretion to award

prevailing-party costs or to "direct[] otherwise." MCR 2.625(A)(1). Because appellee filed its notice of contingent claim within four months after the claim first arose, the probate court did not err by denying the petition to strike.

Affirmed.

K. F. KELLY, P.J., and RICK, J., concurred with JANSEN, J.

BLACKWELL v CITY OF LIVONIA

Docket No. 357469. Submitted December 10, 2021, at Detroit. Decided December 16, 2021, at 9:05 a.m. Leave to appeal denied 509 Mich 977 (2021).

Charles Blackwell brought an action against the city of Livonia in the Wayne Circuit Court under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. He had submitted a request to the city of Livonia seeking inbox messages sent to a social media profile for "Livonia Mayor Maureen Miller Brosnan." The city denied his request because it had no control over the social media profile, no city resources were used to create or operate it, and the profile was used for the mayor's political campaign purposes—not to conduct city business. Blackwell asked city officials to reconsider his request, but the city again denied it and reiterated that the requested records were not available to the city for review or disclosure and did not meet the definition of "public record" in MCL 15.232. Thereafter, Blackwell filed his complaint to compel production of the requested messages. Blackwell alleged that because Mayor Brosnan used the social media profile to disseminate information about her official activities and to communicate directly with constituents seeking to contact the mayor's office, the social media profile was not strictly used for campaign purposes and the inbox messages were "public records" as defined by MCL 15.232. The trial court, Susan L. Hubbard, J., denied Blackwell's motion for summary disposition and granted summary disposition in favor of the city because Blackwell failed to allege or demonstrate that the social media profile was "prepared, owned, used, possessed, or retained in the performance of an official function." Blackwell appealed.

The Court of Appeals *held*:

1. Except under certain exceptions specifically delineated in MCL 15.243, a person who provides a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record is entitled to inspect, copy, or receive copies of the requested public record of the public body. MCL 15.232(h) defines "public body" to include, in addition to specifically delineated state employees and

entities, any other body that is created by state or local authority or is primarily funded by or through state or local authority. The office of the mayor for the city of Livonia, which was created by the city charter and occupies an office within the city administration, is a "public body" under MCL 15.232(h)(*iv*). But that the *office of the mayor* is a public body does not make the mayor herself a "public body." MCL 15.232(h)(*i*) includes employees of state government within the definition of "public body," but it does not include officers and employees of municipalities such as cities or townships. The Supreme Court recognized the distinction between the official—the individual—and the office of the city official—the latter of which constitutes the pertinent "public body" under MCL 15.232(h)(*iv*). The statutory distinction between state and local government officials evinces the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body."

2. Under MCL 15.232, a "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." The social media posts relied on by the FOIA requester to argue that the social media account was used for official business, which included articles about the city's efforts to abate COVID-19 and the number of mental health calls the city police department received each month, did not demonstrate that Mayor Branson was performing an official function when she posted them to her account. Rather, the content of the posts and other evidence indicated that the mayor's social media profile was a campaign page and not an official page for the office of the mayor; it was not part of the city's operations or online presence and was not used in the performance of an official function. Accordingly, given that the mayor herself was not a public body, defendant met its burden of sustaining its decision to withhold the requested records from disclosure because the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office. Direct messages sent or received by a city official through an unofficial social media profile are not subject to public disclosure simply because the city official is an administrative officer for the city. Such messages would be subject to disclosure under FOIA only if the messages were used by the office of the city official in the performance of an official function.

Affirmed.

FREEDOM OF INFORMATION ACT — PUBLIC RECORDS — DIRECT MESSAGES SENT TO PERSONAL SOCIAL MEDIA ACCOUNTS.

Under MCL 15.233 of the Freedom of Information Act (FOIA), except under certain exceptions specifically delineated in MCL 15.243, a person who provides a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record is entitled to inspect, copy, or receive copies of the requested public record of the public body; under MCL 15.232, a "public record" is "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created"; direct messages that were sent to a city mayor's personal social media account, which was used for political purposes and was not part of the city's operations or online presence, and were not owned, used, in the possession of, or retained by the office of the mayor in the performance of an official function, were not subject to disclosure as public records.

Charles Blackwell *in propria persona*.

Paul A. Bernier, *Michael E. Fisher*, and *Eric S. Goldstein* for the city of Livonia.

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

PER CURIAM. Plaintiff appeals as of right the trial court's order denying plaintiff's motion for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10) and granting summary disposition in favor of defendant under MCR 2.116(I)(2). In this case brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., plaintiff sought production of inbox communications sent to a private social media account of Mayor Maureen Miller Brosnan. The trial court determined the communications were not subject to disclosure under FOIA because the social media account was not prepared, owned, used, in the possession of, or retained by defendant and, thus, were not public records. Because there was no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On February 22, 2021, plaintiff submitted a FOIA request to various individuals in Livonia city government seeking "inbox messages" sent to the Facebook profile entitled "Livonia Mayor Maureen Miller Brosnan." On March 1, 2021, defendant denied plaintiff's FOIA request, explaining: "No City resources were used to create or operate the page, and the City's [Information Technology] Department has no control over the page. The page in question is used for the Mayor's political campaign purposes, and not to conduct City business." Upon receipt of the denial letter, plaintiff again wrote to individuals within Livonia city government, stating any appeal to the mayor would be "futile" and asking instead if Livonia "would be willing to overturn it's [sic] denial and produce the requested inbox messages." Michael E. Fisher, Livonia's Chief Assistant City Attorney, responded to plaintiff that the requested records were "not available to the City for review or disclosure and do[] not meet the definition of 'public record' in MCL 15.232."

On March 2, 2021, plaintiff filed a single-count complaint seeking to compel the production of inbox messages sent to the Facebook profile. In the complaint, plaintiff alleged that Mayor Brosnan used the Facebook profile to disseminate information about her official activities as mayor, such as presiding over a swearing-in ceremony for new firefighters. Plaintiff also alleged Mayor Brosnan used the Facebook profile to communicate directly with constituents who were seeking to contact the mayor's office. Thus, according to plaintiff, the Facebook profile was not strictly used for campaign purposes, and the writings he sought were public records as defined by MCL 15.232.

On March 26, 2021, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) and (10). Plaintiff argued Mayor Brosnan was operating the Facebook profile in furtherance of her official duties by posting about city business, rendering the messages "public records" under FOIA. In the motion, plaintiff appended screenshots taken from the Facebook profile, which showed that Mayor Brosnan had posted articles about defendant's efforts to abate COVID-19 and the number of mental health calls the Livonia Police Department received each month. On the basis of this evidence, plaintiff claimed the screenshots demonstrated that Mayor Brosnan used the Facebook profile for official purposes. Relying on *Bisio v Village of Clarkston*, 506 Mich 37; 954 NW2d 95 (2020), plaintiff asserted that the mayor's office was a "public body" as defined by FOIA, making the Facebook messages "public records" subject to disclosure.

In response, defendant averred that any direct messages sent to the Facebook profile were not subject to disclosure as public records under FOIA because they were not prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. Defendant submitted affidavits of Livonia Information Systems Director Casey O'Neil and Livonia Mayoral Chief of Staff Dave Varga, both of whom attested that the Facebook profile was "not part of the City of Livonia's operations or on-line presence." They both also stated the Facebook profile was not "available for official use by the City of Livonia or the Office of the Mayor, nor has it been so used." Thus, defendant argued the Facebook messages were not subject to disclosure because they were not "public records," since they were not in defendant's possession and not created or used in furtherance of official business.

After a hearing, the trial court entered an order denying plaintiff's motion for summary disposition and granting summary disposition in favor of defendant under MCR 2.116(I)(2). The trial court reasoned that plaintiff failed to allege or demonstrate that the Facebook profile was "prepared, owned, used, possessed or retained in the performance of an official function," and the Facebook profile was "in the possession of [] candidate Maureen Brosnan and not even in her performance of an official function." Citing *Hopkins v Duncan Twp*, 294 Mich App 401; 812 NW2d 27 (2011), the trial court explained that the fact that a document is in the possession of a public body, standing alone, does not render the document a "public record" under FOIA. Instead, the trial court found the Facebook profile was used "for political purposes" and, therefore, not a public record. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Buckmaster v Dep't of State*, 327 Mich App 469, 475; 934 NW2d 59 (2019).[1] "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a complaint." *MLive Media Group v Grand Rapids*, 321 Mich App 263, 269; 909 NW2d 282 (2017). When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the

[1] Although the trial court cited MCR 2.116(I)(2), it did not otherwise specify the grounds under which it granted summary disposition in favor of defendant. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and MCR 2.116(C)(10). In deciding the motion, the trial court considered evidence outside of the pleadings when ruling in favor of defendant. We therefore treat the motion as having been decided under MCR 2.116(C)(10). *Williamston Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4; 927 NW2d 262 (2018).

light most favorable to the party opposing the motion. *Id*. "A trial court must grant the motion if it finds 'no genuine issue as to any material fact' and determines that 'the moving party is entitled to judgment or partial judgment as a matter of law.' " *Id*., quoting MCR 2.116(C)(10). "[S]ummary disposition is proper under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Rataj v Romulus*, 306 Mich App 735, 747; 858 NW2d 116 (2014) (quotation marks and citation omitted).

Legal determinations made in the context of a FOIA proceeding are reviewed de novo. *Hopkins*, 294 Mich App at 408 (citation omitted). This Court also reviews de novo questions of statutory interpretation. *Buckmaster*, 327 Mich App at 475. The Court's primary goal of statutory interpretation is to give effect to the Legislature's intent. *Id*. If the statute's language is clear and unambiguous, this Court must give the words their plain and ordinary meaning, and judicial construction of the statute is not permitted. *Id*.

III. ANALYSIS

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). Accordingly, except under certain exceptions specifically delineated in MCL 15.243, "a person who 'provid[es] a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record' is

entitled 'to inspect, copy, or receive copies of the requested public record of the public body.' " *Id*., quoting MCL 15.233(1) (alteration in original).

The term "public body" is defined under MCL 15.232(h) as any of the following categories:

> (*i*) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (*ii*) An agency, board, commission, or council in the legislative branch of the state government.
>
> (*iii*) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
>
> (*iv*) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body.

Additionally, the term "public record" is defined under MCL 15.232(i) as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."

"[W]hat ultimately determines whether records in the possession of a public body are public records within the meaning of FOIA is whether the public body prepared, owned, used, possessed, or retained them in the performance of an official function." *Amberg*, 497 Mich at 32. "In the event a FOIA request is denied and the requesting party commences a circuit court action

to compel disclosure of a public record, the public body bears the burden of sustaining its decision to withhold the requested record from disclosure." *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008), citing MCL 15.240(4).

Plaintiff contends the trial court erred when it granted summary disposition in defendant's favor because it misapplied the holding in *Bisio* when it concluded the Facebook inbox messages were not "public records." According to plaintiff, *Bisio* stands for the proposition that the office of the mayor for the city of Livonia constitutes a public body and, therefore, the Facebook inbox messages are "retained, used, or possessed" by that body. While on the one hand we agree with plaintiff that the "office of the mayor" for the city of Livonia is a public body—*Bisio* settled that question—we do not agree with plaintiff that the office of the mayor retains, uses, or possesses the *private* messages of a political officeholder's social media account, such that those messages become "public records" under FOIA.

In *Bisio*, 506 Mich at 51-53, our Supreme Court held that the office of the city attorney for the Village of Clarkston fell within the definition of a "public body" under MCL 15.232(h)(*iv*) because the village charter established that the city attorney was one of several administrative officers for the Village of Clarkston. The office of the city attorney was a "public body" because the office was an " 'other body that is created by . . . local authority' under MCL 15.232(h)(*iv*)." *Bisio*, 506 Mich at 53. Therefore, communications between the city attorney and a consulting firm, which were in the possession of the office of the city attorney and

were used in furtherance of the office's municipal duties, were public records subject to disclosure under FOIA. *Id*. at 53-54.

In the same manner, the office of the mayor of the city of Livonia falls within the definition of a public body under MCL 15.232(h)(*iv*) because it, too, was created by local authority. Much like the charter for the Village of Clarkston addressed in *Bisio*, the City of Livonia Charter, ch V, § 1 provides as follows:

> The administrative officers of the City shall be the Mayor, City Clerk, City Treasurer, and not less than two (2) nor more than four (4) constables, and all directors and heads of the several departments, and all members of the several commissions and boards of the City government. All other persons in the service or employ of the City shall be deemed employees.

The City of Livonia Charter, ch V, § 3 also indicates that each of the administrative officers occupies an office within the city administration:

> No person shall be eligible for any *administrative office* of the City, elective or appointive, unless he is a duly qualified and registered elector in the City and has continuously resided in the City for at least two (2) years immediately prior to his appointment or the election at which he is a candidate; provided, however, that said requirement of two (2) years continuous residence shall not exist or have any effect as to the first City election held under this Charter. [Emphasis added.]

These provisions are consistent with the common understanding that officers generally occupy offices within an entity. See *Bisio*, 506 Mich at 52. Thus, as in *Bisio*, the city of Livonia mayor's office falls within the definition of a public body under MCL 15.232(h)(*iv*) because it was created by the City of Livonia Charter.

That the *office of the mayor* is a public body, however, is not the end of the analysis. The question presented in this case is whether the inbox messages sent to Mayor Brosnan's Facebook profile, which is not maintained or used by the office of the mayor, are also public records under FOIA. We hold that they are not.

In *Bisio*, 506 Mich at 53 n 10, our Supreme Court recognized the distinction between the city attorney—the individual—and the office of the city attorney—the public body—stating:

> [W]e do not conclude that the city attorney, individually, is himself a "public body" under MCL 15.232(h)(*iv*). Rather, we conclude that the entity, the "office of the city attorney," constitutes the pertinent "public body" under MCL 15.232(h)(*iv*).

While our Supreme Court did not explicitly state that the city attorney was excluded from the definition of "public body," plaintiff advances no convincing argument to hold otherwise. While FOIA includes in the definition of "public body" officers and employees of state government, see MCL 15.232(h)(*i*), the definitional section does not also include officers and employees of municipalities such as cities or townships. The distinction between the state and local government officials demonstrates the Legislature's intent to exclude individual government officers and employees not working in state government from the definition of "public body." See *Breighner v Mich High Sch Athletic Ass'n, Inc*, 471 Mich 217, 233 n 6; 683 NW2d 639 (2004) ("[I]t would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA.") (alteration in original).

In support of his argument that the Facebook inbox messages are "public records," plaintiff relies principally on *West v Puyallup*, 2 Wash App 2d 586, 594-596; 401 P3d 1197 (2018),[2] in which the Court of Appeals of Washington held that posts made by public officials on their private social media accounts may constitute public records under that state's public records laws, provided the records met the statutory elements of a "public record." Similar to this state's FOIA law, the public records law in Washington defines a "public record" as "consisting of three elements: (1) 'any writing' (2) 'containing information relating to the conduct of government or the performance of any governmental or proprietary function' (3) 'prepared, owned, used, or retained by any state or local agency.' " *West*, 2 Wash App 2d at 592 (citation omitted), citing *Nissen v Pierce Co*, 183 Wash 2d 863, 879; 357 P3d 45 (2015). Ultimately, the Washington Court of Appeals concluded that while the social media posts were writings that related to the conduct of government, thus satisfying the first two elements, the social media posts were not prepared by a governmental body. *West*, 2 Wash App 2d at 594-598. The court explained:

> [T]here is no indication that Door was acting in her "official capacity" as a City Council member in preparing these posts. The Facebook page was not associated with the City and was not characterized as an official City Council member page. Instead, the Facebook page was associated with the "Friends of Julie Door," which according to Door's declaration was used to provide information to her supporters. [*Id*. at 599.]

---

[2] Cases from foreign jurisdictions are not binding on this Court but may be considered for their persuasive value. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006).

Defendant met its burden of supporting its decision to withhold the requested records from disclosure because the evidence demonstrates, like the records in *West*, the direct messages sent to Mayor Brosnan's Facebook profile were not subject to disclosure as public records under FOIA given that they were not owned, used, in the possession of, or retained by the city of Livonia mayor's office. In support of his motion for summary disposition, plaintiff relied upon screenshots from the Facebook profile showing Mayor Brosnan had publicly posted articles about the city of Livonia's efforts to abate COVID-19 and the number of mental health calls the city of Livonia Police Department received each month. Like the social media posts in *West*, these posts do not, by themselves, demonstrate Mayor Brosnan was performing an official function when making them public. The content of the posts, coupled with the affidavits from Varga and O'Neil, demonstrate the Facebook profile was used as a campaign page, and not an official page for the office of the mayor. The Facebook profile was not part of defendant's operations or online presence, and neither O'Neil nor Varga had access to any direct messages sent to the Facebook profile. Considering that Mayor Brosnan is not herself a public body under MCL 15.232(h)(*iv*), see *Bisio*, 506 Mich at 53 n 10, defendant met its burden of sustaining its decision to withhold the requested records from disclosure because the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office.

This Court's opinion in *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 247; 789 NW2d 495 (2010), is instructive. In *Howell*, this Court held that personal e-mails sent by public-body employees and captured in the digital memory of a public body's e-mail system did not render such personal e-mails

public records subject to FOIA. *Id*. This Court recognized that "unofficial private writings belonging solely to an individual should not be subject to public disclosure merely because that individual is a state employee[, and] . . . the same is true for all public body employees." *Id*. at 237 (quotation marks and citation omitted). Applying similar reasoning here, private direct messages sent or received by Mayor Brosnan through an unofficial Facebook profile are not subject to public disclosure merely because Mayor Brosnan is an administrative officer for the city of Livonia. Instead, such direct messages would be subject to disclosure under FOIA only if such messages were utilized by the city of Livonia mayor's office in the performance of an official function. See MCL 15.232(i).

Contrary to plaintiff's assertions, none of the evidence submitted by him demonstrated that Mayor Brosnan used the Facebook profile to communicate with individual constituents regarding official business. On the contrary, Mayor Brosnan's comment instructing a constituent to call her office directly showed that Mayor Brosnan did not use the Facebook profile to communicate with individual constituents regarding official business. Instead, she directed the constituent to communicate with her office through official channels by calling her office directly. Indeed, Varga attested in his affidavit that Mayor Brosnan's Facebook profile had never been available for official use by the city of Livonia mayor's office.

In sum, the circuit court did not err when it granted summary disposition in favor of defendant under MCR 2.116(I)(2) because the direct messages sent to the Facebook profile entitled "Livonia Mayor Maureen Miller Brosnan" were not subject to disclosure as public records under FOIA. Defendant met its burden

of sustaining its decision to withhold the requested records from disclosure because the record evidence indicates that the direct messages were not owned, used, in the possession of, or retained by the city of Livonia mayor's office in the performance of an official function.

Affirmed. Defendant, as the prevailing party, may tax costs.

K. F. KELLY, P.J., and JANSEN and RICK, JJ., concurred.

REED-PRATT v DETROIT CITY CLERK

Docket No. 357150. Submitted December 8, 2021, at Detroit. Decided December 16, 2021, at 9:10 a.m.

Leigh Reed-Pratt filed an action in the Wayne Circuit Court against the Detroit City Clerk, the Detroit Election Commission, and Janee Ayers, seeking an order directing the city clerk to not certify Ayers's name to the commission for placement on the August 2021 primary election ballot for an at-large city council seat. On April 6, 2021, Ayers filed an affidavit of identity (AOI), attesting to the truth that, as of that date, all statements, reports, late filing fee, and fines due from her or any candidate committee organized to support her election to office under the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*., had been filed or paid. Plaintiff challenged Ayers's candidacy by letter submitted to the city clerk and members of the commission, arguing that because Ayers's AOI contained false information—specifically, that she had two outstanding campaign finance reports that were required to be filed under the MCFA—the city clerk had a legal duty under MCL 168.558(4) to not certify Ayers's name to the commission for placement on the ballot. On April 27, 2021, the city clerk responded that the requested action was not ministerial in nature because the accuracy of the AOI could not be ascertained on its face and that to resolve that question, the clerk needed information that was supplied to the Wayne County Clerk. After being contacted by the city clerk regarding the information, the county clerk indicated in an e-mail that, as of April 6, 2021, Ayers had outstanding amended campaign finance reports associated with the 2018 annual, July 2019 quarterly, October 2019 quarterly, 2019 annual, July 2020 quarterly, October 2020 quarterly, and the 2020 annual campaign statements; the county clerk noted that the amended campaign statements were filed on April 25, 2021. On April 29, 2021, the city clerk refused to not certify Ayers's name for placement on the ballot. Plaintiff moved for the court to decree the following: (1) that Ayers had failed to file seven amended campaign finance reports required by the MCFA, (2) that Ayers had made a false statement in her AOI when she affirmed that she had filed all required campaign finance reports, and (3) that the city clerk had a duty to not certify Ayers's name to the commission under MCL

168.558(4). The court, Timothy M. Kenny, J., denied plaintiff's motion and dismissed her complaint, concluding that amended campaign finance reports did not fall within MCL 168.558(4) and that plaintiff had failed to establish that Ayers made a knowingly false statement in her AOI. Plaintiff appealed.

The Court of Appeals *held*:

1. Ayers's name was placed on the primary ballot, rendering the issues in this case moot. The Court could nonetheless consider the merits of the case because there was a reasonable expectation that the issues involved could recur yet evade judicial review.

2. MCL 168.550 provides that to be included on the primary election ballot of any political party in Michigan, a candidate must have filed a nominating petition according to the provisions of the Michigan Election Law, MCL 168.1 *et seq*., and complied with all other requirements of that law. MCL 168.558 governs the filing of certain documents, including AOIs. Relevant here, MCL 168.558(4) requires that an AOI must include a statement that as of the date of the affidavit, *all* statements and reports required of the candidate or any candidate committee organized to support the candidate's election under the MCFA have been filed or paid; the attestation requirement applies only to those statements and reports that are required under the MCFA. The word "all" in MCL 168.558(4) is extremely broad and leaves no room for exceptions. Thus, the phrase "all statements and reports" in MCL 168.558(4) encompasses both the initial required report and an amended report. If a candidate fails to comply with this provision, an officer must not certify to the board of election commissioners the name of a candidate who executes an AOI that contains a false statement with regard to any information or statement required under the provision. The failure to supply a facially proper AOI, i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot. MCL 169.216(6) provides that a filing official must determine whether a filing complies with the MCFA; if the filing does not comply with the act, within four days after the deadline for filing a statement or report under the MCFA, the filing official must give notice to the filer by registered mail of an error or omission in the statement or report and give notice to a person the filing official has reason to believe is a person required to and who failed to file a statement or report. In turn, MCL 169.216(7) provides that within 9 business days after the report or statement is required to be filed, the filer must make any corrections in the statement or report filed with the appropriate filing official. In

other words, a correction to a report or statement is itself a report or statement that is required to be filed under the MCFA. In this case, the trial court erred when it concluded that MCL 168.558(4) does not require a candidate to attest that all reports—amended or otherwise—that are required by the MCFA have been filed. However, the seven outstanding campaign finance reports requested by the county clerk were not required to be filed under the MCFA. The county clerk's request for those outstanding reports was made more than four business days after the deadline for filing reports, contrary to MCL 169.216(6), and the county clerk did not identify any error or correction in any of the specified reports requested. Thus, the request did not fall within the scope of MCL 169.216. Because the seven amended reports were not required under MCL 168.558(4), there was no evidence that Ayers made a false statement when she swore that she filed all reports required under the MCFA. Accordingly, because there was no false statement in the AOI, the trial court did not err when it denied plaintiff's request for declaratory relief.

Affirmed.

ELECTIONS – AFFIDAVITS OF IDENTITY – ATTESTATION OF FACTS – "ALL STATEMENTS AND REPORTS."

MCL 168.558(4) requires that an affidavit of identity must include a statement that as of the date of the affidavit, all statements and reports required of the candidate or any candidate committee organized to support the candidate's election under the Michigan Campaign Finance Act (MCFA) have been filed or paid; the attestation requirement applies only to those statements and reports that are required under the MCFA; the phrase "all statements and reports" in MCL 168.558(4) encompasses both the initial required report and any amended report (MCL 169.201 *et seq*.).

Andrew A. Paterson for plaintiff.

The Miller Law Firm, PC (by *Melvin B. Hollowell* and *Angela L. Baldwin*), *Dykema Gossett, PLLC* (by *Jason T. Hanselman* and *W. Alan Wilk*), and *James D. Noseda* for defendants.

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM. Plaintiff, Leigh Reed-Pratt, appeals as of right the trial court order denying her request for a declaratory judgment. For the reasons stated in this opinion, we affirm.

I. BASIC FACTS

This case involves events that occurred before the August 2021 primary election in the city of Detroit. On April 6, 2021, defendant, Janee Ayers, filed an affidavit of identity (AOI) that included the following statement before her signature:

> By signing this affidavit, I swear (or affirm) that the facts I have provided are true. I further swear (or affirm) that the facts contained in the statement set forth below are true. (See Section "E" on reverse for further information.)
>
> **At this date, all statements, reports, late filing fees, and fines due from me or any Candidate Committee organized to support my election to office under the Michigan Campaign Finance Act, PA 388 of 1976, have been filed or paid.**
>
> I acknowledge that making a false statement in this affidavit is perjury—a felony punishable by a fine up to $1,000 or imprisonment for up to 5 years, or both. (MCL 168.558, 933 and 936)[.]

On April 23, 2021, plaintiff challenged Ayers's candidacy in a letter her lawyer submitted to the Detroit City Clerk (the City Clerk) and members of the Detroit Election Commission (the Commission). Plaintiff contended that Ayers's AOI contained a false statement because, contrary to the attestation she made in her AOI, she had two outstanding campaign finance reports that were required to be filed under the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*. Plaintiff argued that, as a result of Ayers's false state-

ment, the City Clerk had a legal duty under MCL 168.558(4) to not certify Ayers's name to the Commission for placement on the August 2021 primary election ballot for an at-large city council seat.

On April 27, 2021, the City Clerk responded that, although a facially improper affidavit was grounds to disqualify a candidate, the accuracy of a candidate's campaign finance report could not be ascertained by looking at the face of the AOI. As a result, the response to the challenge was not ministerial. The City Clerk noted that, because the campaign finance reports were supplied to the Wayne County Clerk (the County Clerk), she would have to inquire of the County Clerk as to whether Ayers had two outstanding campaign finance reports when she filed her AOI on April 6, 2021. In response to the City Clerk's inquiry as to the status of Ayers's campaign finance reporting, the County Clerk advised:

> According to the campaign finance records for Ms. Ayers, as of April 6, 2021, Ms. Ayers had outstanding amended campaign finance reports associated with the 2018 Annual, July 2019 Quarterly, October 2019 Quarterly, 2019 Annual, July 2020 Quarterly, October 2020 Quarterly and the 2020 Annual campaign statements. The amended campaign statements due were filed on April 25, 2021.[1]

Thereafter, on April 29, 2021, the City Clerk refused to not certify Ayers's name for placement on the ballot. Plaintiff filed an action for declaratory relief on the same day. She then filed a motion asking the court to

---

[1] Additionally, on April 27, 2021, plaintiff filed a request with the Secretary of State and the State Director of Elections, asking that they take supervisory control and direct the City Clerk to not certify Ayers's candidacy. The Secretary of State and the State Director of Elections did not respond to the request by the deadline noted in plaintiff's e-mail.

decree that (1) Ayers failed to file seven amended campaign finance reports she was required to file under the MCFA, (2) Ayers made a false statement in her AOI when she affirmed that she had filed all required campaign finance reports, and (3) the City Clerk had a duty to not certify Ayers's name to the Commission under MCL 168.558(4). After briefing by all the parties and three motion hearings, the trial court denied plaintiff's motion and dismissed the complaint, concluding amended campaign finance reports did not fall within MCL 168.558(4) and that plaintiff had failed to demonstrate Ayers made a knowingly false statement in her AOI. Plaintiff now appeals.

II. MOOTNESS

We first address the applicability of the mootness doctrine because "the question of mootness is a threshold issue that a court must address before it reaches the substantive issues of a case." *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019) (quotation marks, citation, and brackets omitted). An issue is moot if it is presented under circumstances "in which a judgment cannot have any practical legal effect upon a then existing controversy." *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018) (quotation marks and citation omitted). "However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review." *In re Indiana Mich Power Co Application*, 297 Mich App 332, 340; 824 NW2d 246 (2012).

In this case, the City Clerk certified Ayers's name to the Commission for inclusion on the August 2021 primary ballot, the Commission voted to include Ayers's name on the ballot, and the election has already

concluded. Therefore, a declaration that Ayers made a false statement on her AOI, possibly triggering a legal duty for the City Clerk to not certify Ayers's name for inclusion on the August 2021 primary ballot, would not "have any practical legal effect upon" an existing controversy. *TM*, 501 Mich at 317 (quotation marks and citation omitted). Nevertheless, we consider the merits of plaintiff's appeal because "the strict time constraints of the election process necessitate that, in all likelihood, such challenges often will not be completed before a given election occurs . . . ." *Gleason v Kincaid*, 323 Mich App 308, 316; 917 NW2d 685 (2018). And, as a result, there is a reasonable expectation that the issues involved in this appeal could recur yet escape judicial review.

III. DECLARATORY JUDGMENT

A. STANDARD OF REVIEW

Plaintiff argues the trial court erred by denying her motion for declaratory judgment. "Questions of law relative to declaratory judgment actions are reviewed de novo, but the trial court's decision to grant or deny declaratory relief is reviewed for an abuse of discretion." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 376; 836 NW2d 257 (2013). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014). "[T]he trial court's factual findings will not be overturned unless they are clearly erroneous." *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been

committed." *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 579; 939 NW2d 705 (2019) (quotation marks and citation omitted).

B. ANALYSIS

To be included on the primary election ballot of any political party in this state, a candidate must "have filed nominating petitions according to the provisions of" the Michigan Election Law, MCL 168.1 *et seq*., and complied with "all other requirements" of the law. MCL 168.550. The filing of certain documents—including AOIs—is governed by MCL 168.558. *Nykoriak v Napoleon*, 334 Mich App 370, 375-377; 964 NW2d 895 (2020). Relevant to this appeal, Subsection (4) provides:

> An affidavit of identity must include a statement that as of the date of the affidavit, all statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the Michigan campaign finance act, 1976 PA 388, MCL 169.201 to 169.282, have been filed or paid; and a statement that the candidate acknowledges that making a false statement in the affidavit is perjury, punishable by a fine up to $1,000.00 or imprisonment for up to 5 years, or both. . . . An officer shall not certify to the board of election commissioners the name of a candidate who fails to comply with this section, or the name of a candidate who executes an affidavit of identity that contains a false statement with regard to any information or statement required under this section. [MCL 168.558(4).]

"The failure to supply a facially proper affidavit of identity (AOI), i.e., an affidavit that conforms to the requirements of the Election Law, is a ground to disqualify a candidate from inclusion on the ballot." *Stumbo v Roe*, 332 Mich App 479, 481; 957 NW2d 830

(2020). Candidates are required to strictly comply with MCL 168.558. *Nykoriak*, 334 Mich App at 377.

Here, plaintiff contends that Ayers's AOI contained a false statement related to the filing of amended campaign finance reports. In support, plaintiff submitted documentation from the County Clerk indicating that as of April 6, 2021, Ayers had not filed seven amended campaign finance reports. Plaintiff contends that because Ayers's AOI contained a false statement indicating that she had filed all necessary statements and reports, MCL 168.558(4) required the City Clerk to not certify Ayers's name to the Commission for inclusion on the August 2021 primary ballot. Further, she argues that the trial court should have ordered the city defendants to not include Ayers's name on the ballot.

The issue, then, is whether MCL 168.558(4) requires that all campaign finance reports and all amended campaign finance reports have been filed as of the date a candidate signs and files his or her AOI. The trial court determined that amended reports are not covered by MCL 168.558(4) because the failure to file an amended report does not erase the initial filing of the report. Plaintiff argues that the trial court's determination was erroneous. We agree. MCL 168.558(4) provides that "*all* statements, reports, late filing fees, and fines required of the candidate or any candidate committee organized to support the candidate's election under the [MCFA] . . . have been filed or paid[.]" (Emphasis added.) This language is unambiguous and extremely broad. Indeed, there "cannot be any broader classification than the word 'all.' In its ordinary and natural meaning, the word 'all' leaves no room for exceptions." *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 642; 774 NW2d 332 (2009) (quotation marks and citation omitted). The

plain language of the statute, therefore, applies without distinction to both an initial report and an amended report.

That does not end our inquiry, however. Relevant to the issues raised on appeal, MCL 168.558(4) requires a candidate to attest that all reports—amended or otherwise—that are required by the MCFA have been filed. As a result, Ayers's statement that she had made the requisite filings is only false if the seven outstanding campaign finance reports were required to be filed under the MCFA.

There is no explicit reference to amended campaign finance reports in the MCFA. However, MCL 169.216 details what a filing official's obligations are when it receives a campaign finance report.[2] As relevant here, MCL 169.216(6) explains that a filing official must determine whether a filing complies with the MCFA. If the filing does not comply with the MCFA,

> [*w*]*ithin 4 business days after the deadline for filing* a statement or report under this act, the filing official shall give notice to the filer by registered mail of an error or omission in the statement or report and give notice to a person the filing official has reason to believe is a person required to and who failed to file a statement or report. [MCL 169.216(6) (emphasis added).]

Thereafter, under MCL 169.216(7), "[w]ithin 9 business days after the report or statement is required to be filed, *the filer shall make any corrections* in the statement or report filed with the appropriate filing official." (Emphasis added.) Thus, a correction to a report or statement is itself a report or statement that is required to be filed under the MCFA.

---

[2] In this case, Ayers's campaign finance reports were required to be filed with the County Clerk. MCL 169.236(6). Thus, the County Clerk was the "filing official." MCL 169.207(3).

The amended reports requested by the County Clerk on March 1, 2021, did not fall under the above provisions. The County Clerk requested the annual 2018, July 2019, October 2019, annual 2019, July 2020, October 2020, and annual 2020 reports, but that request was made more than four business days after the deadline for filing each report. See MCL 169.235(1) (requiring the filing of an annual report not later than January 31 of each year); MCL 169.233(1)(c) (requiring the filing of quarterly reports not later than July 25 and October 25 of each year). In addition, the County Clerk's e-mail did not identify any error or correction in any of the seven campaign finance reports he requested. Instead, he asked that Ayers refile the reports *as previously filed*. Consequently, the request did not fall within the scope of MCL 169.216, and no party has identified any other provision of the MCFA that obligated Ayers to file a report or statement in response to the County Clerk's e-mail. Because the seven amended reports were not "required of the candidate . . . under the [MCFA]," MCL 168.558(4), there is no evidence that Ayers made a false statement when she swore to have filed all reports required under the MCFA. Further, because there was no false statement in the AOI, the trial court did not err by denying plaintiff's request for declaratory relief.[3]

---

[3] Plaintiff also argues that the trial court erred by failing to follow this Court's opinion in *Burton-Harris v Wayne Co Clerk*, 337 Mich App 215, 233; 976 NW2d 30 (2021). However, our Supreme Court has vacated the portion of that case that plaintiff relies upon. *Burton-Harris v Wayne Co Clerk*, 508 Mich 985 (2021). Consequently, we discern no error in the court's decision to not apply *Burton-Harris*. Moreover, there is no merit to plaintiff's argument that the trial court was bound by the County Clerk's determination that as of April 6, 2021, Ayers had seven outstanding amended campaign finance reports. Although the County Clerk was required to make that determination pursuant to MCL 169.216(6), there

Affirmed. A matter of public significance being involved, no taxable costs are awarded. MCR 7.219(A).

CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ., concurred.

---

is no language mandating that the County Clerk's findings of fact may not be disputed in a court of competent jurisdiction, nor is there language precluding the trial court from reaching a different determination after review of the pertinent legal authority and factual background. Moreover, we note that, in this particular case, the County Clerk's letter only indicated that the seven amended campaign finance reports had not been filed. There was no indication in the letter that the reports were required to be filed under the MCFA.

PEOPLE v ISROW

Docket Nos. 351665 and 354834. Submitted December 7, 2021, at Detroit. Decided December 16, 2021, at 9:15 a.m.

Richard T. Isrow II was convicted in the Livingston Circuit Court, following a jury trial, of assault with intent to commit criminal sexual conduct involving sexual penetration; interfering with a crime report; interference with electronic communications; domestic violence, second offense; and fourth-degree child abuse. SD, defendant's former fiancée, testified that defendant attempted to have sex with her after she had refused, pinned her down on the floor to prevent her from leaving, threw her phone against the wall to prevent her from calling the police, and threw a set of keys that struck their four-year-old daughter in the head. The trial court, Miriam A. Cavanaugh, J., sentenced defendant to serve 28 months to 10 years in prison for assault, 28 months to 10 years for interfering with a crime report, one to two years for interference with electronic communication, and 296 days each for domestic violence and child abuse. Defendant appealed.

The Court of Appeals *held*:

1. Defendant argued that the evidence was not sufficient to support his conviction of fourth-degree child abuse because that offense is a specific-intent crime and he did not intend to harm his child when he threw the keys. Typically, a specific-intent crime requires the prosecution to show that the defendant subjectively desired or knew a prohibited result would occur from that act, whereas a general-intent crime generally requires the prosecution to establish that the defendant intended to perform a physical act or recklessly performed that act, regardless of whether the defendant subsequently intended to accomplish the result. The statute prohibiting fourth-degree child abuse, MCL 750.136b(7), provides that a defendant is guilty of this offense if they knowingly or intentionally commit an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results. The phrase "knowingly or intentionally" modifies the phrase "commits an act." No mental state modifies the phrase "poses an unreasonable risk of harm or injury to a child." The grammatical structure of

the statute mirrors that of MCL 750.136b(3)(b), which prohibits second-degree child abuse. The Court of Appeals previously noted that under MCL 750.136b(3)(b), a defendant is guilty of second-degree child abuse if the defendant "knowingly or intentionally commits an act" likely to cause harm to a child, regardless of whether harm results, whereas under MCL 750.136b(2), a defendant is guilty of first-degree child abuse if the defendant "knowingly or intentionally causes serious physical or serious mental harm" to a child. The Court of Appeals concluded that the difference in the language of the statutes was intentional, such that the Legislature must have contemplated a situation in which a person intended an act but may not have intended the consequences of the act. This comparison similarly applied to the differences between the language of the statutes prohibiting first-degree and fourth-degree child abuse. Like the statute concerning second-degree child abuse, the statute for fourth-degree child abuse suggests that the act must be done "knowingly or intentionally" but that the defendant need not have known or intended that the act would pose an "unreasonable risk of harm or injury to a child." Therefore, fourth-degree child abuse is a general-intent crime. In this case, the evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant threw the keys knowingly or intentionally and that this action posed an unreasonable risk of harm to his child. Defendant admitted that he threw the keys intentionally, and the keys hit the child. Thus, the act of throwing the keys, in the vicinity where his child had been standing, posed an unreasonable risk of harm or injury to the child.

2. During closing argument, the prosecutor stated that the jury could consider the testimony of "other witnesses" besides defendant and SD. Defendant argued that this statement constituted prosecutorial misconduct because all the "other witnesses" were police officers and the prosecutor's statement was an improper attempt to persuade the jury to accept the officers' credibility determination regarding SD's version of the events. When considered in context, the prosecutor's comments did not improperly ask the jury to accept any determination by the police witnesses of SD's credibility. Rather, the prosecutor simply noted that the testimony of the officers might assist the jury in determining which witnesses were credible.

3. Defendant argued that defense counsel was ineffective for failing to object to the prosecutor's comments during closing argument. Claims of ineffective assistance of counsel center on deficiencies in counsel's decision-making. A deficiency prejudices

a defendant when there is a reasonable probability that but for trial counsel's errors, the verdict would have been different. In this case, trial counsel's failure to object to the prosecutor's statements did not constitute ineffective assistance because any objection would have been futile. The prosecutor's comments were not improper and did not vouch for the veracity of any witness.

Affirmed.

CRIMINAL LAW – GENERAL-INTENT CRIMES – FOURTH-DEGREE CHILD ABUSE.

MCL 750.136b(7) provides that a defendant is guilty of fourth-degree child abuse if they knowingly or intentionally commit an act that, under the circumstances, poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results; "knowingly or intentionally" modifies "commits an act," but no mental state modifies "poses an unreasonable risk of harm or injury to a child"; because the act must be done "knowingly or intentionally" but the defendant need not have known or intended for the act to pose an unreasonable risk of harm or injury to the child, fourth-degree child abuse is a general-intent crime.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David J. Reader*, Prosecuting Attorney, and *Brandon Ciciotti*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Matthew A. Monahan*) for defendant.

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

PER CURIAM. In these consolidated appeals,[1] defendant appeals following his jury trial convictions of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1); interfering with a crime report, MCL 750.483a(2)(b); interference with electronic communications, MCL

[1] In Docket No. 351665, defendant appeals his original judgment of sentence. In Docket No. 354834, defendant appeals from a judgment of sentence entered after resentencing. The same issues are raised in both appeals, and defendant does not challenge his sentences.

750.540(5)(a); domestic violence, second offense, MCL 750.81(4); and fourth-degree child abuse, MCL 750.136b(7). The trial court sentenced defendant to serve terms of incarceration of 28 months to 10 years for assault with intent to commit CSC involving sexual penetration, 28 months to 10 years for interfering with a crime report, one to two years for interference with electronic communications, 296 days for domestic violence, and 296 days for fourth-degree child abuse. For the reasons discussed herein, we affirm.

I. FACTS

This case arises out of a domestic dispute that occurred in 2019 between defendant; his ex-fiancée SD; and their four-year-old daughter. Defendant and SD's engagement ended in 2016 after defendant pushed SD during a domestic dispute, for which he pleaded guilty to domestic violence.

SD testified that during the 2019 incident at issue in this appeal, defendant attempted to have sexual intercourse with her after she repeatedly refused, pinned her down on the floor to prevent her from leaving, threw her phone against the wall to prevent her from calling the police, and threw a set of keys; the keys hit their four-year-old daughter in the back of the head. Defendant, on the other hand, testified that he did not attempt to have sexual intercourse with SD after she became angry. Defendant admitted that he intentionally tossed the keys out the front door using an underhand throw, and he acknowledged that he threw the keys in the direction of where his daughter had been standing seconds earlier. Defendant testified that he did not realize that his daughter was there and did not intend for the keys to hit her.

II. ANALYSIS

A. INSUFFICIENT EVIDENCE

Defendant argues that there was insufficient evidence for the jury to find him guilty of fourth-degree child abuse because that offense is a specific-intent crime, and he did not intend to harm his daughter when he threw the keys. We disagree.

"Questions of statutory interpretation and issues relating to the sufficiency of the evidence are reviewed de novo." *People v Thorne*, 322 Mich App 340, 344; 912 NW2d 560 (2017). When reviewing claims of insufficient evidence, the appellate court must determine "whether the jury could have found each element of the charged crime proved beyond a reasonable doubt." *People v Smith*, 336 Mich App 297, 303; 970 NW2d 450 (2021) (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id*. (quotation marks and citation omitted).

A court's overriding goal when interpreting a statute is to "give effect to the Legislature's intent." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). This is determined by looking at the words of the statute. *Id*. "If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed." *Id*. To determine whether the language is unambiguous, "[w]e interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *Id*.

Typically, a specific-intent crime requires that the prosecution prove the defendant subjectively desired

or knew a prohibited result would occur from that act. *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997). In contrast, a general-intent crime generally requires that the prosecution prove the defendant intended to perform a physical act, or recklessly performed the physical act required, irrespective of whether the defendant subjectively intended to accomplish the result. *Id*.

In *People v Maynor*, 256 Mich App 238, 242-243; 662 NW2d 468 (2003), this Court noted the differences in the statutory language governing first-degree and second-degree child abuse. A defendant is guilty of second-degree child abuse if the defendant "knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results," MCL 750.136b(3)(b), whereas a defendant is guilty of first-degree child abuse if the defendant "knowingly or intentionally causes serious physical or serious mental harm to a child," MCL 750.136b(2), as amended by 2016 PA 488. This Court concluded that the Legislature's use of different language in these statutes was intentional. *Maynor*, 256 Mich App at 242. In other words, by including the phrase "commits an act" in the statute prohibiting second-degree child abuse and not in the first-degree child abuse statute, the Legislature must have "contemplated the situation where a person intended an act, but perhaps not the consequences of the act." *Id*.

The plain language of the fourth-degree child abuse statute is similar to the language in the second-degree child abuse statute. The fourth-degree child abuse statute provides, in relevant part, that a defendant is guilty of fourth-degree child abuse if "[t]he person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm

or injury to a child, regardless of whether physical harm results." MCL 750.136b(7)(b). The phrase "knowingly or intentionally" modifies the phrase "commits an act," not the phrase "poses an unreasonable risk of harm or injury to a child." No mental state modifies the phrase "poses an unreasonable risk of harm or injury to a child." This grammatical structure mirrors that of the second-degree child abuse statute. Therefore, the same comparison can be made between first-degree and fourth-degree child abuse that was made in *Maynor* between first-degree and second-degree child abuse. The grammatical structure of both the second-degree and fourth-degree child abuse statutes suggests that the act must be done "knowingly or intentionally," but the defendant need not know or intend that the act pose an "unreasonable risk of harm or injury to a child." Therefore, fourth-degree child abuse is a general-intent crime.

The evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant knowingly or intentionally threw the keys and that this action posed an unreasonable risk of harm or injury to defendant's child. Defendant admitted that he intentionally tossed the keys. The keys hit defendant's four-year-old daughter in the back of the head. Throwing a set of keys, knowing a child had been standing in the vicinity of the location in which the keys were thrown seconds before, poses an unreasonable risk of harm or injury to a four-year-old child. Therefore, there was sufficient evidence to support defendant's conviction of fourth-degree child abuse.

B. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied a fair trial when the prosecutor suggested during closing argu-

ment that the jury could consider the testimony of police officers when considering the credibility of SD and defendant. Defendant contends that this suggestion constituted an improper attempt to persuade the jury to accept the police officers' "credibility determination" concerning SD's version of events. We disagree.

"[T]o preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not take either of these steps. This issue is therefore unpreserved and is reviewed for plain error. See *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third prong requires that a defendant show "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

Claims of prosecutorial misconduct "are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Anderson*, 331 Mich App 552, 565; 953 NW2d 451 (2020) (quotation marks and citation omitted). A prosecutor cannot "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), or mischaracterize evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecutor may argue from the evidence, and reasonable inferences from it, to support a witness's credibility. *Bennett*, 290 Mich App at 478. The prosecutor also

"may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 426; 884 NW2d 297 (2015) (quotation marks and citation omitted).

During closing arguments, the prosecutor stated:

> Luckily, there is actually a jury instruction that you are going to get which is going to give you sort of some things to consider when you are assessing credibility. Some, ah, factors to look at to help you make a decision which hopefully will be helpful to you. I thought I'd go through a couple of those things. I want you to think about these things when you think about the testimony of the witnesses that you heard from. *And I don't want you to get pigeonholed into only thinking about* [*SD's*] *testimony versus the defendant's testimony, because I didn't just call all those other witnesses*[2] *just to drag this trial out, right? I called them to testify because I thought they would provide information to you that would help you when you were looking at this jury instruction about credibility, okay? So, I don't want you to fall into the trap of thinking that you only have two people to choose from. Two people to listen too* [*sic*]*, and only one version to pick, okay?* [Emphasis added.]

A review of the prosecutor's remarks in context does not support defendant's argument that the prosecutor improperly asked the jury to accept any determination of the police witnesses regarding SD's credibility. Rather, the prosecutor simply noted that the testimony of the police officers might assist the jury in determin-

[2] All of the "other witnesses" referred to by the prosecutor during closing arguments were police officers.

ing which of the other witnesses' testimony was credible. Defendant has failed to show plain error in the challenged remarks.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in the alternative that trial counsel was ineffective for failing to object to the prosecutor's statement during closing arguments. We disagree.

A claim of ineffective assistance of counsel "presents a mixed question of fact and constitutional law." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). All "findings of fact are reviewed for clear error, while the legal questions are reviewed de novo." *Id*. When "the reviewing court is left with a definite and firm conviction that the trial court made a mistake," there is clear error. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omitted).

The United States and Michigan Constitutions protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 17. This includes the right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Smith*, 336 Mich App 79, 100; 969 NW2d 548 (2021). Trial counsel is ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 US at 686. Trial counsel's performance is presumed to be effective, and defendant has the heavy burden of proving otherwise. See *id*. at 690. To establish ineffective assistance of counsel, a defendant must show "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies preju-

diced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), citing *Strickland*, 466 US at 688.

Claims of ineffective assistance of counsel "center on deficiencies in the defense counsel's decision-making . . . ." *Randolph*, 502 Mich at 14. There is a strong presumption that trial counsel's decision-making is the result of sound trial strategy. *People v White*, 331 Mich App 144, 149; 951 NW2d 106 (2020). A court must determine whether strategic decisions were made by trial counsel after a less-than-complete investigation. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "If counsel's strategy is reasonable, then his or her performance was not deficient." *Randolph*, 502 Mich at 12. Failure to raise a futile objection or advance a meritless argument does not constitute ineffective assistance of counsel. *People v Zitka*, 335 Mich App 324, 341; 966 NW2d 786 (2021). In addition, failing to raise an objection may be consistent with a sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). A deficiency prejudices a defendant when there is a reasonable probability that but for trial counsel's errors, the verdict would have been different. *Randolph*, 502 Mich at 9.

Trial counsel's failure to object to the prosecutor's statement during closing argument did not amount to ineffective assistance of counsel because objecting to this statement would have been futile. See *Zitka*, 335 Mich App at 341. As previously concluded, the prosecutor's comments about witness credibility were appropriate and did not improperly vouch for the veracity of any witness. In addition, trial counsel may have failed to object for strategic reasons, which does not amount to ineffective assistance of counsel. See *Unger*, 278 Mich App at 242. Trial counsel may have thought that

objecting to the prosecutor's statement would bring more attention to the police officers' statements, which would cut against defendant's strategy during closing arguments of emphasizing the differences between defendant's and SD's testimony.

Affirmed.

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

In re JOSEPH & SALLY GRABLICK TRUST

Docket Nos. 353951 and 353955. Submitted July 7, 2021, at Lansing. Decided December 16, 2021, at 9:20 a.m. Leave to appeal denied 512 Mich ___ (2023).

Katelyn Banaszak (appellant) filed two actions in the Genesee County Probate Court against Dorothy Grablick and Judith Almasy (collectively, appellees) and others, regarding the administration of decedent Joseph Grablick's will and the decedent's trust, The Joseph and Sally Grablick Family Trust. Appellant's mother, Sally Grablick, married the decedent in 1993. During their marriage and after their divorce in 2019, the decedent treated appellant as his daughter. The decedent executed his will in 2005; in the document, he identified Sally as his spouse and identified appellant as his living child who was his stepchild. Under the terms of the will, the decedent's assets were left to The Joseph & Sally Grablick Family Trust. On the same date, the decedent and Sally executed a trust adoption agreement and adopted the joint revocable trust known as The Joseph & Sally Grablick Family Trust. The trust agreement stated that the settlors were married to each other and that appellant was the only living child of the settlors. Under its terms, upon the death of either spouse, the surviving spouse would receive all principal and income, and upon the death of the surviving spouse, appellant, as the residual beneficiary, would receive all principal and income. The trust agreement contained a default provision for distribution of the trust estate to appellees Dorothy Grablick and Judith Almasy, the decedent's mother and sister. The decedent and Sally divorced in April 2019, and the decedent died in July 2019. Appellant was appointed personal representative of the decedent's estate. After the will was discovered, appellant filed a petition in the trust case for supervision of trust, for appointment of a trustee, and for determination of trust beneficiaries (Docket No. 353951). Appellant also filed a petition for probate of the will and a determination of heirs in the estate case (Docket No. 353955). The court, Jennie E. Barkey, J., entered a stipulated order stating that the sole issue to be determined was whether appellant was a beneficiary of the decedent's will or the trust or whether, under MCL 700.2807(1)(a)(*i*), the dispositions to

appellant were revoked when the decedent and Sally divorced. The parties separately moved for summary disposition, and the court granted summary disposition in favor of appellees, reasoning that the dispositions to appellant were revoked when the decedent and Sally divorced. Appellant appealed.

The Court of Appeals *held*:

The Revised Probate Code (RPC), MCL 700.1 through MCL 700.993, was repealed in 1998 by MCL 700.8102(c) of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., effective April 1, 2000. The RPC provided that, in the absence of an express will provision stating otherwise, if a testator and a spouse divorced after the testator's will was executed, the testator's former spouse would be considered predeceased for the purpose of distributing the testator's property after death. While the RPC precluded a testator's former spouse from receiving distributions from their estate in the absence of an express provision in the will to the contrary, it did not preclude the former spouse's relatives from receiving distributions from the testator's estate pursuant to the terms of the will. Effective in 2000, EPIC modified the circumstances under which relatives of the former spouse had a claim to the testator's estate after the divorce. Relevant here, MCL 700.2807(1)(a)(*i*) provides that, except as provided by the terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage revokes a disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse. Under MCL 700.2806(e), "relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity. The term "affinity" has always been understood as existing via marriage. Death of a spouse terminates the relationship by affinity created by marriage; however, the relationship by affinity continues if the marriage resulted in issue who are still living. As used in MCL 700.8101(2)(e) and first developed in *Bliss v Caille Bros Co*, 149 Mich 601 (1907), the term "affinity" refers to the relation existing because of marriage between each of the married persons and the blood relatives of the other. The degrees of affinity are computed in the same way as those of consanguinity or kindred; in other

words, when a couple marries, each spouse becomes related by affinity to the other spouse's blood relatives by the same degree. Given this definition of "affinity," in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces their spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives. Under MCL 700.8101(2)(e), if a decedent's will was executed before EPIC's effective date, the rules of construction or presumption in EPIC apply to the decedent's will unless there is a clear indication of a contrary intent. Extrinsic evidence may be used to establish whether a clear indication of a contrary intent exists in those circumstances; thus, the evidence may be used to clarify the latent ambiguity in a decedent's will created by MCL 700.8101(2)(e). MCL 700.8101(2)(e) was not applicable in this case because the decedent executed the will after the effective date of EPIC; thus, appellant could not submit extrinsic evidence to establish that the decedent intended for her to remain a beneficiary under the decedent's will. Because appellant was a blood relative of the divorced individual's former spouse (Sally), after the divorce, appellant was no longer related to the divorced individual (the decedent) because the affinal relationship no longer existed. In other words, appellant and the decedent were not related by marriage after the decedent and Sally divorced, and as a result, they were not related by affinity. Accordingly, under MCL 700.2807(1)(a)(*i*), appellant could not inherit under the decedent's will because her distribution was revoked when Sally and the decedent divorced. The Court of Appeals opinions *In re Fink Estate*, unpublished per curiam opinion of the Court of Appeals, issued July 24, 2008 (Docket No. 278266), and *In re Monahan Estate*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2007 (Docket No. 271408), both addressed situations in which a testator executed a will while the RPC was in effect, bequeathing gifts to the testator's stepchildren, but died after divorcing the stepchild's parent and after EPIC was in effect. The reasoning of the Court in each opinion was consistent with the Court's explanation of "affinity" here and was also instructive in that both stated that, under MCL 700.2806(e), the children of a testator's ex-spouse were not related to the testator by blood, adoption, or affinity and were considered relatives of the divorced individual's former spouse. The probate court correctly determined that the decedent's disposition to appellant was revoked under MCL 700.2807(a)(*i*) because appellant was a relative of the divorced individual's

former spouse. Accordingly, the probate court properly granted summary disposition in favor of appellees.

Affirmed.

ESTATES AND PROTECTED INDIVIDUALS CODE – WORDS AND PHRASES – REVOCATION OF DISPOSITION – "RELATIVE OF THE DIVORCED INDIVIDUAL'S FORMER SPOUSE" – RELATIVE BY "AFFINITY."

MCL 700.2807(1)(a)(*i*) of the Estates and Protected Individuals Code states that (except as provided by the terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment) the divorce or annulment of a marriage revokes a disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse; under MCL 700.2806(e), "relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity; the term "affinity" refers to the relation existing because of marriage between each of the married persons and the blood relatives of the other; in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces their spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives (MCL 700.1101 *et seq*.).

Speaker Law Firm, PLLC (by *Jennifer M. Alberts* and *Liisa R. Speaker*) for Katelyn Banaszak.

Christenson & Fiederlein, PC (by *Craig R. Fiederlein*) and *Cline, Cline, & Griffin, PC* (by *R. Paul Vance*) for Dorothy Grablick and Judith Almasy.

Before: BORRELLO, P.J., and SERVITTO and STEPHENS, JJ.

STEPHENS, J. These consolidated appeals involve both the estate and the trust of Joseph Grablick (the

decedent), who died in 2019. In Docket Nos. 353951 (the trust case) and 353955 (the estate case), appellant, Katelyn Banaszak, the biological daughter of decedent's ex-wife Sally Grablick, appeals as of right the June 9, 2020 order of the Genesee Probate Court granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of appellees, Dorothy Grablick and Judith Almasy, respectively, the decedent's mother and sister. The probate court found that appellant was not a beneficiary of the decedent's will or of the Joseph and Sally Grablick Family Trust because the dispositions to her were revoked under MCL 700.2807(1)(a)(*i*) when the decedent and Sally[1] divorced. We affirm.

I. BACKGROUND

Appellant was eight years old at the time her mother and the decedent married in October 1993 and was treated by the decedent as his daughter both during and after the marriage.

On September 28, 2005, the decedent executed his will. The will identified Sally as his spouse and identified his living children as "Katelyn M. Wrecker, who is my step-child." Under the terms of his will, the decedent's assets were left to "The Joseph & Sally Grablick Family Trust."

On the same date, the decedent and Sally executed a trust adoption agreement and created a joint revocable trust known as "The Joseph & Sally Grablick Family Trust." The trust adoption agreement stated that the settlors were married to each other and identified

[1] To avoid confusion, we refer to those family members with the same last name by their first names.

appellant[2] as the only living child of the settlors. The agreement identified the residuary beneficiary of the trust as "The above-named Child." Under the explicit terms of the trust, upon the death of either spouse, the surviving spouse was entitled to receive all principal and income, and upon the death of the surviving spouse, appellant would receive all principal and income. The agreement also provided a default provision for distribution of the trust estate to Dorothy Grablick and Judith Almasy.[3]

The decedent and Sally divorced on April 3, 2019. The decedent died on July 2, 2019. Appellant was appointed personal representative of the decedent's estate. After a will was discovered, the appellant filed a petition in the trust case and a petition for probate in the will case. Appellant also requested an order determining heirs. On January 3, 2020, the court entered a stipulated order in both cases indicating that the sole issue before the court for determination was how the statutory provision of MCL 700.2807(1)(a)(*i*) and (3) regarding the divorce of the decedent affected the appellant's interests under the putative will of the decedent dated September 28, 2005, and under the trust agreement for the Joseph and Sally Grablick Family Trust.

On March 23, 2020, appellees Dorothy and Judith moved for summary disposition under MCR 2.116(C)(10). Appellant filed an answer and brief in

---

[2] At the time of the creation of the trust, appellant's name was Katelyn M. Walker.

[3] The default provision provided for distribution of the trust assets in the absence of beneficiaries as follows: 1/4 to Dorothy Grablick; 1/4 to Judith Almasy; 1/6 to James and Nancy Hickmott (or to the survivor); 1/6 to Stephanie Atchison; and 1/6 to J. M. David Hickmott. The Hickmotts and the Atchisons are blood relatives of Sally. There is no dispute that their dispositions were revoked.

opposition to appellees' motion for summary disposition and a countermotion for summary disposition under MCR 2.116(I)(2). The probate court granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of appellees. The court found that appellant was not a beneficiary of the decedent's will or of the Joseph and Sally Grablick Family Trust because the dispositions to her were revoked under MCL 700.2807(1)(a)(*i*) when the decedent and Sally divorced.

This appeal followed.

II. STANDARD OF REVIEW

This issue involves questions of statutory interpretation, which this Court reviews de novo. *In re Attia Estate*, 317 Mich App 705, 709; 895 NW2d 564 (2016).

The first applicable rule of statutory construction is as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

This Court also reviews de novo a probate court's decision on a motion for summary disposition. *In re Casey Estate*, 306 Mich App 252, 256; 856 NW2d 556 (2014). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regard-

ing 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). "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*.

III. ANALYSIS

Appellant contends that the probate court erred in its interpretation and application of MCL 700.2806(e) and MCL 700.2807(1)(a)(*i*) and improperly granted summary disposition in favor of appellees. We disagree.

The Revised Probate Code (RPC), MCL 700.1 through MCL 700.993, was repealed in 1998 by MCL 700.8102(c). See MCL 700.8102(c), as enacted by 1998 PA 386. MCL 700.124(2)[4] of the RPC specified that, in the absence of an express will provision stating otherwise, if a testator and a spouse divorced after the testator's will was executed, the testator's former spouse would be considered predeceased for the pur-

[4] In full, MCL 700.124(2) provided: If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as a personal representative, unless the will expressly provides otherwise. Property prevented from passing to a former spouse because of revocation by divorce passes as if the former spouse failed to survive the decedent and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent. Provisions not revoked by any means except the operation of this subsection are revived by testator's remarriage to the former spouse. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section. Any other change of circumstances does not revoke a will.

pose of distributing the testator's property after death. The provision precluded a testator's former spouse from receiving distributions from their estate in the absence of an express provision in the will to the contrary. It did not, however, preclude the former spouse's relatives from receiving distributions from the testator's estate pursuant to the terms of the will. This provision required that "[p]roperty prevented from passing to a former spouse because of revocation by divorce passe[d] as if the former spouse failed to survive the [testator] . . . ." *Id*. Therefore, if the testator's bequest to a former spouse's relative was contingent on the testator surviving his spouse, and the testator's former spouse was considered predeceased under the RPC after she and the testator divorced, then the former spouse's relative would automatically take pursuant to the terms of the testator's will, even if the former spouse was still alive.

In 2000, the Legislature repealed the RPC and adopted the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. MCL 700.8101; MCL 700.8102(c). EPIC modified the circumstances under which relatives of the former spouse had a claim to the testator's estate after the divorce. Specifically, MCL 700.2807 states:

> (1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:
>
> (a) Revokes all of the following that are revocable:
>
> (*i*) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment

> created by law or in a governing instrument to a relative of the divorced individual's former spouse.

MCL 700.2806 defines certain terms used in MCL 700.2807(1)(a)(*i*) as follows:

> (a) "Disposition or appointment of property" includes, but is not limited to, a transfer of an item of property or another benefit to a beneficiary in a governing instrument.
>
> * * *
>
> (d) "Governing instrument" means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.
>
> (e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

Consequently, in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces their spouse, the divorce revokes any disposition or appointment of property to either the former spouse or the former spouse's relatives.

This Court has twice addressed situations in which a testator executed a will bequeathing gifts to the testator's stepchildren under the RPC, subsequent to a divorce between the testator and the stepchild's parent after the effective date of EPIC. While both cases are unpublished, they give us guidance and are persuasive. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010).

The first case is *In re Fink Estate*, unpublished per curiam opinion of the Court of Appeals, issued July 24,

2008 (Docket No. 278266). In that case, the decedent executed a will on April 27, 1990, while married to the appellant-stepchildren's mother; the decedent executed the will when the RPC was in effect. The will left everything to the spouse if she survived the decedent. The will further provided that if the spouse predeceased the decedent, the stepchildren would have " 'the exclusive privilege of purchasing my farm[5] and any and all farming tools and equipment for a price of double the state equalized valuation on [sic] said farm.' " *Id*. at 1. The decedent did not amend or revoke the will after his 2001 divorce from the children's mother or before his death on April 10, 2006. *Id*. The probate court entered an order determining the decedent's heirs and/or devisees and finding that the will was subject to MCL 700.2807 of EPIC, and it revoked all dispositive portions of the will with regard to the stepchildren. *Id*. at 2.

In *In re Monahan Estate*, unpublished per curiam opinion of the Court of Appeals, issued November 20, 2007 (Docket No. 271408), the decedent executed his will on September 5, 1980, while married to his spouse, who had two children from a previous marriage. *Id*. at 1-2. The will bequeathed the remainder of the decedent's estate to his then spouse, but only if she survived him by 30 days. If she did not survive him by 30 days, the will had a specific provision addressing disposition of the estate to the surviving stepchildren: " 'I give all the remainder of my estate in equal shares to my wife's children or to their descendants by right of representation. I intentionally make no bequest to my

[5] The farm referenced in the will consisted of two parcels of real property with a state equalized value (as doubled according to the will) of $279,400 at the time of the decedent's death, but the appraised value of the farm was purportedly $729,725. *In re Monahan Estate*, unpub op at 1-2.

children as set forth in Article I, Section 2.' " Article I, Section 2 of the decedent's will stated: " 'My children from a previous marriage, now living are Judith Lynn Monahan, Richard Bruce Monahan, Jr., and Alice Kaye Monahan.' " *Id*. The decedent divorced his spouse in 1999. *Id*. The decedent's relationship with his stepchildren remained strong after the divorce. *Id*. The decedent died on July 2, 2004. *Id*. at 3. Judith Monahan Steffer, the decedent's natural daughter, petitioned the trial court to identify the decedent's heirs, and in making this request, she claimed that pursuant to MCL 700.2807(1)(a)(*i*), the devise in the will to Evelyn, to Evelyn's children, and to her children's descendants was revoked by the subsequent divorce of the decedent and Evelyn. *Id*. The probate court noted that the decedent's will was drafted when the RPC was in effect. *Id*. The probate court explained that the RPC required that a spouse named in a testator's will be considered predeceased for purposes of probating the will if the marriage between the testator and his spouse ended in divorce or annulment after implementation of the will, but it did not discuss the effect of divorce or annulment on bequests made to that spouse's children. *Id*. The probate court concluded that although EPIC required the revocation of appointments and dispositions made in a will to a spouse's children upon the divorce or annulment of the marriage between a testator and his spouse, it also included an interest-of-justice exception in which the trial court retained the discretion to instead apply the RPC in a particular circumstance. *Id*. After considering both the decedent's will and extrinsic evidence, the court concluded that the decedent viewed Evelyn's children as his family and intended to leave them the remainder of his estate after his death, even though he and Evelyn had divorced. *Id*. The court found that the

RPC was still applicable to the decedent's 1980 will and divided the remainder of decedent's estate between Evelyn's children. *Id*.

The issue presented in the above cases, both of which involved a will that was executed under the RPC, and a decedent who died after EPIC was adopted, was whether EPIC governed the effect that the divorce would have on the subsequent distribution of the decedent's estate.[6]

This Court's analyses in *In re Fink Estate* and *In re Monahan Estate* are substantially similar and are instructive to this Court:

> The Legislature's express intent in enacting EPIC was, in part, to provide a series of rules for interpreting the provisions of a will to ensure that the distribution of a testator's estate would correspond to his wishes. See MCL 700.1201(b). Further, in both the RPC and EPIC, the Legislature assumed that a testator who provided for a spouse in his will and later divorced his spouse would not want his former spouse to receive any portion of his estate, even if he did not revise his will after the divorce, and it adopted legislation preventing a former spouse from receiving a distribution from the testator's estate absent an express provision in the testator's will to the contrary. See MCL 700.124(2); MCL 700.2807(1)(a)(*i*). However, EPIC reflects an expanded policy determination. By also precluding the relatives of a testator's former spouse from taking under the testator's will (in the absence of an express provision in the will to the contrary), the Legislature obviously assumed that a testator who executed his will and subsequently divorced his spouse would not want

[6] The issue arose because, under EPIC, in the absence of express terms to the contrary in the governing instrument, when a testator who has executed a will subsequently divorces his spouse, the divorce revokes any disposition or appointment to either the former spouse or the former spouse's relatives. See MCL 700.2807(1)(a)(*i*).

his former spouse's relatives to receive distributions from his estate. See MCL 700.2807(1)(a)(*i*).

EPIC also retains the RPC provision permitting an alternate disposition of property "as provided by the express terms of a governing instrument." See MCL 700.2807(1). This means that if a testator decides that he wants his spouse's children or other relatives to receive distributions from his estate even if he were to divorce his spouse, he can include an express provision in his will specifying this intent. Presumably, a testator executing his will after EPIC took effect on April 1, 2000, would be aware of the default provisions of MCL 700.2807. *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27; 614 NW2d 634 (2000).

EPIC, which took effect on April 1, 2000 (MCL 700.8101[1]), "applies to a governing instrument executed by a decedent dying after that date." MCL 700.8101(2)(a). However, MCL 700.8101(2)(e) provides the following caveat: "A rule of construction or presumption provided in this act applies to a governing instrument executed before that date unless there is a clear indication of a contrary intent." Although decedent died several years after EPIC took effect, he executed his will and divorced Della before it took effect. Hence, the RPC governed the effect that his divorce would have on the subsequent distribution of his estate.

If MCL 700.8101(2)(a) alone governed, and if MCL 700.8101(2)(e) was not taken into consideration, EPIC would control the interpretation of decedent's will. Appellants are Della's children and are not related to decedent by blood, adoption, or affinity; therefore, they would be considered "relatives of the divorced individual's former spouse" pursuant to MCL 700.2806(e). Under MCL 700.2807(1)(a)(*i*), the right of appellants to take pursuant to the terms of decedent's will would be revoked.

However, MCL 700.2807(1)(a)(*i*) does not govern the revocation of provisions in decedent's will concerning the significantly discounted distribution of the farm, farming tools, and equipment, to Della's children. Because decedent's will was executed before EPIC was implemented in

2000, the rules of construction or presumption in EPIC apply to decedent's will "unless there is a clear indication of a contrary intent." MCL 700.8101(2)(e). In this instance, there existed a clear indication of decedent's contrary intent. Particularly, extrinsic evidence indicated that decedent wanted appellants to have the opportunity to acquire his farm when he died, irrespective of whether he was married to Della at the time.

Appellees' position presumes that MCL 700.2807(1) is a substantive rule of law. But the statute does not create, define, or regulate the rights of parties to recover from a testator's estate. Rather, the governing instrument executed by the testator governs the rights of parties to receive distributions from the testator's estate and the circumstances under which they may receive these distributions. We therefore conclude that MCL 700.2807(1) is a rule of construction. As such, the exception set forth in MCL 700.8101(2)(e) applies, and the trial court erred in its application of MCL 700.2807(1) when interpreting and implementing the provision of decedent's will at issue in this case.

Appellees argue that the trial court was precluded from considering extrinsic evidence to determine if "a clear indication of a contrary intent" exists. However, MCL 700.8101(2)(e) does not require that a showing of contrary intent must be found in the governing document for the exception to apply. Nothing in MCL 700.8101 prevents a trial court from considering extrinsic evidence to determine whether a testator who executed his will before EPIC was implemented had an intent contrary to the presumption contained in EPIC. [*In re Fink Estate*, unpub op at 4-5; see also *In re Monahan Estate*, unpub op at 6.]

This Court concluded that a latent ambiguity developed when MCL 700.2807 took effect. This Court said:

Under the RPC, Della would have been treated as predeceased when she and decedent divorced and, as a result, appellants would have been afforded the opportunity to acquire the farm, along with the farming tools and equipment, pursuant to the terms of the will. Decedent did not

> include any provisions in the will indicating that his intent regarding the applicability of this provision to appellants in the event of his and Della's divorce was different from the default provisions set forth in the RPC. In other words, he did not indicate he did not want appellants to have the opportunity to acquire the farm after his death if he and Della were divorced when he died.
>
> However, a latent ambiguity developed when MCL 700.2807 took effect. Although decedent's will was unambiguous on its face, extrinsic facts (decedent's divorce and the implementation of EPIC) created an ambiguity in the document. These circumstances, when considered in their totality, indicate that decedent would have had one of two possible intents as to whether appellants would still receive the opportunity to acquire the farm, tools, and equipment if he and Della divorced. Decedent could have intended that, consistent with the provisions of the RPC in effect at the time he executed his will, appellants were to have opportunity to acquire the real and personal property upon his death despite his divorce from Della. Alternatively, he could have simply wanted the provisions of the probate code in effect at the time of his death to govern whether appellants would inherit that part of his estate. Accordingly, a latent ambiguity in decedent's will existed, and the trial court improperly failed to consider extrinsic evidence to resolve this ambiguity and to determine decedent's intent at the time he executed the will. [*In re Fink Estate*, unpub op at 6; see also *In re Monahan Estate*, unpub op at 7-8.]

In *In re Fink Estate*, unpub op at 7, this Court concluded that the extrinsic evidence "clarified the latent ambiguity in decedent's will and indicated that, consistent with the provisions of the RPC, decedent wanted appellants to have the opportunity to acquire the farm upon his death." In *In re Monahan Estate*, unpub op at 8, this Court concluded that the extrinsic evidence "clarifies the latent ambiguity in decedent's will and indicates that, consistent with the provisions

of the RPC, he wanted Evelyn's children to receive the remainder of his estate after his death."

Adopting this analysis, the appellant is not entitled to a distribution from the estate. The will was executed after the effective date of EPIC and, therefore, MCL 700.8101(2)(e) was not applicable. There is no question that appellant was not related by blood or adoption in this case. She asks this Court to find that she was related by affinity. We cannot do so.

Specifically, appellant asserts that by using the word "affinity" in MCL 700.2806(e), the Legislature contemplated that a relative of the divorced individual's former spouse may continue to be "related" to the divorced individual after the divorce. She argues that because she maintained a close, loving, father-daughter relationship with the decedent after the divorce, she is outside of the category of persons labeled "relatives" of the divorced individual's former spouse whose putative bequests are revoked pursuant to MCL 700.2806(e). Appellant relies primarily on the majority opinion in *Patmon v Nationwide Mut Fire Ins Co*, an unpublished per curiam opinion of the Court of Appeals, issued December 23, 2014 (Docket No. 318307), concerning first-party no-fault insurance. The insurance policy at issue in *Patmon* defined "relative," in part, as " 'one who regularly lives in your household and who is related to you by blood, marriage, or adoption (including a ward or foster child).' " *Id*. at 2 (emphasis omitted). The insurance company did not dispute that if the child's mother were still alive, the child would be " 'related by marriage' " to her stepfather. This Court said that the insurance policy, standing alone, offered no guidance in determining whether the death of the biological parent terminated the " 'relation . . . by marriage' " between the stepchild and

the surviving stepparent, and that the Court's task was to discern the meaning of the term " 'related . . . by marriage' " in that context. *Id*. at 3-4. This Court engaged in an analysis of foreign authority, primarily in the context of insurance policies, before opining as follows:

> The weight of this authority persuades us that the common understanding of the term "related by marriage" can encompass a stepparent relationship even absent the biological parent. Heeding [the] admonition that we must place the words in context before interpreting them further convinces us that the Nationwide policy affords coverage to a stepchild who continues to reside with a stepparent, even after the death of the stepparent's spouse. [*Id*. 6-7.]

The dissenting judge in *Patmon* disagreed that a stepchild is related to a stepparent after a spouse's death terminated the marriage. *Patmon* (O'CONNELL, J., dissenting), unpub op at 1. The dissenting judge opined:

> Intermediate appellate courts have no authority to change the law. Principles of stare decisis require us to reach the same result in a case that presents substantially similar issues as presented in a case that another panel of this Court decided. MCR 7.215(C)(2); *WA Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004). No matter how dire the circumstances, or how deserving the cause, we are not allowed to side-step the law.
>
> Persons are related by affinity when they are members of a family that is unified by a marriage. *People v Armstrong*, 212 Mich App 121, 128; 536 NW2d 789 (1995). A relationship by affinity includes a step-relationship created by the remarriage of a parent. *Id*. at 122, 128. However, the law in Michigan is clear: a marriage terminates on death of a spouse. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977); *Byington v Byington*, 224

> Mich App 103, 109; 568 NW2d 141 (1997). The surviving spouse is no longer related to the other spouse's children. See *In re Combs Estate*, 257 Mich App 622, 625; 669 NW2d 313 (2003).
>
> Sometimes, this rule leads to an apparently unfair result. For instance, in *Combs*, the step-children were not entitled to any proceeds from a wrongful death action involving their step-mother because their father passed away several years earlier. *Id*. at 623, 625. But this is the law in Michigan, and we are not free to avoid it.
>
> In this case, Patmon is not entitled to recover under the language of the policy because she is not related to Jordan by blood, affinity, or marriage. While a former step-child may remain close and still maintain an emotional relationship with the former step-parent, at law, they are no longer related. The "why" is uncomplicated—marriage terminates on divorce or the death of a spouse. The legal relationship formed as a result of that marriage does not survive the spouse's death. [*Id*. at 1-2.]

We first note that EPIC is a very subject-matter-specific statute and that even if "affinity" under no-fault law would include her as a relative of the testator, such a definition would not apply to this case. However, even if it did, she cannot prevail. Appellant does not dispute that the definition of "affinity" in our courts has developed over time but that the definition has ultimately returned to that first established in *Bliss v Caille Bros Co*, 149 Mich 601, 608; 113 NW 317 (1907). See *People v Zajaczkowski*, 493 Mich 6, 13-14; 825 NW2d 554 (2012) (quoting the *Bliss* definition of affinity); *Lewis v Farmers Ins Exch*, 315 Mich App 202, 214-215; 888 NW2d 916 (2016) (quoting the *Bliss* definition of affinity). In *Bliss*, the Court defined "affinity," in the context of a case involving judicial disqualification, as:

> the relation existing in consequence of marriage between each of the married persons and the blood relatives of the

> other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all the blood relatives of the husband. [*Bliss*, 149 Mich at 608.]

In other words, when a couple marries, each spouse becomes related by affinity to the other spouse's blood relatives by the same degree.

Although this Court in *In re Fink Estate* and *In re Monahan Estate* was not tasked with defining the term "affinity" in the context of MCL 700.2806 and MCL 700.2807, this Court's pronouncement that the children of a testator's ex-spouse are not related to the testator by blood, adoption, or affinity and are considered "[r]elative[s] of the divorced individual's former spouse" pursuant to MCL 700.2806(e) is both instructive and consistent with the definition of affinity in *Bliss*. Moreover, recently this Court, in holding that the relationship of two adopted children by a single mother did not arise from a marriage and so was not a relationship by affinity, stated that "affinity has always been understood so as to exist via a marriage, and we are not aware of any published case holding to the contrary." *People v Moss*, 333 Mich App 515, 526; 963 NW2d 390 (2020),[7] oral argument ordered on the

[7] This Court originally denied the defendant's application for leave to appeal his conviction following his plea of no contest to third-degree criminal sexual conduct under MCL 750.520d(1)(d) (related by blood or affinity and sexual penetration occurs) against his adoptive sister. *People v Moss*, unpublished order of the Court of Appeals, entered August 21, 2017 (Docket No. 338877). The Supreme Court remanded the case to this Court for consideration as on leave granted and directed this Court to

> specifically address whether a family relation that arises from a legal adoption, see MCL 710.60(2) ("After entry of the order of adoption, there is no distinction between the rights and duties

application 507 Mich 939 (2021).[8] Indeed, in *Shippee v Shippee's Estate*, 255 Mich 35, 37; 237 NW 37 (1931), the Court explored the relationship between Mary Shippee and the plaintiff, who was the widow of Mary's son. The Court addressed whether a relation by affinity survived the death of the plaintiff's husband. The Court said that "[if] there was living issue of the marriage, then the relation by affinity survived the death of plaintiff's husband, for in such event the mother-in-law was the grandmother of such issue. If there was no issue, then the affinity ended at the death of the connecting spouse." *Id*. at 37. The Court said that ample authority existed for the following: " 'Death of the spouse terminates the relationship by affinity; if,

---

> of natural progeny and adopted persons") (1) is effectively a "blood" relation, as that term is used in MCL 750.520–MCL 750.520e; or (2) is a relation by "affinity," as that term is used in MCL 750.520b–MCL 750.520e, see *Bliss v Caille Bros Co*, 149 Mich 601, 608 (1907); *People v Armstrong*, 212 Mich App 121 (1995); *People v Denmark*, 74 Mich App 402 (1977). [*People v Moss*, 503 Mich 1009, 1009 (2019).]

This Court concluded that the defendant and the complainant were effectively related by blood and that an adequate factual basis existed for the defendant's no-contest plea. *Moss*, 333 Mich App at 519, 524. This Court noted that given its holding, it was not necessary to decide whether a relationship by affinity also existed. *Id*. at 524. Considering the Supreme Court's order, however, this Court intentionally addressed the issue. *Id*. Even though the analysis was not decisive of the controversy, it was certainly germane to the controversy and, therefore, not dictum. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007); *People v Higuera*, 244 Mich App 429, 437; 625 NW2d 444 (2001).

[8] In the order granting oral argument on the application, the Supreme Court directed the defendant-appellant to "file a supplemental brief addressing whether the Court of Appeals erred in concluding on remand that the defendant and the complainant are effectively related by blood for purposes of MCL 750.520d(1)(d), such that there was an adequate factual basis for the defendant's no-contest plea." *Moss*, 507 Mich at 939.

however, the marriage has resulted in issue who are still living, the relationship by affinity continues.' " *Id*. (citation omitted).

Here, appellant and the decedent were not related by marriage after the decedent and Sally divorced. Appellant is a blood relative of the divorced individual's former spouse and, after the divorce, is not related to the divorced individual because the affinal relationship no longer existed. Accordingly, appellant's disposition was revoked by the divorce. See MCL 700.2807(1)(a)(*i*).

Appellant contends that MCL 700.2806(e) expressly contemplates that a person may continue to be related to the divorced individual by affinity after the divorce and that "[t]his alone indicates that a divorce does not always destroy a relationship by affinity." (Emphasis omitted.) She asserts that "[t]o interpret the statute otherwise would render part of the statute nugatory." We disagree.

If the decedent and Sally had a child, the child would be a blood relative of both the decedent and Sally. If that child married, the child's spouse would be related to Sally (the divorced individual's former spouse) by affinity. The child's spouse would also be related after the divorce to the decedent (the divorced individual) by affinity. The child's spouse would not be a "relative of the divorced individual's former spouse" under MCL 700.2806(e) because the child's spouse would be related to the divorced individual's former spouse by affinity and, after the divorce, would be related to the divorced individual by affinity. Under those circumstances, disposition to the child's spouse would not be revoked under MCL 700.2807(1)(a)(*i*).

Accordingly, the probate court properly determined that the decedent's disposition to appellant was re-

voked under MCL 700.2807(1)(a)(*i*) because appellant is a relative of the divorced individual's former spouse.

Affirmed.

BORRELLO, P.J., and SERVITTO, J., concurred with STEPHENS, J.

ALBITUS v GREEKTOWN CASINO, LLC

Docket No. 356188. Submitted December 16, 2021, at Detroit. Decided December 16, 2021, at 9:25 a.m.

Michael Albitus brought a premises-liability action in the Wayne Circuit Court against Greektown Casino, LLC, and Gary Platt Manufacturing Company for personal injuries that he suffered when he fell after the back of a chair that he was sitting in gave way or collapsed while he was playing a slot machine. Gary Platt Manufacturing Company, the manufacturer of the chair at issue, settled with plaintiff. Greektown moved for summary disposition under MCR 2.116(C)(10), arguing that Albitus could not establish that Greektown had actual or constructive notice of the allegedly defective chair. Albitus argued that Greektown knew or should have known about the defective chair because of its 24-hour surveillance of the incident area and because numerous employees in that area were responsible for monitoring safety. Relying on surveillance video of the incident, Albitus's safety expert stated in an affidavit that a defect was observable before Albitus sat down—he said the backrest leaned back a bit further than that of other chairs. Albitus further argued that Greektown had a duty to inspect the premises and if it had properly done so, the defect would have been discovered and Albitus's injuries would have been prevented. The trial court, Martha M. Snow, J., granted Greektown's motion, concluding that Albitus failed to meet his burden to show that Greektown had actual or constructive notice of any defect in the chair and rejecting Albitus's contention that a premises owner had a duty to routinely inspect for hazardous conditions because the duty to inspect under Michigan law was recently abolished in the case of *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1 (2016). Albitus appealed.

The Court of Appeals *held*:

1. The duty of premises owners to inspect for dangers on behalf of invitees is a longstanding principle of Michigan law. The Michigan Supreme Court explicitly affirmed this duty to inspect in *Lowrey*. *Lowrey* merely clarified how this duty operates at the summary-disposition stage of a proceeding: a defendant need not present evidence of a routine or reasonable inspection to prove a

premises owner's lack of constructive notice of a dangerous condition on its property. Only when the plaintiff establishes a question of fact regarding constructive notice might evidence of inspection efforts be needed for the defendant to negate an essential element of the nonmoving party's claim; otherwise, a defendant can meet its burden simply by demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. Therefore, while Albitus was correct that Greektown was still bound by a duty to inspect the premises, this appeal ultimately depended on whether Albitus provided sufficient evidence to establish a genuine issue of fact concerning the element of constructive notice.

2. To prevail on a premises-liability claim, an invitee must show that the premises owner breached its duty to the invitee and that the breach constituted the proximate cause of the invitee's damages. Breach occurs if the premises owner knows or should have known of a dangerous condition and fails to protect invitees via repair, warning, or other appropriate mitigation of the danger under the given circumstances. Therefore, notice—actual or constructive—of the dangerous condition is an essential element in establishing a premises-liability claim. Constructive notice is present when the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it. In this case, no evidence was presented proving that the defect had existed for a sufficient length of time that Greektown should have known about it, Albitus failed to explain how Greektown's use of 24-hour surveillance and employees regularly patrolling the casino were unreasonable, and Albitus offered no evidence of negligent deviation from these practices. Without some additional evidence that the defect existed for some significant amount of time before Albitus's fall or of some other negligent action, Albitus failed to establish that Greektown had constructive notice of the defect but rather affirmed that Greektown had proper practices in place for detecting potential hazards. Nor was the character of the defect such that a reasonable premises owner would have discovered it: a backrest on a chair leaning a bit farther back than others, without more, simply does not show that Greektown should have known a dangerous defect was present, i.e., that the chairback was going to collapse. Albitus's evidence was insufficient to create a genuine issue of material fact regarding Greektown's constructive notice. Accordingly, the trial court did not err by granting defendant's motion for summary disposition.

Affirmed.

Mindell Law (by *Tyler M. Joseph*) for Michael Albitus.

Secrest Wardle (by *Renee T. Townsend* and *Drew W. Broaddus*) for Greektown Casino, LLC.

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM. Plaintiff appeals as of right an order granting summary disposition to defendant[1] Greektown Casino in this premises liability action. We affirm.

I. BACKGROUND

On October 23, 2016, plaintiff allegedly suffered injuries after falling from a chair on the premises of defendant's casino. Plaintiff contended that he was sitting at a slot machine and fell when the back of the chair gave way or collapsed. According to plaintiff, the fall caused a fractured right arm, torn shoulder, and neck injury, and these injuries required extensive medical treatment. Plaintiff filed a complaint alleging in relevant part that defendant was responsible for the defective chair and liable for his injuries. Plaintiff asserted three separate counts, one each for general negligence, premises liability, and breach of implied warranty.

On April 29, 2020, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that premises liability was the only viable theory of liability and that plaintiff could not establish that

[1] Defendant Gary Platt Manufacturing Company, the manufacturer of the chair at issue, settled with plaintiff and is not involved in this appeal. Thus, the term "defendant" refers to Greektown Casino, LLC.

defendant had actual or constructive notice of the allegedly defective chair. Defendant referred to plaintiff's testimony that the chair appeared normal before he sat on it and, after he sat on it, the chair felt normal. Defendant further argued there was no evidence that defendant knew or should have known of the allegedly defective condition of the chair or that the defect even existed prior to plaintiff using the chair. In other words, there was no evidence that the chair was obviously defective, that defendant had been notified that the chair was broken, or that someone else had fallen or had an incident involving the chair. Plaintiff responded, arguing that defendant knew or should have known about the defective chair because of its 24-hour surveillance of the incident area and its numerous employees in that area responsible for patron safety. Plaintiff stressed testimony from defendant's risk and safety manager confirming the area was under constant surveillance and that numerous employees in the area were responsible for monitoring safety, including the safety of the slot-machine chairs. Plaintiff also argued that the defect could be seen in the surveillance video before plaintiff's injury.

At a hearing on the motion, defendant presented the trial court with the video surveillance from the incident, countering plaintiff's assertion that a defect in the chair was observable upon casual inspection before plaintiff fell. Plaintiff responded that his safety expert stated in his affidavit that a defect was observable in the video in that the chairback leaned backward further than the chairbacks adjacent to it. Plaintiff further argued that defendant had a duty to inspect the premises to protect invitees from hazardous conditions and had constructive notice of the defect because it had 24-hour surveillance and numerous employees in the area of the incident. According to plaintiff, had defen-

dant and its employees done their jobs and properly inspected the premises, the defect would have been discovered and plaintiff's injuries prevented.

The trial court ultimately granted defendant's motion for summary disposition on all three of plaintiff's claims. The trial court agreed with defendant that this was solely a premises liability action. And regarding that claim, the trial court concluded that plaintiff failed to meet his burden of showing defendant had actual or constructive notice of any defect in the chair, stressing the chair's normal appearance and plaintiff's own testimony that the chair looked and felt normal. As for the surveillance video, the trial court indicated that it did not show that the chair was defective. The trial court also disagreed with plaintiff's contention that defendant, as a premises owner, had a duty to routinely inspect for hazardous conditions. Specifically, the trial court concluded that the recent case of *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1; 890 NW2d 344 (2016), abolished the prior duty-to-inspect requirement under Michigan law. Subsequently, plaintiff's motion for reconsideration was denied, and this appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim." *Id*. at 160. The moving party must identify the matters that have no disputed factual issues and has the initial burden of either submitting affirmative evidence negating an essential element of the nonmoving party's claim or demonstrating that the nonmoving party's

evidence is insufficient to establish an essential element of their claim. *Lowrey*, 500 Mich at 7, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The party opposing the motion must then establish by evidentiary materials that a genuine issue of disputed fact exists. *Quinto*, 451 Mich at 362-363. After considering the documentary evidence submitted in the light most favorable to the nonmoving party, the court determines whether a genuine issue of material fact exists to warrant a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citation omitted). Issues of law are also reviewed de novo. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

III. ANALYSIS

Plaintiff contends the trial court erred by concluding that (1) *Lowrey* dispensed with the requirement that premises owners conduct reasonable inspections to protect patrons from hazards on the property, and (2) plaintiff presented insufficient evidence to create a genuine issue of material fact regarding defendant's constructive notice of the defective chair. We agree that the trial court misconstrued *Lowrey*, but we disagree that the trial court erred by granting defendant summary disposition on the basis of the lack of notice.

It was undisputed below that plaintiff was an invitee of defendant's business when the alleged injury occurred. To prevail on a premises liability claim, "an invitee must show that the premises owner breached its duty to the invitee and that the breach constituted

the proximate cause of damages suffered by the invitee." *Lowrey*, 500 Mich at 8. Breach occurs if the premises owner knows or should have known of a dangerous condition and fails to protect invitees via repair, warning, or other appropriate mitigation of the danger under the given circumstances. *Id*. Thus, actual or constructive notice of the relevant dangerous condition is an essential element in establishing a premises liability claim. *Id*. at 8-9. Plaintiff never claimed that defendant had actual notice of the dangerous condition; rather, plaintiff claimed that defendant had constructive notice. Constructive notice is present when "the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." *Id*. at 11-12.

Plaintiff first argues the trial court erred by concluding that *Lowrey* abolished a premises owner's duty to inspect for hazardous conditions on the property. We agree. Plaintiff correctly notes that the duty of premises owners to inspect for dangers on behalf of invitees is a longstanding principle of Michigan law. See, e.g., *Price v Kroger Co of Mich*, 284 Mich App 496, 500; 773 NW2d 739 (2009) (noting that a property owner owes business invitees a duty to inspect the premises for hazards that might cause injury). Contrary to the trial court's conclusion, *Lowrey* explicitly affirmed this duty to inspect. See *Lowrey*, 500 Mich at 10 n 2 ("We have described the duty a landowner owes to an invitee as [an] obligation to also make the premises safe, which requires the landowner to inspect the premises . . . .") (quotation marks and citation omitted; alteration in original). Rather than dispensing with the duty to inspect, *Lowrey* merely clarified how this duty operates at the summary-disposition stage of a proceeding. Specifically, the Court determined that a defendant need not "present evidence of a routine or reasonable

inspection . . . to prove a premises owner's lack of constructive notice of a dangerous condition on its property." *Id*. at 10. Only when the plaintiff has successfully established a question of fact regarding constructive notice might evidence of inspection efforts be needed for the defendant to "negate[] an essential element of the nonmoving party's claim . . . ." See *id*. at 7 (quotation marks and citation omitted). Otherwise, a defendant can meet its burden simply by demonstrating "that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." See *id*. at 7 (quotation marks and citation omitted). And that is precisely what defendant asserts it has demonstrated here. Therefore, while plaintiff is correct that defendant was still bound by a duty to inspect the premises, this appeal ultimately depends on whether plaintiff provided sufficient evidence to establish a genuine issue of fact concerning the element of constructive notice.

As for this issue, plaintiff argues he provided sufficient evidence that defendant had constructive notice of the defective chair through the testimony of defendant's risk and safety manager and the affidavit of plaintiff's expert. Plaintiff also argues that an issue of fact exists when expert testimony indicates that the defendant would have discovered the dangerous condition through reasonable inspection, as his expert claimed in the instant case. Defendant counters that plaintiff's proffered evidence cannot establish an issue of fact regarding constructive notice because the defect was latent, i.e., it was not discoverable even through reasonable inspection. Defendant also stresses the lack of any evidence indicating that the defect had existed for a sufficient length of time to impute notice to defendant.

As an initial matter, defendant is correct that no evidence was presented proving that the defect had "existed [for] a sufficient length of time that [defendant] should have know[n] of it." *Lowrey*, 500 Mich at 10 (quotation marks and citation omitted). In fact, the evidence presented arguably indicates the contrary. Plaintiff relies on defendant's safety manager's testimony regarding defendant's use of 24-hour surveillance and employees regularly patrolling the casino floor to imply some failure in defendant's duty to reasonably inspect the premises. But plaintiff fails to explain how these inspection practices were unreasonable and offers no evidence of negligent deviation from these practices. Thus, without some additional evidence that the defect existed for some significant amount of time before plaintiff's fall or of some other negligent action, this testimony merely affirms that defendant had proper practices in place for detecting potential hazards. And defendant's safety manager specifically recognized that no employees were made aware of any issue with the chair, either through earlier incidents, customer complaints, or their own inspection practices. From this evidence, the more reasonable explanation is that the defect either had not existed for a length of time that it should have been detected and fixed, or that the nature of the defect itself made it undiscoverable regardless of when it arose.

We next consider whether the alleged defect was "of such a character . . . that [defendant] should have know[n] of it." *Lowrey*, 500 Mich at 10 (quotation marks and citation omitted). Though plaintiff's safety expert's affidavit[2] largely focused on proper inspection

[2] Defendant also argues that the testimony of plaintiff's expert must be discounted because the expert's opinion infringed on legal questions

of the premises and defendant's alleged failure to detect the defect (but did not allege any specific negligent action related to defendant's inspection), the expert's testimony relating to the condition of the chair in the video seems to address this prong of constructive notice. According to the expert's specific testimony, the surveillance video showed the defect in the chair because it visibly leaned backward farther than adjacent slot-machine chairs—allegedly because of a deformed metal support.

The surveillance footage in question provides two separate angles of the incident, one from behind and one from the side, as well as a close-up view of the chair after plaintiff's fall. The video depicts plaintiff seating himself in the chair and turning his attention to the slot machine. After approximately 40 seconds, plaintiff leans back in the chair, at which point the backrest appears to buckle and plaintiff falls. Though plaintiff's expert is correct that the backrest appears broken in the close-up footage from *after* plaintiff's fall, the chair looks completely normal up until that event. As plaintiff approaches the chair and sits down, it appears just like all the other chairs in the vicinity; only once plaintiff leans back does the defect become apparent.

We therefore agree with the trial court that the surveillance video shows no significant underlying defect that should have been discovered—giving rise to

---

reserved for the court and was made without the requisite personal knowledge relating to defendant's notice. We only briefly address this argument here because it is largely irrelevant to constructive notice in this case and not dispositive to the issue at hand. Regarding portions of the affidavit actually relevant to constructive notice and analyzed in this discussion, they relate specifically to factual assertions over which plaintiff's expert did acquire the required personal knowledge.

constructive notice of a dangerous condition. Even assuming arguendo that the chairback did lean backward a bit further than the chairbacks of adjacent chairs, we do not believe that it was of such a character that "reasonable minds might differ" on the issue of constructive notice. See *Johnson*, 502 Mich at 761. A backrest on a chair leaning a bit farther back than others, without more, simply does not show that defendant should have known a dangerous defect was present, i.e., that the chairback was going to collapse. The expert's testimony regarding the chair's condition was thus insufficient to create a genuine issue of material fact regarding defendant's constructive notice, an essential element of plaintiff's claim. Accordingly, the trial court did not err by granting defendant's motion for summary disposition.

Affirmed.

CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ., concurred.

PEOPLE v SIMON

Docket No. 354013. Submitted August 10, 2021, at Lansing. Decided December 21, 2021, at 9:00 a.m.

Lou Anna K. Simon was charged in the 56A District Court with four counts of making a false or misleading statement to a peace officer in a criminal investigation, MCL 750.479c(1)(b). Specifically, defendant, the former president of Michigan State University (MSU), was charged based on the allegation that defendant knowingly and willfully made a false or misleading statement in a 2018 police interview regarding her knowledge of who was the subject of a 2014 Title IX investigation—a sports medicine doctor at the MSU College of Osteopathic Medicine who was later convicted of criminal sexual conduct, Larry Nassar. The prosecution asserted that defendant knowingly and willfully made false or misleading statements with respect to whether, before the 2016 media reporting on Nassar's misconduct, defendant (1) knew that Nassar was the sports medicine doctor under review in 2014 and (2) knew the nature of the allegation or the substance of the review. During the police interview, defendant stated that in 2014, she had been informed by a staff member that there was "a sports medicine doc" under review but that she was "not aware of any of the substance of that review" or "the nature of the complaint." Following the preliminary examination, the district court, Julie H. Reincke, J., found that there was probable cause to believe that defendant had violated MCL 750.479c(1)(b) and bound defendant over on all four charges. The district court concluded that evidence suggested that Paulette Granberry Russell, the Title IX coordinator and chief advisor on diversity to defendant, must have told defendant in a May 19, 2014 meeting about the details of the sexual assault allegations and provided defendant with Nassar's name as the alleged perpetrator. Defendant moved to quash the bindover in the Eaton Circuit Court. The circuit court, John D. Maurer, J., quashed the bindover and dismissed the case, ruling that the district court abused its discretion when it found probable cause to believe that defendant knowingly and willfully made false or misleading statements because there was no evidence that anyone communicated Nas-

sar's name or the specific nature of the allegations to defendant in 2014. The circuit court further stated that the prosecution's argument required the court to speculate without evidentiary support that defendant was informed in 2014 of Nassar's name and the nature of the complaint against him and that defendant remembered in 2018 that she had known that information in 2014. The court reiterated that there was no evidence that would permit such an inference without improperly resorting to speculation. The prosecution appealed.

The Court of Appeals *held*:

The district court abuses its discretion by binding over a defendant when the prosecution has failed to present sufficient evidence to support each element of the charged offense. MCL 750.479c(1)(b) provides, in pertinent part, that a person who is informed by a peace officer that the peace officer is conducting a criminal investigation shall not knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation. For purposes of MCL 750.479c(1)(b), "mislead" means (1) to lead or guide in the wrong direction; (2) to lead into error of conduct, thought, or judgment; lead astray. In this case, the prosecution did not introduce any evidence that defendant was actually informed in 2014 or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him. At most, there was evidence that defendant was notified of an incident involving an unnamed "sports medicine doc" and that Russell may have had some general discussion with defendant about this incident during their May 19, 2014 meeting. Without evidence that defendant was provided with Nassar's name or details about the nature and substance of the allegations in 2014, there was no evidence that defendant's 2018 statements to the police were affirmatively false or misleading as required by MCL 750.479c(1)(b). Accordingly, the evidence was insufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant made a false or misleading statement. The district court abused its discretion by finding that there was probable cause of this element of the crime and by binding defendant over for trial based on mere speculation.

Affirmed.

STEPHENS, P.J., concurring, agreed with the majority opinion and additionally agreed with Judge GLEICHER that defendant's alleged falsehoods were not material under MCL 750.479c(1)(b).

GLEICHER, J., concurring, agreed with the majority's conclusion but wrote separately to provide additional reasons to affirm the circuit court's decision: that defendant's allegedly false statements were immaterial to the prosecution's sham investigation, that defendant's literally true answers could not be subject to prosecution, and that defendant was charged for reasons that had nothing to do with bringing justice to Nassar's victims or to vindicating legal principles.

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

Silver & Van Essen, PC (by *Lee T. Silver*, *Michael L. Gutierrez*, and *J. Terrance Dillon*) and *James R. Bruinsma* for defendant.

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

BORRELLO, J. The prosecution appeals by right an order quashing the bindover of defendant, who is the former president of Michigan State University, on four counts of making a false or misleading statement to a peace officer, MCL 750.479c(1)(b), and dismissing defendant's felony information. For the reasons set forth in this opinion, we affirm.

I. FACTUAL BACKGROUND

In 2014, a victim initiated a complaint with Michigan State University (MSU) that Larry Nassar, who was at that time a doctor in the MSU College of Osteopathic Medicine, had sexually assaulted her during an examination. Kristine Moore, who was an MSU employee in the office that investigated Title IX complaints (including sexual assault complaints), eventually received the complaint for investigation and spoke to the victim by telephone on May 15, 2014, at approxi-

mately 6:00 p.m. Moore testified[1] that at some point the next morning, she informed her supervisor, Paulette Granberry Russell, by telephone about the victim's complaint.[2] Russell was the Title IX coordinator and chief advisor on diversity to defendant, who was the president of MSU at that time. Moore further testified that she did not recall the specific conversation or exactly what she said to Russell at that time when she told her about the complaint.

Russell sent an e-mail on the morning of May 16, 2014, to defendant stating only that "[w]e have an incident involving a sports medicine doc." Russell testified that she sent this e-mail after she had been told by Moore about the victim's complaint. Russell explained that Moore's telephone call to her had occurred either on May 15 or very early on May 16. Russell did not recall the specific details of her conversation with Moore. Russell further testified that she did not even remember having a conversation with Moore but was merely assuming that they spoke "because there was an email from me to the president alerting her to allegations." After having her memory refreshed by a transcript of her 2018 interview at the Attorney General's office, Russell testified that she had a telephone conversation with Moore, during which Moore relayed that she had received a complaint regarding allegations of sexual assault by a doctor in the College of Osteopathic Medicine. Russell believed that she asked Moore to send her more details by e-mail.

---

[1] Because of the procedural posture of this case, in which a preliminary examination has been conducted but not a trial, we refer to the preliminary-examination testimony.

[2] Moore testified that she also informed the Office of the General Counsel and the MSU Police Department.

Moore subsequently sent an e-mail to Russell on the afternoon of May 16, 2014, as a follow up to their earlier telephone conversation. In that e-mail, Moore summarized the nature of the victim's complaint and mentioned that the complaint was against Nassar. The e-mail indicated that the victim alleged that Nassar had massaged the victim's breasts, buttocks, and vagina. Moore testified that she never sent this e-mail to defendant. Russell testified that she did not recall providing defendant with the details of the victim's complaint against Nassar as set forth in the May 16 e-mail Russell received from Moore.

In her position reporting directly to defendant, Russell generally had monthly individual meetings with defendant to provide updates on various matters as necessary. Russell testified that she typically created the agendas for these meetings, which usually included items of "university-wide impact."

On May 19, 2014, Russell had a scheduled one-on-one meeting with defendant. On the typewritten agenda that Russell prepared for this meeting, Russell had included "COM Incident." Russell indicated that "COM" stood for "College of Osteopathic Medicine" and that the Nassar complaint was the only incident involving the COM during May 2014 of which Russell was aware. There was conflicting evidence regarding whether the May 19, 2014 meeting was held in person or over the telephone. According to Russell, her calendar indicated that it was scheduled as an in-person meeting, but her agenda indicated that it was to be conducted by telephone call. Nobody else was involved in the meeting; Russell and defendant were the only participants. Russell testified that she did not "independently recall if it was in person or by phone." Russell testified that she could not independently

remember the details of the conversation during that meeting and that she did not remember "bringing up the matter involving Larry Nassar at that meeting." When asked if she thought she would have brought this up, Russell testified as follows:

> It's possible; but again, I cannot recall stating to President Simon the matter involving Larry Nassar at that meeting. I don't have any notes that would cause me to trigger a memory of that. It was two thousand and, you know, fourteen. I can't remember.

Another version of Russell's agenda for the May 19 meeting that also included Russell's handwritten notes from the meeting was admitted as an exhibit at the preliminary examination. Russell's handwritten notes contained nine specific names related to various agenda items, but Nassar's name was not one of them and did not appear in any of Russell's handwritten notes on the agenda. There were also no handwritten notes pertaining to the COM incident on the agenda. She could not recall whether the COM incident was discussed during the meeting or what was discussed about Nassar. Russell admitted it was possible that she discussed the Nassar investigation with defendant. Russell also testified that it was very possible that she did not discuss Nassar with defendant in the May 19 meeting. Russell stated further that she had no independent recollection of specifically discussing Nassar with defendant during the May 19 meeting, that it was possible that she discussed the COM incident in terms of an incident involving a sports medicine doctor without discussing Nassar by name, and that she did not recall mentioning Nassar's name to defendant in 2014.

Russell's calendar also indicated that she had a meeting scheduled with defendant on May 14, 2014. However, Russell testified that she did not remember if

that meeting actually occurred; she subsequently testified in relation to other documentary evidence that the May 14 meeting occurred but involved multiple other people and was held with respect to a specific congressional sexual assault survey that MSU was completing. The prosecution admitted into evidence a file folder that was labeled with the date, time, and subject of the May 14, 2014 meeting. The folder contained background materials relevant to the congressional sexual assault survey that was the subject of that meeting. The May 14 meeting folder also contained a copy of the agenda for the May 19, 2014 meeting between Russell and defendant, but the copy of the agenda had no handwriting on it. On the outside of the May 14 folder, there were handwritten notes that stated, "sports med, Dr. Nassar SA" and "Estell[e] MCG, age discrim." Russell testified that the handwriting appeared to be her own, that "SA" meant "sexual assault," and that she assumed that she made the note so she would raise this issue in her conversation with defendant.

However, Russell testified that she had no recollection of discussing this May 14 folder with defendant and that she could not be certain whether she had this folder with her during the May 19 conversation with defendant. Russell could not recall when she wrote the note about Nassar on the folder, but she indicated that she was not aware of the allegations against Nassar until after the May 14 meeting when she was contacted by Moore on May 15 or 16. Russell thus assumed that she must have written the note sometime between May 15 and May 19, 2014. Russell's handwritten notes from the May 19 meeting, which appeared on her copy of the May 19 agenda, did not include any notes indicating that she discussed Nassar or an age discrimination matter with defendant during

the May 19 meeting. Russell did not independently recall discussing any of the items on her agenda or folder with defendant. Russell could not recall ever telling defendant Nassar's name. According to Russell, defendant never inquired and was never told the name of the individual involved in the COM investigation.

Marti Howe, who worked at MSU in 2014 as defendant's assistant and reported directly to defendant, was primarily responsible for keeping defendant's calendar, scheduling her appointments, preparing her materials for appointments, and arranging defendant's travel. Howe testified that she also prepared a written agenda for defendant pertaining to the May 19, 2014 meeting between defendant and Russell. Howe identified a copy of this agenda,[3] which was admitted into evidence. The agenda also contained handwritten notes in addition to the typed items on the agenda, and Howe identified the handwriting as defendant's handwriting. The agenda contained a typed item, "Sexual Assault Cases." There was a handwritten checkmark next to this item. Also next to this item were the following handwritten notes: "COM/Both Issues/Court Case." Howe testified that she was not present at the meeting and did not know the substance of what was discussed regarding these items, nor did she have any additional knowledge about what these notes meant. Nassar's name did not appear on the May 19, 2014 agenda. Howe testified that under the system used by defendant, a check mark meant that the item was discussed but would carry over to the next meeting to be discussed again. There was also documentary and testimonial evidence that "Sexual Assault Cases" appeared as an agenda item on multiple agendas for meetings between defendant and Russell, including

[3] This agenda was different from the one prepared by Russell.

agendas for the March, April, June, July, and August 2014 meetings between defendant and Russell.

The 2014 investigation concluded that there was no finding of a Title IX or MSU policy violation by Nassar. Moore testified that before 2016, she never had any conversation with defendant about the 2014 victim's complaint, the investigation in that matter, or Nassar. Moore also testified that she did not recall whether she provided a copy of her final report to Russell before 2016. Moore did not provide a copy or draft of her final report to defendant before 2016.

Russell testified that there was no written protocol to report Title IX investigations to the president, that she did not know of Title IX investigative reports being shared with the president, and that the "president would be aware that we had Title IX investigations, but the detail of those were not typically disclosed to the president." Russell was told verbally by Moore about the no-finding conclusion of the investigation but was not given a copy of the final report. Russell testified that there were no writings or e-mails between her and defendant during 2014, 2015, or the majority of 2016 mentioning Nassar by name. Nassar's name did not appear on any of Russell's meeting agendas. As previously noted, Russell testified that she did not recall ever specifically mentioning Nassar's name to defendant. Russell testified that she did not believe that she ever asked defendant to be involved in the 2014 investigation of Nassar in any way. Moore testified that defendant was not involved in the 2014 Nassar investigation. June Youatt, who was the provost at MSU, testified that the MSU procedures did not require the provost or president to be involved in sexual assault complaints or investigations unless there was a finding of responsibility.

In early 2018, after additional allegations of sexual misconduct by Nassar led to his criminal prosecution and conviction, a law enforcement investigation into MSU's handling of the Nassar matter was initiated. Detective Sergeants Joseph Cavanaugh and William Arndt, both employed by the Michigan State Police, were involved in the investigation. According to Cavanaugh, the investigation was intended to find out "who knew what and when, if anything, at the university related to Narry—or Larry Nassar from 2014 on, as well as other issues at the university such as Dean Strampel."

As part of the investigation, the detectives interviewed defendant on May 1, 2018. During that interview, the following exchange took place:

> *Mr. Arndt*: So I mean specifically to Nassar, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar, or, you know, misconduct for that matter, anything?
>
> [*Defendant*]: I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the—
>
> *Mr. Arndt*: I think that's going to boil right into our next question.
>
> [*Defendant*]: The national piece?
>
> *By Mr. Cavanagh*:
>
> *Q*. Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or—
>
> *A*. I was told by one of the staff members that there was a sports medicine—
>
> *Q*. I see.

> *A*. —physician who was going through OIE [the Office of Institutional Equity], none of the substance. And I don't involve myself in the OIE investigations.

Both Arndt and Cavanaugh acknowledged during their respective preliminary-examination testimony that they did not ask defendant follow-up questions regarding who informed her that there was a sports medicine doctor under review, when she had been informed, or whether she had asked for additional information.

Defendant was subsequently charged with four counts of making a false or misleading statement to a peace officer in a criminal investigation, contrary to MCL 750.479c. Specifically, defendant was charged with one count based on the allegation that the interviewing officers were investigating first-degree criminal sexual conduct (CSC-I) and defendant knowingly and willfully made a false or misleading statement regarding her knowledge of who was the subject of the 2014 Title IX investigation involving Nassar. Defendant was also charged with one count based on the same allegedly false or misleading statement with respect to the interviewing officers' investigation of misconduct of a public official. Defendant was charged with an additional count based on the allegation that with respect to the CSC-I investigation, defendant knowingly and willfully made a false or misleading statement regarding her knowledge of the nature and substance of the 2014 Title IX investigation. Finally, defendant was charged with another count based on this same allegedly false or misleading statement with respect to the investigation of misconduct of a public official.

Following the preliminary examination, the district court found that there was probable cause to believe

that defendant committed these crimes and bound defendant over on all four charges. As relevant to the resolution of this appeal, the district court concluded that "evidence suggests" that the victim's 2014 allegations against Nassar were a "topic of conversation in a meeting between [defendant] and Russell." The district court essentially inferred that Russell must have told Simon in their May 19, 2014 meeting about the details of the allegations and provided defendant with Nassar's name as the alleged perpetrator.

Defendant moved the circuit court to quash the bindover. In a thorough and well-reasoned written opinion, the circuit court determined that the district court had abused its discretion by finding that probable cause supported multiple elements of the offenses. The circuit court ruled, in relevant part, that "[t]he district court abused its discretion in finding probable cause to believe Dr. Simon knowingly and willfully made false or misleading statements." In support of this conclusion, the circuit court reasoned that there was no evidence that anyone communicated Nassar's name or the specific nature of the allegations to defendant in 2014. The circuit court further stated that the prosecution's argument required the court to speculate without evidentiary support that defendant was informed in 2014 of Nassar's name and the nature of the complaint against him and that defendant remembered in 2018 that she had known that information in 2014. The court reiterated that there was no evidence that would permit such an inference without improperly resorting to speculation. The circuit court quashed the bindover and dismissed the case. The prosecution now appeals.

II. STANDARD OF REVIEW

"A district court magistrate's decision to bind over a defendant and a trial court's decision on a motion to quash an information are reviewed for an abuse of discretion." *People v Bass*, 317 Mich App 241, 279; 893 NW2d 140 (2016) (quotation marks and citation omitted). "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Anderson*, 501 Mich 175, 189; 912 NW2d 503 (2018) (quotation marks and citation omitted). An abuse of discretion occurs if the court does not select a reasonable and principled outcome. *Id*. The district court abuses its discretion by binding over a defendant when the prosecution has failed to present sufficient evidence to support each element of the charged offense. *People v Perkins*, 468 Mich 448, 452, 454-455, 458; 662 NW2d 727 (2003). "[T]o the extent that a lower court's decision on a motion to quash the information is based on an interpretation of the law, appellate review of the interpretation is de novo." *Bass*, 317 Mich App at 279 (quotation marks and citation omitted).

"In order to bind a defendant over for trial in the circuit court, the district court must find probable cause that the defendant committed a felony" based on there being "evidence of each element of the crime charged or evidence from which the elements may be inferred." *Anderson*, 501 Mich at 181-182 (quotation marks and citation omitted). Further,

> a magistrate's duty at a preliminary examination is to consider all the evidence presented, including the credibility of witnesses' testimony, and to determine on that basis whether there is probable cause to believe that the defen-

> dant committed a crime, i.e., whether the evidence presented is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. [*Id*. at 178 (quotation marks and citation omitted).]

III. ANALYSIS

The statute under which defendant was charged, MCL 750.479c, provides, in pertinent part, as follows:

> (1) Except as provided in this section, a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not do any of the following:
>
> * * *
>
> (b) Knowingly and willfully make any statement to the peace officer that the person knows is false or misleading regarding a material fact in that criminal investigation.

As this Court has previously stated, this statute "prohibits knowingly and willfully making a statement regarding a material fact 'that the person knows is false or misleading.' " *People v Williams*, 318 Mich App 232, 239; 899 NW2d 53 (2016). For purposes of this statute, mislead means "1. to lead or guide in the wrong direction. 2. to lead into error of conduct, thought, or judgment; lead astray." *Id*. at 240 (quotation marks and citation omitted). Additionally, false statements are misleading as well because "[a]n affirmatively false statement—a bald-faced lie—may turn an investigator's attention away from the true perpetrator or the source of valuable evidence." *Id*.

In this case, the prosecution asserted that defendant knowingly and willfully made false or misleading statements with respect to whether, before the 2016 media reporting on Nassar's misconduct, defendant (1) knew that Nassar was the sports medicine doctor

under review in 2014 and (2) knew the nature of the allegation or the substance of the review. These two allegedly false or misleading statements formed the basis for four charged offenses under MCL 750.479c because the officers were investigating both CSC-I and misconduct of a public official.

The prosecution essentially contends that defendant lied about (1) whether she knew that Nassar was the specific individual being investigated in the 2014 Title IX investigation and (2) whether she knew the details of those allegations or that the allegations involved sexual assault. The prosecution maintains that the evidence and inferences from that evidence show that defendant was informed in 2014 of Nassar's name and the nature of the allegations against him.

However, the prosecution did not introduce any evidence that defendant was actually informed in 2014 or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him. At most, there was evidence that defendant was notified of an incident involving an unnamed "sports medicine doc" and that Russell may have had some general discussion with defendant about this incident during their May 19, 2014 meeting. The fact that defendant was aware of this level of information is not inconsistent with her statements during the 2018 police interview that she "was aware that in 2014 there . . . was a sports medicine doc who was subject to a review" but "was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the . . . national piece[.]"

The evidence that defendant wrote "COM" on her May 19, 2014 meeting agenda next to the agenda item "Sexual Assault Cases" supports the reasonable infer-

ence that this incident was at least brought up during the meeting. It also supports the inference that defendant was, at a minimum, provided with information that the incident involved allegations of sexual assault. However, this knowledge is also not inconsistent with defendant's statements during her 2018 police interview. As quoted earlier, the questioning was as follows:

> *Mr. Arndt*: So I mean specifically to Nassar, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar, or, you know, misconduct for that matter, anything?
>
> [*Defendant*]: I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the—
>
> *Mr. Arndt*: I think that's going to boil right into our next question.
>
> [*Defendant*]: The national piece?
>
> *By Mr. Cavanaugh*:
>
> *Q*. Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or—
>
> *A*. I was told by one of the staff members that there was a sports medicine—
>
> *Q*. I see.
>
> *A*. —physician who was going through OIE [the Office of Institutional Equity], none of the substance. And I don't involve myself in the OIE investigations.

Thus, in defendant's very next answer after stating that she "was not aware of any of the substance of that review, the nature of the complaint," defendant clarified that she had been told that this doctor was being investigated by OIE. Arndt testified at the preliminary examination that he understood defendant's reference

to indicate that there was a Title IX investigation and that he assumed defendant was saying that the investigation involved matters of a sexual nature.[4] It is not clear what defendant meant by stating that she was not aware of the substance of the review or nature of the complaint, and the interviewing officers did not ask any follow-up questions to clarify or probe what defendant meant. Arndt testified that he assumed defendant meant that she was not aware of the details of the complaint. As we have already stated, there was no evidence presented by the prosecution that defendant was actually apprised of the details of the allegations or complaint against Nassar in 2014 until after Nassar's misconduct garnered national media attention in 2016. On this record, we cannot say that defendant's statements during the 2018 police interview were affirmatively false or misled law enforcement in this regard. See *Williams*, 318 Mich App at 240.

Without evidence that defendant was provided with Nassar's name or details about the nature and substance of the allegations in 2014, there was no evidence that defendant's 2018 statements to the police were affirmatively false or misleading as required by the statute. *Id*. The prosecution has essentially argued that defendant made false or misleading statements because Russell *must* have provided more details to

[4] Russell testified that "OIE evolved in 2015, late 2015, as a separate office from the Office for Inclusion and Intercultural Initiatives." OIE was responsible for "[a]ll of the compliance functions, particularly around the university's non-discrimination, anti-discrimination policy, as well as the Title IX responsibilities." Russell explained that Title IX responsibilities included "complaints involving sex discrimination, the Relationship Violation Sexual Misconduct Policy." Russell was in charge of the Inclusion and Intercultural Initiatives Office in 2014 and was still in charge of this office at the time of trial. She stated that the functions of OIE were under her supervision until 2014.

defendant considering the seriousness of the allegations and the amount of information Russell possessed.

However, that conclusion simply is not supported by the evidence and instead rests on mere speculation and suspicion. We cannot impute that knowledge to defendant without some evidence that this information actually made its way to defendant or from which we could legitimately infer, rather than assume, that fact. Although "a district court may . . . rely on inferences to establish probable cause for a bindover," a "person of ordinary prudence and caution [may] not infer" a fact "absent any actual evidence" to support the inference of that fact because "[m]ere suspicion is not the same as probable cause . . . ." *People v Fairey*, 325 Mich App 645, 651-652; 928 NW2d 705 (2018). A district court abuses its discretion if its bindover decision is based on a "fail[ure] to distinguish between a *suspicion* of guilt and a *reasonable belief*" of guilt. *Id*. at 651. Despite that the probable-cause standard is a "rather low level of proof, the magistrate must always find that there is evidence regarding each element of the crime charged or evidence from which the elements may be inferred in order to bind over a defendant." *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000) (quotation marks and citation omitted).

For the reasons stated in this opinion, the evidence was insufficient for a person of ordinary prudence and caution to conscientiously entertain a reasonable belief that defendant made a false or misleading statement. The district court abused its discretion by finding that there was probable cause of this element of the crime and by binding defendant over for trial based on mere speculation. *Id*.; *Anderson*, 501 Mich at 178, 181-182.

Accordingly, we affirm the circuit court's decision quashing the bindover and dismissing the case.[5]

Affirmed.

STEPHENS, P.J., and GLEICHER, J., concurred with BORRELLO, J.

STEPHENS, P.J. (*concurring*). I concur with the majority opinion. I additionally agree with the concurring judge that Dr. Simon's alleged falsehoods were not material under MCL 750.479c(1)(b).

GLEICHER, J. (*concurring*). The Michigan Attorney General charged Lou Anna K. Simon with making two false statements to police officers investigating Michigan State University's (MSU) handling of the horrific sexual abuse perpetrated by Dr. Larry Nassar. The majority opinion correctly holds that the prosecution failed to produce any evidence supporting that Dr. Simon's statements were false or misleading and affirms the circuit court's decision to quash the bindover. There are additional reasons to affirm the circuit court. Dr. Simon's allegedly false statements were immaterial to the prosecution's sham investigation, and her literally true answers cannot be subject to prosecution. Furthermore, the record reveals that Dr. Simon was charged for reasons that have nothing to do with bringing justice to Nassar's victims or to vindicating legal principles. On those added bases, I concur with the majority.

Sixty years ago, then United States Attorney General Robert Jackson, later a Justice of the United

[5] Because our conclusion effectively disposes of this case, we decline to reach the remainder of the parties' arguments. See *People v Graves*, 207 Mich App 217, 220; 523 NW2d 876 (1994).

States Supreme Court, declared that "the most dangerous power of the prosecutor [is] that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted." Jackson, *The Federal Prosecutor*, 24 J Am Judicature Soc'y 18, 19 (1940). This prosecution imbues Justice Jackson's words with life. Multiple institutions—including the Federal Bureau of Investigation, the Ingham County Prosecutor's Office, USA Gymnastics, and MSU—failed Nassar's victims. By readily accepting that Nassar engaged in a recognized medical treatment rather than flagrant sexual abuse, people who could and should have stopped Nassar lost the opportunity to protect hundreds of women. Dr. Simon was not one of those people. Despite her periphery to the abysmal decisions made by her institution, Dr. Simon was a high-profile target, selected to assuage public anger rather than to protect the integrity of the law.

I. THE SHAM INVESTIGATION BY MSU

By mid-January 2018, Larry Nassar had been convicted of multiple crimes and sentenced to the equivalent of life in prison. That same month, the then Michigan Attorney General Bill Schuette launched the criminal investigation that yielded this prosecution.

There can be no debate about one central fact: MSU grossly mishandled complaints about Nassar beginning as early as 1997 and continuing until 2016. MSU's malfeasance allowed an unconstrained Nasser to molest hundreds of young victims. As a partial recompense MSU created a $500 million fund to compensate victims, and the civil justice system continues to consider claims.

Several detailed examinations of the widespread institutional failures contributing to Nassar's success

in deceiving authorities have been published and are discussed below. MSU has scrutinized its failures and publicly admitted to many of them. So why did the Attorney General get involved in a criminal investigation of MSU *after* Nassar had been sentenced and the civil litigation commenced? The historical background supports that the goal was to exact retribution for MSU's failure to stop Nassar rather than to pursue justice for criminal wrongdoing. Dr. Simon was the one of the scapegoats selected to justify that effort.

A. THE 2014 INVESTIGATION

In 2014, Amanda Thomashow contacted Dr. Jeffrey Kovan, a physician in the MSU Sports Medicine Clinic, to report that she had been sexually assaulted by Dr. Nassar during a March 2014 medical examination.[1] Dr. Kovan met with Ms. Thomashow and immediately brought her concerns about the exam to MSU's Office for Institutional Equity (OIE). At the time, the OIE was charged with investigating potential violations of Title IX, which prohibits sex discrimination in education, including investigations of sexual assault.

Thomashow spoke by phone with Kristine Moore, an attorney and an investigator for the OIE. Moore testified at Dr. Simon's preliminary examination that she understood that Thomashow had reported a sexual assault. This was not a difficult conclusion to reach, as Thomashow described that in response to her complaint of hip pain Nassar had "massaged" her breasts, buttocks, and vaginal area with an ungloved hand in a manner that seemed sexual in nature. Moore notified MSU's Office of the General Counsel, the MSU police

[1] I use Ms. Thomashow's name because she has on several occasions publicly—and courageously—described her encounter with Nassar.

department, and her superior, Paulette Grandberry Russell. Moore then met with Thomashow and a detective in the MSU police department. An investigation ensued in which Moore interviewed Nassar and several other physicians. Nassar told Moore that "touching in the vaginal area" was an appropriate treatment of the "sacrotuberous ligament," and that he had been performing that procedure "for a long time" and on hundreds of young women.

Moore then consulted with Dr. Brooke Lemmen, a physician board certified in family and sports medicine who worked as a full-time physician at MSU. Dr. Lemmen was also a friend and colleague of Nassar. Dr. Lemmen advised that Nassar's manipulation of "areas very close to the vaginal area" was medically appropriate. Similarly, Dr. Lisa DeStafano (another board-certified physician and a friend and colleague of Nassar) told Moore that the "treatment" administered by Nassar, described by the physicians as a manipulation of areas close to the vagina, was medically appropriate. Dr. Jennifer Gilmore, who told Moore that she and Nassar had known each other since their residencies and that Nassar treated her daughter, echoed those opinions. None of these physicians knew that Nassar's "treatment" went far beyond that which they recognized as a legitimate osteopathic therapy, and the inaccuracy of their understanding of Nassar's actual conduct emerged during the criminal proceedings. But given the united front of expert opinions exculpating Nassar at the time, Moore's report concluded that Nassar's conduct was medically appropriate and not sexual in nature. MSU's general counsel approved the report. Dr. Simon was never provided with a copy of the investigative report nor informed of the result.

Nevertheless, the MSU police department referred Nassar to the Ingham County prosecutor. The prosecutor declined to bring any charges.

Of course, Nassar's "treatment technique" was *not* a recognized or appropriate medical procedure; it was sexual abuse. As others have opined, Moore's investigation should have sought input from physicians outside of MSU rather than from Nassar's colleagues and friends. The 2014 MSU investigation was deeply flawed.[2] The physicians and others who vouched for Nassar—including Nassar himself—led the investigation astray.

The OIE was not the only entity that failed to pursue evidence that Nassar's "treatments" of his victims were sexual assaults. Thanks to a comprehensive report issued by the Inspector General of the United States in 2021, we know that the Federal Bureau of Investigation received detailed and highly specific allegations of sexual assault involving Nassar in 2015, yet failed to open a formal investigation and "did not advise state or local authorities about the allegations and did not take any action to mitigate the risk to gymnasts that Nassar continued to treat." United States Department of Justice, Office of the Inspector General, *Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar* (July 2021), p ii,

[2] Multiple additional deficiencies in the handling of Thomashow's complaint against Nassar were identified by the United States Department of Education Office for Civil Rights in a lengthy report. See United States Department of Education, Office for Civil Rights, *Report Re: OCR Docket No. 15-18-6901: Michigan State University*, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15186901-a.pdf> (accessed October 19, 2021) [https://perma.cc/SSK8-CXEQ].

available at <https://oig.justice.gov/sites/default/files/reports/21093.pdf> (accessed October 19, 2021) [https://perma.cc/8ZD4-C6X4]. The failures of USA Gymnastics, Inc., to meaningfully follow up on reports of sexual abuse are also well documented in after-the-fact reports. See McPhee & Dowden, *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes* (December 10, 2018), available at <https://www.nassarinvestigation.com/en> (accessed October 19, 2021) [https://perma.cc/XL4U-FSL6].

B. FAST-FORWARD FOUR YEARS, TO 2018

Against an inexcusable backdrop of multi-institutional malpractice characterized by the minimization of sexual assault complaints, disbelief of the young women, and countless missed opportunities to stop the abuse, then Attorney General Bill Schuette undertook his own criminal investigation of MSU. William Arndt, a Michigan State Police detective sergeant and a lead investigator in this effort, testified at the preliminary hearing: "We were investigating not so much Nassar's CSC [criminal sexual conduct], because he had already been convicted. We were investigating the CSC as it relates to the aiding and abetting by other employees at the university; not specifically including Ms. Simon, but other or any employee at the university and/or the misconduct in office."

This "explanation" of the basis for a criminal investigation of an entire university is difficult to take seriously. To establish that anyone aided or abetted Nassar in the perpetration of criminal sexual assaults, the prosecution would have to prove that the person "performed acts or gave encouragement" that assisted

Nassar in committing the crime and that the person *intended* the commission of the crime at the time he or she gave the aid or encouragement. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted). None of the young women reported that others had "performed acts or given encouragement" to Nassar. By the time the Attorney General's investigation commenced, hundreds of young women had given statements or testimony that during the assaults only Nassar, and occasionally parents, were in the room. Further, the investigators knew that the medical "culture" at MSU condoned Nassar's "treatment" of the "sacrotuberous ligament" and that physicians were on record as attesting to its usefulness. It defies reason (and the extensive factual record available in January 2018) that before 2016, anyone at the university believed that Nassar was routinely penetrating the vaginas of his patients or understood that the treatment he claimed to be performing was actually sexual assault. Searching for evidence of "aiding and abetting" was a complete waste of time, and no evidence supports that the detectives believed they would stumble on an "aider and abetter."

The misconduct in office statute, MCL 750.505, addresses "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999) (quotation marks and citation omitted). The Supreme Court has set forth five factors for establishing a "public office" under the statute:

> (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged,

> must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id*. at 354 (quotation marks and citation omitted).]

Dr. Simon likely qualified as a "public officer," as did a handful of other MSU officials.

Arndt claimed that he was specifically investigating Dr. Simon regarding a possible charge of misconduct in office based on a "potential cover up of the CSC with Mr. Nasser." Superficially, this makes sense. But Arndt's explanation dissolves in the light of his awareness that the MSU police had referred Nassar to the Ingham County prosecutor in 2014 with a recommendation that he be charged. It is inconceivable that Simon intended to corruptly cover up Nassar's "crimes" given the opinions of three physicians exculpating him from criminal activity and the conclusions of the university's OIE and legal counsel that no sexual assault had occurred. What was Dr. Simon allegedly covering up?

Unsurprisingly, the Attorney General's "investigation" yielded no evidence of aiding or abetting. The dean of the College of Osteopathic Medicine (COM), William Strampel, was convicted of two misdemeanor counts of willful neglect of duty by a public officer, MCL 750.478, "for failing to properly oversee" Nassar "and for permitting Nassar to return to work before completion of the Title IX investigation of an allegation that Nassar engaged in sexual misconduct." *People v Strampel*, unpublished per curiam opinion of the Court of Appeals, issued January 14, 2021 (Docket No.

350527), p 1 n 1. But Strampel was charged with these crimes approximately six weeks *before* the detectives interviewed Dr. Simon.

As to Dr. Simon, the investigation revealed not even a shred of evidence of any crime. Absent evidence of "aiding or abetting" or misconduct in office, the investigators seized on the crime with which they charged Dr. Simon: lying to them.

II. THE 2018 INTERVIEW WITH DR. SIMON—FOUR YEARS AFTER THE UNDERLYING EVENTS

Dr. Simon told the investigators that she was aware of the 2014 OIE investigation, but that pursuant to university policy, she was not involved in it. Because no finding implicating an MSU employee was made, she was never informed of the result. Dr. Simon told the investigators that she did not know Larry Nassar personally and had no role whatsoever in the investigation after being apprised of its existence. These facts have never been refuted.

So why are we here? Why was Dr. Simon charged with four felony counts carrying a penalty of up to four years' imprisonment? As Justice Jackson warned in 1940, "With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." *The Federal Prosecutor*, 24 J Am Judicature Soc'y at 19. In such circumstances, "it is not a question of discovering the commission of a crime and then looking for the man who committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him." *Id*. That is precisely what happened here. This prosecution is designed to punish and humiliate Dr. Simon for the sins of MSU, not to provide

justice for Nassar's victims or to vindicate the legitimate purposes of the law penalizing those who lie to the police.

The felony information charges that Dr. Simon lied to a peace office in violation of MCL 750.479c(1)(b) in two different respects: she made a statement during the 2018 interview that "she knew was false or misleading" related to "her knowledge of who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar," and that she falsely stated "that she was not aware of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar . . . ."

The majority opinion elucidates the facts surrounding the voluntary interview conducted with Dr. Simon by Arndt and another Michigan State Police officer, William Cavanaugh. And the majority accurately discerns that "the prosecution did not introduce any evidence that [Dr. Simon] was actually informed in 2014, or at any time prior to 2016 of Nassar's *name* or the details of the allegations against him." Accordingly, the majority holds that because there was no evidence that Dr. Simon was provided with Nassar's name or any details regarding the 2014 investigation, the prosecution failed to establish probable cause supporting a bindover for lying to the police about these subjects.

The prosecution's claim that Dr. Simon made a false statement regarding her awareness of Nassar's name is utterly fallacious for several more reasons. First and foremost, everyone in the interview room knew—and openly acknowledged—that the subject of the discussion that day was Larry Nassar. Dr. Simon deceived no one by failing to utter Nassar's name. The whole point of the meeting was to discuss Nassar.

At the very outset of the meeting the following interchange took place:

> *By Mr. Cavanaugh*:
>
> *Q*. We can get right into the meat and potatoes of what we'd like to ask today and I guess we'll start today with Larry Nassar.
>
> *A*. Okay.
>
> *Q*. Did you know Larry Nassar personally?
>
> *A*. No.
>
> *Q*. At all?
>
> *A*. No.

Cavanaugh then presented Dr. Simon with Nassar's "personnel form," asked her a few questions about it, read aloud from it, and established that the "provost's office" and the dean had responsibility for overseeing the assignments given to tenured faculty such as Nassar. This conversation referenced Nassar's work for MSU Gymnastics and his volunteer work for USA Gymnastics. The discussion regarding Nassar triggered by his personnel form went on for 10 pages, concluding with Dr. Simon's explanation that the university did not independently keep track of the voluntary work faculty members provide to "outside entities." It then segued directly into one of the two answers that the prosecution alleges was false or misleading:

> *Mr. Arndt*: *So I mean specifically to Nassar*, were you aware of any prior investigation, you know, before the story broke in the news, were you aware of any prior investigation with Larry Nassar or, you know, misconduct for that matter, anything?
>
> [*Dr.*] *Simon*: I was aware that in 2014 there . . . was a sports medicine doc who was subject to a review. But I was not aware of any of the substance of that review, the

nature of the complaint, that was all learned in '16 after it became clear in the newspaper regarding the—

Mr. Arndt: I think that's going to boil right into our next question.

[*Dr.*] *Simon*: The national piece?

By Mr. Cavanaugh:

Q. Sure. Well, how did you become aware of it in 2014? Is that something that's part of a briefing or—

A. I was told by one of the staff members that there was a sports medicine—

Q. I see.

A. —physician who was going through OIE, none of the substance. And I don't involve myself in the OIE investigations.

Q. And that's a standard practice?

A. That's a standard practice. It has nothing to do with the substance of the case.

* * *

Standard practice is not to be involved because they need to be done in a straightforward way without any political pressure one way or the other.

Q. Sure, absolutely.

Mr. Arndt: So as part of the Title IX, . . . though, investigation do they report back to the provost, you, vice-president? Do they ever bring those findings back or is that confidential information? How does that work?

[*Dr.*] *Simon*: The process is such that if there are significant issues that arise as a result of that that implicate policy or education, those are typically brought forward. But in this case I can tell you straightforwardly that since there was no finding as I learned in 2016, not then, I had no knowledge of what happened in the Title IX investigation in 2014. [Emphasis added.]

The context of this discussion makes it abundantly clear that everyone in the room knew that Dr. Simon was talking about the OIE investigation into Larry Nassar. Nassar was the sole subject of the discussion preceding the interchange about the "sports medicine doc," the follow-up questions specifically focused on Nassar, and the prosecution has never contended that *another* doctor was also sexually assaulting patients. Indeed, a few pages after the allegedly false or misleading answer, Dr. Simon reiterated that she first learned of the concerns about Nassar after the Indianapolis Star published an exposé implicating Nassar in 2016. She then learned the result of the 2014 investigation and its conclusion that "[i]t was a legitimate medical procedure . . . ."

But regardless of whether Dr. Simon was or was not told Nassar's name in 2014, or knew or did not know the details of Thomashow's allegations at that time, her 2018 answers to the investigators' questions did not fall within the ambit of MCL 750.479c(1)(b) for two legal reasons. First, even if she somehow misled the investigators—a fanciful proposition at best—her answers were literally true. A literally true answer cannot sustain a prosecution for making a false or misleading statement. Second, Dr. Simon's answers were incapable of influencing the decision-making process and therefore were immaterial.

A. LITERALLY TRUE STATEMENTS CANNOT SUPPORT A CONVICTION

In *Bronston v United States*, 409 US 352, 352-353; 93 S Ct 595; 34 L Ed 2d 568 (1973), the United States Supreme Court addressed "whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked

and arguably misleading by negative implication."[3] Samuel Bronston owned a company that sought bankruptcy protection, and he testified at a creditors' hearing as follows:

> *Q*. Do you have any bank accounts in Swiss banks, Mr. Bronston?
>
> *A*. No, sir.
>
> *Q*. Have you ever?
>
> *A*. The company had an account there for about six months, in Zurich.
>
> *Q*. Have you any nominees who have bank accounts in Swiss banks?
>
> *A*. No, sir.
>
> *Q*. Have you ever?
>
> *A*. No, sir. [*Id*. at 354.]

Bronston had, in fact, maintained a personal bank account in Switzerland but did not have the account at the time of inquiry. *Id*. The government contended that Bronston's answer to the second question, although literally true, "unresponsively addressed his answer to the company's assets and not to his own," "implying that he had no personal Swiss bank account . . . ." *Id*. at 355.

---

[3] The federal perjury statute, 18 USC 1621(1), provides that one who takes an oath and "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true" commits perjury. Although textually different from MCL 750.479c(1)(b), both statutes require a false statement and an intent to mislead or deceive. *Bronston*'s reasoning and logic are equally applicable to a voluntary interview with police officers. Judge Alex Kozinski has observed that "due process calls for prudential limitations on the government's power to prosecute under" the perjury statute. *United States v Bonds*, 784 F3d 582, 585 (CA 9, 2015) (Kozinski, J., concurring). *Bronston* supplies one such limitation.

A unanimous Supreme Court acknowledged that Bronston's answer to the question posed to him was not responsive and could be interpreted as implying an untruth. The Court observed, however, that the perjury statute "does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true." *Id*. at 357-358. Moreover, the Court explained that "the drastic sanction of a perjury prosecution" could not have been intended "to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer." *Id*. at 358. In short, "[t]he burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry." *Id*. at 360. A questioner who suspects that a witness has answered unresponsively should "press another question or reframe his initial question with greater precision. Precise questioning is imperative as a predicate for the offense of perjury." *Id*. at 362.[4]

Dr. Simon was asked how she became aware of the 2014 investigation; no evidence refutes her answer that she "was told by one of the staff members that there was a sports medicine . . . physician who was going through OIE . . . ." And Dr. Simon was never asked whether she knew the name of the "sports medicine doc," because it was obvious to everyone in

[4] That the investigators failed to ask precise questions, failed to follow up Dr. Simon's answers, and failed to follow the script that they had been handed by attorneys in the Attorney General's office also substantiates that none of the information they neglected to obtain was material, which is discussed in more detail below. The information was immaterial to the investigation because the investigators *knew* what the answers to their questions would be, and therefore they had no reason to question Dr. Simon with more acuity.

the room that the name was Nassar. Like the witness in *Bronston*, Dr. Simon gave answers that were literally true.[5] While in *Bronston* the answer at issue was not completely responsive to the question and was arguably misleading, Dr. Simon's answers *were* responsive. And even if a witness deliberately sidesteps answering a question, the duty falls on the inquisitor to detect the evasion and "to flush out the whole truth with the tools of adversary examination." *Bronston*, 409 US at 358-359.

If Arndt and Cavanaugh wanted to know whether Dr. Simon was aware in 2014 of Nassar's name or the details of the OIE investigation, it was their obligation to probe more deeply. This prosecution is a legally improper vehicle for remedying the investigators' poor technique.

B. THE ALLEGEDLY FALSE OR MISLEADING STATEMENTS WERE IMMATERIAL AS A MATTER OF LAW

In *United States v Gaudin*, 515 US 506, 509; 115 S Ct 2310; 132 L Ed 2d 444 (1995), a case involving an allegedly false statement made on federal loan documents, the United States Supreme Court offered a now widely accepted definition of materiality: "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." (Quotation marks and citation omitted; brackets in original.)[6] Ordinarily, materiality is a jury question. *Id*. at 522-523. In the context of this case, however, the question presented is whether the pros-

[5] Arndt admitted during his preliminary examination testimony that Dr. Simon's answers were true.

[6] Here is another definition: "Material information is information that, if believed, would tend to influence or affect the issue under determination." *United States v Crousore*, 1 F3d 382, 385 (CA 6, 1993).

ecution presented *any* evidence of materiality. To warrant a bindover, "there must be evidence on each element of the crime charged or evidence from which those elements may be inferred." *People v Doss*, 406 Mich 90, 101; 276 NW2d 9 (1979) (quotation marks, citation, and emphasis omitted).

The prosecution did not establish that Dr. Simon's statements were material to its investigation of MSU. Dr. Simon's failure to name Nassar as the person "who was the subject of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint" had not a shred of influence on any decision made in this case. Similarly, the prosecution brought forward no evidence that Dr. Simon's denial of her personal awareness "of the nature and substance of the 2014 MSU Title IX investigation into the Amanda Thomashow complaint against Larry Nassar" impacted the decisions under consideration by the investigators.

The prosecution's witnesses never put forward a plausible explanation of why Dr. Simon's failure to say Nassar's name aloud instead of referring to him as "a sports medicine . . . physician who was going through OIE" influenced or affected their investigation into "aiders and abetters" or officials guilty of misconduct in office. Instead, when asked this question, the investigators offered a word salad suggesting that if Dr. Simon had said Nassar's name, the investigators would have had to do less work—to find the nothing that they ultimately found, presumably. As Arndt testified:

> *Q*. If the defendant would have told you in 2018 that she knew about the investigation regarding Larry Nassar in 2014, would it have materially affected the investigation you were conducting in 2018?
>
> *A*. Yes.

Q. How?

A. We would have been able to pinpoint the time line to one, for her interview, but for others; more specifically, pinpoint that time line and the search warrants that we did were broad, and there were—I don't even know how many—hundreds of thousands of documents we would have, we went through or the attorney general went through. We could have pinpointed time lines, agendas, calendars. That information would have been, would have been useful to us as investigators so we didn't have to go through hundreds of thousands of documents, we could have obtained a calendar appointment for a specific day or conducted a search warrant for a specific day or person regarding a specific time line.

This answer is difficult to parse. I assume that Arndt's version of a "material" misstatement or falsehood is anything that allegedly makes his job more difficult—resulting from his own failure to ask follow-up questions. Any extra work involved in "pinpoint[ing] time lines, agendas, calendars" or "narrowing the focus" of the investigation resulted directly from poor questioning. But that is not the only legal impediment to prosecution. That the detectives had to work harder (in hindsight) than they felt was necessary to construct "time lines" or to review documents does not transform even a blatantly false statement into a material one.

According to the prosecution, the material "facts" about which Simon misled the investigators were (1) her 2014 knowledge of Nassar's name and (2) her 2014 knowledge of the substance of the OIE investigation. Let's assume that Dr. Simon knew both things and deliberately failed to share that knowledge with the investigators. No evidence supports that her silence regarding these two "facts" influenced or could have influenced the pertinent *decisions* made during the

investigation—that no one had aided or abetted Nassar, and that Dr. Simon had not obstructed justice. Statements that waste an investigator's time or result in more investigation may be material if the wasted time or the extra effort distract an investigator from the true culprit, lead to the destruction of evidence, or trigger the arrest of an innocent person. None of those things happened here, nothing even close.

During the preliminary examination, counsel for Dr. Simon repeatedly returned to the subject of materiality, laboring to elicit testimony from Arndt and Cavanaugh that would illuminate the prosecution's argument for this essential element of the charges. Each time, they hit the same roadblock: elusive answers asserting, in essence, that the investigators would have had less work to do had Dr. Simon volunteered more information.

Here is another example:

> *Q*. . . . But . . . here's my question, Detective Arndt. And this is really important cause it's an element of the offense and I wanna make sure everybody understands this.
>
> When you say that she impeded a criminal investigation into CSC first degree by virtue of the fact that she said, "I was aware that in 2014 there was a sports medicine doc who was subject to a review," you knew that the sports medicine doc that she was referring to was Larry Nassar; correct?
>
> *A*. I assumed that's who she was discussing, yeah.
>
> *Q*. So then explain to us . . . how that answer given by Dr. Simon that she was aware in 2014 that there was a sports medicine doc who was subject to a review, which you already said was a true statement, but nonetheless, explain to us how that statement impeded a criminal investigation into CSC first degree.
>
> *A*. Again, I think it's one of those where she, based on the interview and the comments made, what a month

later, we then come across documents that contradict what we felt that, believed that she knew. And it would have been easier for us, or it did impede our investigation going through hundreds of thousands of documents produced by Michigan State. It would have been easier for us to, one, question Dr. Simon, Paulette Russell, . . . and those other people about specific dates, times, even . . . so far as search warrants to narrow the time line down.

Q. I don't understand at all. Are you suggesting to us, Detective Arndt, that if Lou-Anna Simon had said, "Oh, and by the way, I knew that the sports medicine doctor's name was Larry Nassar," you wouldn't have reviewed all of those documents that you subpoenaed from Michigan State?

A. I think we would have been able to better focus the investigation to certain days, documents, calendar appointments, those types of things.

* * *

Q. And regardless of what Dr. Simon said or didn't say in her interview, you or somebody that was part of this team would have reviewed the documents produced by Michigan State in response to your subpoena; correct?

A. Eventually, yes.

Evidently, Arndt and the prosecution are unaware of the legal definition of materiality. As described above, a false statement is material when it has a natural tendency to influence, or is capable of influencing, the decision of a decision-making body. Decisions about when to issue a subpoena or which subpoenas to issue are simply not material in a legal sense. Arndt's belief that he had to work harder (to find no evidence of any actual crime) says nothing about whether Dr. Simon's answers influenced or were capable of influencing the relevant decision: whom to charge with a crime, and what to charge.

This Court has explained that "a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person." *People v Williams*, 318 Mich App 232, 240; 899 NW2d 53 (2016). In those examples, misleading statements prevented the police from solving a crime and qualified as material because they deprived the decision-makers of the information necessary to make an accurate and informed charging decision. Here, there is no crime, no evidence of aiding and abetting, and no evidence of misconduct in office on the part of Dr. Simon. Her statements had no bearing on the decision not to charge anyone with aiding and abetting, or (other than Strampel, who had already been charged) with misconduct in office.

The prosecution's concept of materiality would fling open the door to prosecuting every trivial misstatement (or trivial falsehood) offered during a police interrogation that, in an officer's subjective calculation, caused extra work—even those that had no impact on any decision-making. According to the prosecution's reasoning, despite that a witness deceives no one and her statement bears no importance whatsoever to the ultimate outcome of the investigation, she may be prosecuted if an investigator feels aggrieved. Such a rule counsels strongly against voluntary cooperation. And surely the materiality requirement incorporated within MCL 750.479c(1)(b) requires proof of something more than an investigator's opinion that he had to work harder to find no evidence of a crime.

United States v Fiala, 929 F2d 285, 289 (CA 7, 1991), involving a challenge to a federal sentencing enhance-

ment for impeding or obstructing justice, is somewhat analogous and makes the same point. Under Note 3(g) to the federal sentencing guidelines commentary, a sentence enhancement was deemed appropriate "if a defendant made a 'materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation.' " *Id*. at 290. Fiala was stopped by the police and asked if he had anything illegal in the car. He responded that he did not. *Id*. at 289. The police decided to search the car anyway and called for a K-9 unit. It took 1½ hours for the unit to arrive. *Id*. at 286. The dog alerted to the possible presence of drugs, and the police found two large bags of marijuana and two handguns in the car. *Id*. at 286-287. The prosecution sought enhancement based on Fiala's denial that he had drugs in the car, arguing that the statement impeded the investigation. The United States Court of Appeals for the Seventh Circuit held that "Fiala's statement clearly does not meet the standards of Note 3(g): his denial of guilt was neither material nor could it possibly be said to have significantly obstructed the troopers' investigation." *Id*. at 290. In other words, the extra time and effort expended by the officers to find the contraband did not transform a denial of guilt into a materially false statement.

III. WHY ARE WE HERE?

From its inception, the investigation culminating in the charges against Dr. Simon was a hunt for someone at MSU on whom the Attorney General could pin blame for Nassar's crimes. In an opening statement at the preliminary examination, the assistant attorney general handling this case repeatedly betrayed the true object of this prosecution. "Great institutions like great people, have to do more than look good," he

declared, "they have to be good." He also expounded: "[O]ur theory of the case is [that] from 2011 through 2014, under the defendant's control, . . . Michigan State University had a culture of protect the brand. From 2005 to 2018, as president, her mission was for MSU to look good." "The truth," he continued, was that "MSU had an extremely poor record in handling sexual misconduct and sexual assault, and that's been well established."

Throughout the preliminary examination, the assistant attorney general accused Dr. Simon of having lied to "the media," "the victims," "Congress," and countless others. Vilifying Dr. Simon was the centerpiece of the assistant attorney general's strategy to achieve a bindover, and he succeeded in the district court. What got lost, however, was that this is a *criminal* prosecution, not a civil lawsuit. Dr. Simon's negligence, if any, and her efforts to shield MSU from blame, if any, are not crimes.

Justice Jackson taught us that when a prosecutor "picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." *The Federal Prosecutor*, 24 J Am Judicature Soc'y at 19. Foreshadowing this case, Jackson explained, "It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group . . . ." *Id*. The danger of abuse is greatest when the times "cry for the scalps of individuals or groups" because those in power dislike their views. *Id*. While Justice Jackson was specifically referencing those targeted for political reasons, the point resonates here, as well.

There can be no doubt but that MSU and many others betrayed Nassar's victims and caused incalculable harm. MSU and other institutions failed to do their jobs and failed to protect vulnerable young women from a vicious predator. The question facing this Court is whether Dr. Lou Anna K. Simon should bear *criminal* responsibility for this tragedy. The answer, directly and unevasively stated, is no.

PEOPLE v KLAGES

Docket No. 354487. Submitted August 10, 2021, at Lansing. Decided December 21, 2021, at 9:05 a.m. Leave to appeal denied 510 Mich 935 (2022).

Kathie A. Klages was convicted by a jury in the Ingham Circuit Court of two counts of lying to a peace officer, MCL 750.479c. Defendant was the administrator of Spartan Youth Gymnastics and a gymnastics coach at Michigan State University (MSU). Two gymnasts who participated in Spartan Youth Gymnastics testified that they disclosed to defendant in 1997 that they were being digitally penetrated by Dr. Larry Nassar, a physician at MSU, in the guise of providing medical treatment. In 2018, during an interview with an investigator from the Department of Attorney General, defendant stated that she did not remember whether the gymnasts had ever made such disclosures to her. Following her convictions, defendant appealed.

The Court of Appeals *held*:

Defendant argued that the prosecution did not provide sufficient proof to establish the elements of the offense under MCL 750.479c(1)(b). Under the statute, a person who is informed by a peace officer that the officer is conducting a criminal investigation shall not knowingly or willfully make any statement that the person knows is false or misleading regarding a material fact in that investigation to a peace officer who is conducting the criminal investigation. In this case, the prosecution was required to prove under the statute that defendant falsely denied that the two gymnasts disclosed Nassar's sexual abuse in 1997, that defendant knowingly and willfully made a false statement regarding this fact to a peace officer, that the peace officer was conducting an investigation and defendant was advised of this, and that defendant's denial of the conversation constituted a material fact in the context of the peace officer's investigation. Michigan courts had not previously determined what constituted a material fact under the statute. However, the United States Supreme Court has defined a "material" statement as one that has the natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was

addressed. Further, the Court stated that determining whether a statement is material requires a determination of at least two questions: (a) what statement was made? and (b) what decision was the decision-maker trying to make? Adopting this approach in this case required the identification of the false statement, the determination of the decision that the decision-maker was trying to make, and the application of the legal standards governing materiality to the facts of the case. The false statements at issue concerned whether defendant knew in 1997 that Nassar had sexually abused the two witnesses. The prosecution argued that the decision that the decision-maker was trying to make was to determine whether anyone at MSU had committed criminal sexual conduct or misconduct in office by allowing Nassar to prey on young athletes. However, the evidence presented by the prosecution did not establish that defendant's lie in 2018 regarding her knowledge in 1997 of Nassar's conduct influenced the attorney general's charging decision; that is, the prosecution failed to prove that defendant's failure to recall or admit to the 1997 conversations was a fact material to the investigator's determination of whether persons at MSU, other than Nassar, had committed criminal sexual conduct or misconduct in office. Further, a material fact must be able to influence the decision of the decision-making body to which it was addressed. The attorney general's investigator testified only that defendant's failure to disclose had affected his personal decision-making, not that of the decision-making body. The possibility that the investigator may have asked different questions had defendant not denied the accusations does not constitute evidence that the decision of the decision-making body was influenced, or that it could have been influenced, by defendant's denials. No evidence showed that defendant's denials impeded the progress of the investigation or that her denials confused or misdirected the investigation. Additionally, the attorney general's investigator was not misled by defendant because he did not believe her claim that she did not recall the witnesses' 1997 disclosures. No other witnesses were offered by the prosecution to support the materiality of defendant's denials, and the attorney general's investigator offered only conjecture about his personal investigative methods, none of which described a materially different course of investigation. Had defendant admitted that the gymnasts disclosed Nassar's assaults to her in 1997, no evidence supported that the investigation would have yielded a different decision regarding whether to charge others for criminal sexual conduct or misconduct in office. Accordingly, viewing the evidence and inferences in the

light most favorable to the prosecution, defendant's lies regarding the 1997 conversations were inconsequential, not material.

Convictions vacated and case remanded for dismissal of the charges.

BORRELLO, J., dissenting, believed that the majority erred by asserting that there was no evidence that defendant's false statement regarding the 1997 conversations with Boyce and RF was material to the 2018 criminal investigation because this conclusion implied that a false statement was only material if it actually affected the prosecution's charging decision. However, according to Judge BORRELLO, the language of MCL 750.479c does not require this level of specificity. He noted that the trial court had to determine whether defendant's false statement involved a fact that was significant or essential to the criminal investigation conducted by the attorney general, which in turn required the court to consider whether the false statement related to a fact that had the capacity or natural tendency to influence the investigator's decisions regarding how to proceed with the investigation. The investigator testified that defendant's false statement changed the direction of his questioning, and that had she corroborated Boyce's and RF's version of the events, he would have questioned her more vigorously and tried to obtain additional search warrants. Given defendant's denials, the investigator believed there was nothing more he could do. When viewed in the light most favorable to the prosecution, a rational trier of fact could have found that defendant's statements were false with respect to material facts because they were significant or essential to the criminal investigation conducted by the investigator and influenced his decisions about how to proceed with the investigation. Contrary to the majority's holding, the statutory language does not require the prosecution to prove that the false statement prevented a specific criminal charge from being filed. The statute also does not require the criminal investigation to pertain to criminal activity by the person alleged to have made the false or misleading statement or that the false statement must be material to that person's own potential criminal liability. Additionally, viewing the evidence in the light most favorable to the prosecution, the jury could have found the testimony of Boyce and RF credible with respect to whether and how the 1997 conversation occurred, and the jury could have also found defendant's claim that she did not remember the conversation to not be credible. The evidence permitted a rational inference that defendant falsely claimed not to remember the conversation in response to allegations that she was told of Nassar's misconduct in

1997. Viewing the evidence in this light also permitted the rational inference that the false statement was material for purposes of the statute.

CRIMINAL LAW – INVESTIGATIONS – MAKING A FALSE STATEMENT OF MATERIAL FACT TO A PEACE OFFICER – MATERIALITY.

MCL 750.479c(1)(b) prohibits a person who has been informed by a peace officer that the officer is conducting a criminal investigation from making a false statement regarding a material fact of that criminal investigation; "materiality" is defined as a natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it was addressed; thus, to determine whether a false statement made to a peace officer is material, the court must first identify the false statement and then determine the decision that the decision-maker was trying to make before applying the legal standards to the facts of the case.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *B. Eric Restuccia*, Deputy Solicitor General, for the people.

Chartier & Nyamfukudza, PLC (by *Mary Chartier* and *Kurt E. Krause*) for defendant.

Before: STEPHENS, P.J., and BORRELLO and GLEICHER, JJ.

GLEICHER, J. The Michigan Attorney General charged Kathie Ann Klages with making a false statement to a peace officer investigating Michigan State University's knowledge of the sexual abuse perpetrated by Dr. Larry Nassar. Klages made the allegedly false statement in 2018, after Nassar had been convicted, sentenced, and imprisoned. The statement concerned Klages's memory of conversations with two gymnasts that had taken place 21 years earlier, in 1997. Klages denied any recollection of having been told by the gymnasts that Nassar's "treatment" had included digital-genital penetration. A jury disbelieved

this testimony and convicted her of two counts of lying to a peace officer, MCL 750.479c.

Klages raises several challenges to her convictions. We find one dispositive. No evidence supported that Klages's false statement regarding the 1997 conversations was material to the criminal investigation conducted in 2018. We vacate her convictions and remand for dismissal of the charges.

I. BACKGROUND

Dr. Larry Nassar was employed by Michigan State University (MSU) from 1996 through 2016. He was fired after an article published in the Indianapolis Star revealed that he had sexually abused two Olympic gymnasts. Within weeks of the article's publication, hundreds of other gymnasts reported that Nassar had sexually abused them, too. Overwhelming evidence rapidly emerged that as an MSU physician and a consultant for USA Gymnastics, Nassar had brazenly preyed on young women by penetrating their genitals with an ungloved hand in the guise of treatment.

Kathy Klages began coaching gymnastics at MSU in 1990. Like seemingly everyone else in the gymnastics world at that time, Klages thought that Nassar was an exceptionally skilled and caring physician. Indeed, Nassar had gained celebrity status as the physician who attended the most gifted gymnasts in the world. Klages and other coaches regularly referred young athletes to him for treatment. Klages sent her daughter, granddaughter, and son to Nassar for medical care and considered Nassar a friend, even after two young gymnasts allegedly informed her that he had sexually abused them.

In addition to coaching gymnastics at MSU, Klages worked as the administrator of Spartan Youth Gym-

nastics. Larissa Boyce, aged 39 at the time of trial, participated in the Spartan Youth Gymnastics program as a teenager in the 1990s.[1] On Klages's recommendation, Boyce began seeing Nassar when she was 16 years old. Initially, Boyce's parents accompanied her. Boyce explained that Nassar "was great," "very charismatic," and "we really loved him honestly." Nassar "was the Olympic doctor for . . . the gymnasts," Boyce continued, and "[w]e respected him." Nassar began sexually abusing Boyce after her parents stopped going into the exam room with her.

RF, aged 37 at the time of trial, also participated in Spartan Youth Gymnastics. Klages's daughter was on RF's team, and Klages (as well as other coaches) referred RF to Nassar for treatment of a back injury. Nassar initially treated RF for three years, from 1994 through 1997.

In 1997, Boyce had a conversation with RF about her discomfort with Nassar's "treatments." RF confirmed that Nassar was touching her under her shirt and penetrating her, too. Boyce told RF that she was going to reveal this information to Klages, and asked RF to accompany her. RF resisted; she wanted to continue to see Nassar to get clearance to compete despite her back pain.

A few weeks or months later—Boyce could not recall which—Boyce told Klages that Nassar "was sticking his fingers inside of me and it felt like he was fingering me." According to Boyce, Klages responded that she had known Nassar for years and " '[t]here's no way that he would do anything inappropriate.' " Boyce described that Klages then asked different gymnasts

[1] We use some of the complainants' names in this opinion because they have on several occasions publicly—and courageously—described their encounters with Nassar.

from the Spartan Youth program to enter the room and inquired of them whether Nassar had done anything that made them feel uncomfortable. Boyce recalled feeling mortified and embarrassed, like "a liar," "dirty," "destroyed," and as though Klages "thought [she] was making it up."

At Boyce's request, RF verified to Klages that Nassar had "fingered" her, too. Boyce testified that Klages did not believe them. Boyce testified that Klages

> said she would—she raised a piece of paper and said, "I can file this, but there's going to be very serious consequences for you and Larry Nassar."
>
> [*Prosecutor*]: How'd that make you feel?
>
> [*Boyce*]: I mean, I was 16. I didn't want to cause problems. I wasn't trying to get anybody in trouble, so I just felt defeated. I felt like I was trying to do the right thing, but then I also felt like I must have a dirty mind. I must be thinking of this wrong. What's wrong with me? And, as a 16 year old you don't want to feel that way. And I wanted to impress [Klages] because I wanted to be on her team.

Boyce testified that she then said that it was all a " 'big misunderstanding' " and left the room. She did not tell her parents because she "did not want to talk about it ever again." Boyce continued to see Nassar, and Nassar brought up Boyce's conversation with Klages when Boyce next saw him. Boyce testified:

> So I sat in [Nassar's] office and he came in and said, "So, I talked to [Klages]. She told me you had concerns." And I remember sitting there feeling mortified. And I remember raising my hands up and saying, "I'm so sorry. It's all my fault. It's a big misunderstanding." And so I hopped back up on his table and continued to be abused by him because I wanted to prove that I was not dirty. That I didn't have—I wasn't thinking of it wrong. That I didn't have a dirty mind.

Boyce stopped participating in Spartan Youth Gymnastics in 1998. She estimated that she was about 20 years old the last time Nassar treated her.

RF provided similar testimony. She recollected that Klages had expressed that "he's a really good doctor," "we're not going to talk about this anymore," and that the girls "were really lucky to see" Nassar, who had just returned from the Olympics. According to RF, Klages had "some sort of paper" and was indicating that "a lot could go wrong if we continue to talk about—it and there would be problems for everybody involved." RF testified, "[T]hat made me feel like the—all the treatment that Dr. Nassar was doing was actual treatment, even though I was trying to say that I didn't like the treatment." RF "felt like [she] was in trouble and everything stopped," and she was told to go back to practice.

After that meeting, RF made no further revelations about Nassar. She continued to see Nassar a "couple times a week," and Nassar continued to touch RF "[u]nderneath [her] shirt, underneath [her] shorts, anywhere he wanted to that he said it was okay for him to do." RF ultimately stopped seeing Nassar in 2012 when she was about 30 years old and worked for Spartan Youth Gymnastics from 1998 to 2000.

As is now public knowledge, Boyce and RF were not the first nor the last young women to report Nassar's sexual abuse to people in authority. As discussed in detail in this Court's opinion in *People v Simon*, 339 Mich App 568; 984 NW2d 800 (2021), Amanda Thomashow reported Nassar's abuse to an MSU physician in 2014, and MSU immediately launched an investigation through its Office of Institutional Equity (OIE). *Id*. at 588 (GLEICHER, J., concurring). As part of that investigation, three MSU physicians advised the

OIE that Nassar's "treatment" was medically appropriate.[2] *Id*. at 589. The OIE report concluded that Nassar's conduct was a recognized medical therapy and not sexual in nature, and MSU's general counsel approved the report. *Id*. Nevertheless, the MSU police department referred Nassar to the Ingham County prosecutor. The prosecutor declined to bring any charges. And during Klages's trial, the Attorney General's lead investigator revealed that two other reports of Nassar's sexual misconduct had been made "to Meridian Township" in 2004 and 2014. These complaints did not lead to Nassar's arrest because the police "dropped the ball," the investigator opined, by deeming Nassar's conduct a "medical procedure[]."

MSU, the Ingham County prosecutor, and the Meridian Township police department were not the only official entities duped by Nassar. A year before Thomashow's report, the Federal Bureau of Investigation received detailed and highly specific allegations of sexual assault involving Nassar yet failed to open a formal investigation and did not notify state or local authorities about the allegations. See Department of Justice, Office of the Inspector General, *Investigation and Review of the Federal Bureau of Investigation's Handling of Allegations of Sexual Abuse by Former USA Gymnastics Physician Lawrence Gerard Nassar* (July 2021), p ii, available at <https://oig.justice.gov/sites/default/files/reports/21-093.pdf> (accessed October 19, 2021) [https://perma.cc/WS66-2B23]. USA Gymnastics, too, has admitted to its substantial role in

[2] Likely none of the physicians knew that Nassar's "treatment" involved digital-vaginal penetration with an ungloved hand, far exceeding what they recognized as legitimate manipulation of the "sacrotuberous ligament."

allowing Nassar to prey on young athletes. See McPhee & Dowden, *Report of the Independent Investigation: The Constellation of Factors Underlying Larry Nassar's Abuse of Athletes* (December 10, 2018), available at <https://perma.cc/H9D2-QN4R>.

The tide finally turned in 2016, when Rachael Denhollander revealed the abuse she had suffered to reporters at the Indianapolis Star. After the article reporting Denhollander's story appeared, Andrea Munford, a lieutenant with the MSU police department, began investigating sexual assault reports against Larry Nassar. Munford's investigation led to Nassar's prosecution. Munford's team conducted approximately 1,000 witness interviews, spoke to Boyce and RF in 2017, and questioned Klages four times that year.

By mid-January 2018, Nassar had been convicted of multiple crimes and sentenced to the equivalent of life in prison. That same month, then Michigan Attorney General Bill Schuette launched a separate criminal investigation of MSU that led to this prosecution of Klages and to the prosecution of Dr. Lou Anna K. Simon, MSU's former President. Both women were charged with lying to the investigating officers. One other MSU official was charged and convicted of crimes involving Nassar: Dr. William Strampel, the dean of MSU's College of Osteopathic Medicine, was convicted of two counts of willful neglect of duty by a public officer, MCL 750.478, a misdemeanor, "for failing to properly oversee doctor Larry Nassar . . . and for permitting Nassar to return to work before completion of the Title IX investigation of an allegation that Nassar engaged in sexual misconduct." *People v Strampel*, unpublished per curiam opinion of the Court of Appeals, issued January, 14, 2021 (Docket No. 350527), p 1 n 1.

David Dwyre, the chief of investigations for the Michigan Department of Attorney General, testified that the goal of the Attorney General's 2018 investigation was to identify any new Nassar victims and to find out "who knew about Larry Nassar, when did you know it, and what was done about it, essentially." Dwyre provided this further explanation:

> [*Prosecutor*]: [Were] individuals from Michigan State University included in that group?
>
> [*Dwyer*]: Yes.
>
> [*Prosecutor*]: Okay. And the sexual assaults of Ms. Boyce and [RF], were they another facet of your investigation?
>
> [*Dwyer*]: Not as it pertained to criminal prosecution of Larry Nassar, because he had already been prosecuted by that point. But . . . did anyone else know about it and did they do anything to . . . notify Michigan State University, because it was important. That was, kind of, like one of the main reasons of the investigation.

Criminal investigations, however, are intended to investigate crimes, not to punish or expose poor institutional decision-making. See ABA Standards for Criminal Justice (4th ed), Prosecutorial Investigations, Standard 26-1.2(c):

> The purposes of a criminal investigation are to:
>
> (i) develop sufficient factual information to enable the prosecutor to make a fair and objective determination of whether and what charges should be brought and to guard against prosecution of the innocent, and
>
> (ii) develop legally admissible evidence sufficient to obtain and sustain a conviction of those who are guilty and warrant prosecution.

The prosecution asserts that Dwyre was investigating first-degree criminal sexual conduct and misconduct in office involving "public officers" at MSU. Dwyre admitted at Klages's preliminary examination that Klages was not the target of an active criminal-sexual-conduct or misconduct-in-office investigation.[3] And William Strampel had been charged with failing to properly supervise Nassar in 2018, the year before Dwyre's interview with Klages.

At Klages's trial, the prosecution never asked Dwyre to identify the specific crimes being investigated when he interviewed Klages. Rather, Dwyre told the jury that he interviewed Klages because he knew that in four previous police interviews she denied having had a conversation with Boyce or RF about Nassar's sexual abuse. Dwyre believed that her denials were lies, asserting that "it was important to interview her to see what she was going to say about that." He continued:

> I wanted to know what was told to her, and then what did she do with that information. Who did she tell that the victims . . . had disclosed sexual assault, what did you tell them, when did you tell them, did you—because that was going to change, really, the course of—it potentially could change the course of my direction of my investigation.

During the interview, Klages insisted that she had no memory of Larissa Boyce and agreed that if one of her gymnasts claimed to have been touched in a sexual way, she would not have been able to forget it. Klages denied ever coaching Boyce, leading to the following exchange:

> *Mr. Dwyre*: You never coached her.

---

[3] Klages could not have been charged with misconduct in office because she was not a "public officer" as that term is defined in MCL 750.478a(7)(c).

Ms. Klages: She keeps saying that I was her coach. I was the administrator of Spartan Youth Gymnastics. I did not coach out on the competition floor.

Mr. Dwyre: Perfect. If a student athlete came to you and said they were sexually assaulted by a—would you—

Ms. Klages: Absolutely.

Mr. Dwyre: You couldn't forget that, would you agree?

Ms. Klages: Right.

Mr. Dwyre: I just want to lock that down, okay, perfect.

Ms. Klages: Yes.

Mr. Dwyre: And you're saying that you don't recall—do you even recall who she is?

Ms. Klages: No, I do not.

Mr. Dwyre: Okay. You have no . . . not until this all blew up did you even know who she was?

Ms. Klages: Correct. And when she first came out as a Jane Doe and I had heard her (inaudible) I had no idea, and then when she came out with her name I still had no idea.

Klages also denied any memory of telling Boyce that if Boyce filed a complaint about Nassar there would be serious consequences for Boyce and Nassar.

When asked if RF reported in 1997 that Nassar had "penetrated her vaginally and anally," Klages responded, "I do not remember that either." Klages remembered that RF was not one of her gymnasts, but a Spartan Youth athlete and her daughter's teammate. The questioning continued:

Mr. Dwyre: So you wouldn't have forgotten if she would have came to you about Larry Nassar and said somebody stuck his fingers inside of her, you wouldn't have forgotten that, correct?

Ms. Klages: I do not believe I would have ever forgot that.

* * *

I was horrified when I saw what Larissa Boyce told her lawyer, I was just horrified.

She repeated that she did not recall RF ever discussing her treatment by Nassar. When asked if she would remember if RF had said something about "this is funny" or "this doesn't look right," Klages responded, "I would think I would remember that." Klages summarized: "Well, I don't recall any conversations with either one of those two young women . . . ."

The Attorney General charged Klages under MCL 750.479c(1)(b) with one count of lying to a peace officer on the basis that "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" during Agent Dwyre's investigation of first-degree criminal sexual conduct, and one count of lying to a peace officer because "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" related to the criminal investigation of misconduct in office. A jury convicted her of both charges.

Klages raises many issues on appeal. One is dispositive, and we limit our analysis to that issue.

II. ANALYSIS

MCL 750.479c(1)(b) provides in relevant part that "a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not . . . [k]nowingly and willfully make any statement to the peace officer that the person knows is false or misleading r*egarding a material fact* in that criminal

investigation." (Emphasis added.) Because the plain text of MCL 750.479c(1)(b) requires the prosecution to prove that the accused made a false "statement" "regarding a material fact" in a criminal investigation, it is critical to first identify the "statement" at issue to determine whether it regards "a material fact." In this case, the information charges that the false statement was Klages's denial "that she was told by witnesses that they were sexually assaulted by Larry Nassar." In her interview, Klages denied having any memory of such conversations. But because Klages also declared that she did "not believe I would have ever forgot that," the prosecution interpreted Klages's answers to their questions as outright denials that the conversations with Boyce and RF ever took place.

Thus, proof that Klages's statements constituted a felony under MCL 750.479c(1)(b) required the prosecution to prove that Klages falsely denied that Boyce and RF had revealed Nassar's sexual abuse in 1997, that Klages knowingly and willfully made a false statement regarding this fact to a peace officer, that the peace officer was conducting a criminal investigation and advised Klages to that effect, and that Klages's denial of the conversation constituted a material fact in the peace officer's criminal investigation.

Klages's brief on appeal takes issue with the sufficiency of the prosecution's proof of several elements of the crime. We find merit in her argument that the prosecution presented insufficient evidence that her denial of having taken part in a 1997 conversation about Nassar was a material fact under MCL 750.479c(1)(b).

Published Michigan caselaw construing MCL 750.479c(1)(b) is limited to one case: *People v Williams*, 318 Mich App 232; 899 NW2d 53 (2016). There, how-

ever, we focused on whether the statutory language "embraces *passive* failures to disclose material facts as well as outright lies." *Id*. at 238 (emphasis added). We concluded that "[s]tatements that omit material information may qualify as false" or misleading and thereby fall within the statute's ambit. *Id*. We did not examine the meaning of the term "material fact." This case provides an opportunity to fill in that gap. Because federal law provides a rich and persuasive resource regarding the meaning of materiality in the context of statutes similar to MCL 750.479c(1)(b), we adopt the reasoning in the cases discussed below.

A. MATERIALITY, GENERALLY

United States v Gaudin, 515 US 506, 508; 115 S Ct 2310; 132 L Ed 2d 444 (1995), arose from an allegedly false statement made on federal loan documents. The defendant was charged with making false statements in a matter within the jurisdiction of a federal agency in violation of 18 USC 1001. *Gaudin*, 515 US at 508. The question presented was whether the materiality component of the statute constituted a jury question. *Id*. at 507. The United States Supreme Court began its analysis by reiterating the now widely accepted description of a "material" statement as one that has "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id*. at 509 (quotation marks and citation omitted, brackets in original). Determining whether a statement is material, the Court elucidated, requires a "determination of at least two subsidiary questions of purely historical fact: (a) what statement was made? and (b) what decision was the [decision-maker] trying to make?" *Id*. at 512 (quotation marks and citation omitted). And ultimately, the ques-

tion boils down to: "whether the statement was material to the decision," which "requires applying the legal standard of materiality . . . to these historical facts." *Id*. (quotation marks and citation omitted).

Ordinarily, materiality is a mixed question of fact and law, ultimately resolved by a jury. See *id*. at 522-523. Although a judge may not rule that a statement *is* material as a matter of law, a judge may rule that it is not. See *United States v Serv Deli Inc*, 151 F3d 938, 941 (CA 9, 1998) ("However, a judge may rule that a false statement is *not* material as a matter of law, that is, that the evidence is insufficient for the jury to find the statement is material."). Here, the issue presented is whether the prosecution presented constitutionally sufficient evidence of the materiality of Klages's denial that she remembered conversations regarding Larry Nassar that took place 21 years earlier. Absent such evidence, Klages's conviction cannot stand. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992).

We review de novo whether sufficient evidence supports a conviction, viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the crime's elements proven beyond a reasonable doubt. *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). Constitutionally sufficient evidence of guilt exists where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citation omitted). We review de novo questions of statutory interpretation, including the meaning of statutory terms. *People v Rodriguez*, 463 Mich 466, 471; 620 NW2d 13 (2000).

B. A CLOSER REVIEW OF THE MEANING OF MATERIALITY

As mentioned above, *Gaudin* defined "materiality" as "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 US at 509. The Supreme Court borrowed that definition from *Kungys v United States*, 485 US 759, 770; 108 S Ct 1537; 99 L Ed 2d 839 (1988). In *Kungys*, the Court focused on the issue of consequence here: the meaning of materiality and how materiality principles should be applied.

Kungys involved the materiality standard applicable to two federal statutes, 8 USC 1451(a) and 8 USC 1101(f)(6). *Kungys*, 485 US at 763. The former statute relates to denaturalization proceedings while the latter criminalizes false testimony " 'for the purpose of obtaining any benefits' under the immigration and naturalization laws."[4] *Id*. at 773 (emphasis omitted). The petitioner in *Kungys* had been naturalized as a United States citizen for 34 years before the United States filed a denaturalization complaint alleging that he "had made false statements with respect to his date and place of birth, wartime occupations, and wartime residence." *Id*. at 764. The district court found the statements to have been misrepresentations but not material within the meaning of 8 USC 1451(a).[5] *Kungys*, 485 US at 764-765.

---

[4] The Court held in *Kungys*, 485 US at 779-780, that 8 USC 1101(f)(6) did not contain a materiality provision. Therefore, our discussion of *Kungys* is limited to the Court's construction of 8 USC 1451(a).

[5] "8 USC 1451(a) provides for the denaturalization of citizens whose citizenship orders and certificates of naturalization 'were procured by concealment of a material fact or by willful misrepresentation[.]' " *Kungys*, 485 US at 767. The language of this statute differs from that of MCL 750.479c(1)(b), but both require that the statements at issue concern a "material fact." For that reason, *Kungys* is instructive.

Justice Scalia, who authored *Kungys* for a plurality of the Court, began his discussion of materiality with the observation that "[t]he term 'material' in § 1451(a) is not a hapax legomenon," by which he meant that the term is frequently used.[6] *Id*. at 769. Justice Scalia continued:

> Its use in the context of false statements to public officials goes back as far as Lord Coke, who defined the crime of perjury as follows:
>
> > "Perjury is a crime committed, when a lawful oath is ministred by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely, and falsly in a matter material to the issue, or cause in question, by their own act, or by the subornation of others." [*Id*., quoting 3 Coke, The Third Part of the Institutes of the Laws of England, p 164 (6th ed 1680).]

Blackstone also used the term, Justice Scalia wrote, proclaiming that to constitute perjury, "the false statement 'must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not punishable.' " *Kungys*, 485 US 769, quoting 4 Blackstone, Commentaries on the Laws of England, p *137. Given this history, Justice Scalia observed, "it is unsurprising" that many federal statutes involving perjury incorporate the term, and that the federal courts have a "quite uniform understanding" of its meaning. *Kungys*, 485 US at 769-770. The definition quoted above, that a "concealment or misrepresentation is material if it has a natural tendency to influence, or was capable of influencing, the decision of the decision-making body to which it was addressed," represents

---

[6] For those who are not scholars of ancient Greek, hapax legomenon means "a word or form occurring only once in a document." *Merriam-Webster's Collegiate Dictionary* (11th ed).

"[t]he most common formulation" of the common-law understanding of the term's meaning, the Court concluded. *Id*. at 770. In *Kungys*, the Court applied that definition to hold "that the test of whether Kungys' concealments or misrepresentations were material is whether they had a natural tendency to influence the decisions of the Immigration and Naturalization Service." *Id*. at 772.

The Supreme Court concluded that Kungys's misrepresentation regarding the date and place of his birth was not material because the government offered "no suggestion that those facts were themselves relevant to his qualifications for citizenship." *Id*. at 774. Only "if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications" would the misrepresentation be material, the Court explained, "[b]ut not even that has been found here." *Id*. If Kungys had explained his initial misstatement regarding his date and place of birth, the Court reasoned, the discrepancy would have led to one of three results: a denial of the petition for denaturalization, "or an investigation, or . . . an investigation [that] would have produced the described outcome." *Id*. at 775. But even if an investigation had been spurred by the discrepancy, that alone would not itself have established that the misrepresentation was material. Rather, the materiality analysis requires an examination of "what would have ensued from official knowledge of the misrepresented fact (in this case, Kungys' true date and place of birth), not what would have ensued from official knowledge of inconsistency between a positive assertion of the truth and an earlier assertion of falsehood." *Id*.

C. THE MATERIALITY STANDARD, APPLIED TO THIS CASE

As proposed in *Gaudin*, 515 US at 512, to determine whether a statement is material we must first identify the false statement and then determine the decision that the decision-maker was trying to make. Next, we apply the legal standards governing materiality to the facts of the case. Guided by this logical approach, we conclude that the statements at issue—Klages's denial of memory of the conversations with Boyce and RF and her denial that the conversations took place—were not material facts.

The false statements at issue center on whether Klages was aware in 1997 that Nassar had sexually abused Boyce and RF. According to the prosecution, the decision that the decision-maker was trying to make was whether anyone at MSU had committed criminal sexual conduct or misconduct in office by allowing Nassar to prey on young athletes. Dwyre supplied no information or explanation, however, evidencing that Klages's 2018 lie regarding her 1997 awareness of Nassar's conduct influenced the Attorney General's charging decision. Alternatively stated, the prosecution failed to prove that Klages's failure to recall or to admit to the 1997 conversations was a fact material to the investigator's determination of whether someone at MSU, other than Nassar, had committed criminal sexual conduct or misconduct in office.

A material fact must have "a natural tendency to influence, or [be] capable of influencing, the *decision* of the *decisionmaking body* to which it was addressed." *Kungys*, 485 US at 770 (quotation marks and citations omitted; emphasis added). Dwyre's testimony on this score focused entirely on his personal "decisions" regarding "the direction of my questioning" and never

mentioned or even alluded to the decision of the "decisionmaking body":

> [*Prosecutor*]: Tell us, if you will Special Agent Dwyer [sic], if during the interview Ms. Klages had corroborated Ms. Boyce and [RF] in their statements that they told her back in 1997, what *might* you have done differently?
>
> * * *
>
> [*Dwyre*]: . . . [H]ad Kathie Klages corroborated what Larissa Boyce and [RF] had said previously to investigators, it would have changed the direction of my questioning. I would have immediately began questioning who did you tell. Recognizing that Ms. Klages potentially could become a Defendant. She had a duty to report.[7] So I would have wanted to know who she reported this information to, *and it would have changed that type of direction of my questioning*. Had she told me that she told other people, I would have wanted to know more about that. I would have questioned her more vigorously about that because I would have tried to obtain, if possible, search warrants about their two conversations, if they would have been in text or any type of social media or anything like that. I also would have—had she not—had she told me I never—I was given this information, but I never told anyone, I would have then changed again my direction of questioning and I would have asked her why didn't you, and did—and knowing this, why did you continue to send athletes to Dr. Nassar? [Emphasis added.][8]

---

[7] This is an untrue statement; Klages was not a mandatory reporter under the statute in effect in 1997 and still is not. When Boyce and RF told Klages about Nassar, Klages was working as an administrator of a private gymnastics' organization and as a gymnastics coach at MSU. She was never a "school administrator, school counselor, or teacher" as contemplated by MCL 722.623(1)(a). The statute never included athletic coaches or even university professors as mandatory reporters.

[8] In his closing argument, the assistant prosecuting attorney attempted to explain why Klages's lie was material as follows:

That Dwyre "might" have asked different questions or pursued different leads is not equivalent to evidence that the "the decision of the decisionmaking body" was influenced, or even capable of being influenced, by Klages's denials. No evidence was presented that Klages's denials hampered the Attorney General's ability to conduct a complete and thorough investigation into whether others at MSU had committed criminal sexual conduct or misconduct in office. No evidence was presented that Klages's denials could have confused the Attorney General or steered the investigators in an inappropriate direction. Dwyre's speculation that other questions may have been asked says nothing about whether the hypothetical answers to those questions were capable of influencing the ultimate decisions to be made. Indeed, had Klages refused to speak to the investigators for a fourth or fifth time, Dwyre and his team would have been in precisely the same position they were in after Klages denied the 1997 conversation.

> And is it material? Is it material? If the investigation is who knew what and when about Larry Nassar and we have information that says that she knew back in '97 and she lies to the officers about that, how is that not material to the investigation? I submit to you that that is the question that was trying to be answered by the Attorney General Michigan State Police investigation. It is material. It is the entire investigation. It is the question that we were asked and tasked with answering.

This argument misstates the law in a critical respect. The investigation into "who knew what and when about Larry Nassar" was supposed to have been an investigation of potential criminal conduct, not a roving inquiry designed to expose MSU's mistakes and to further embarrass the institution. Tellingly, the assistant prosecuting attorney then admitted that a search warrant of Klages's electronics would not have revealed anything because "[y]ou're not going to have something from 2017 talking about information from 1997."

That Klages, theoretically, may have told others about the revelations disclosed by RF and Boyce does not render Klages's denials a "material fact" absent evidence that the "decisionmakers" would have been misled, misdirected, deflected from a target, or otherwise "influenced" by the absence of more information. No such evidence was produced. Indeed, no evidence was presented that Klages's false statements *could* have misled, misdirected, deflected, or otherwise hindered the Attorney General's investigation. Dwyre testified that his team re-interviewed every one of Nassar's victims, gathered all the reports regarding Nassar in MSU's custody as well as other police agency reports, executed "multiple search warrants at Michigan State University," and never attempted to obtain any others. After sifting through a vast amount of information, the investigators never found any evidence that Klages had told anyone about the conversations she denied having with Boyce and RF:

> [*Defense Counsel*]: But you had spoken to—your team did, over 1,110 people and in none of those conversations and interviews did anybody say Mrs. Klages told me about these comments from 1997, right?
>
> [*Dwyre*]: That's true.
>
> [*Defense Counsel*]: And you had search warrants for Mr. Nassar's computer, right?
>
> [*Dwyre*]: I didn't, but another agency did.
>
> [*Defense Counsel*]: Another agency did, right. And [you] actually have computer and cell phones, those things, right?
>
> [*Dwyre*]: Correct.

[*Defense Counsel*]: And, in fact, you actually had somebody look in January of 2020 to try and find out if you could find a photo of Ms. Klages and Mr. Nassar, right?

[*Dwyre*]: True.

[*Defense Counsel*]: Couldn't find that photo?

[*Dwyre*]: We could not.

[*Defense Counsel*]: Looked on there, couldn't find any evidence that Ms. Klages had made any comment to him about these comments from 1997?

[*Dwyre*]: That's true.

[*Defense Counsel*]: And Ms. Klages actually gave her phone and computers during the investigation, right?

[*Dwyre*]: Not to us, but to Michigan State University.[9]

And as Dwyre admitted, Klages's denials did not throw the investigators off the trial of possible offenders for another reason: Dwyre never believed her. Dwyre knew that Klages had denied speaking to Boyce and RF about Nassar because she had said precisely the same thing during at least four previous police interviews. He conducted his own interview with Klages because "I was concerned that she potentially could have lied" in her previous statements—not because he sought information relevant to "a decision the decisionmaker was trying to make." In other words, Dwyre never testified that he interviewed Klages to obtain information relevant to criminal sexual conduct or misconduct in office; rather, he interviewed her to

[9] Dwyre claimed that he did not "believe" that he could have gotten a search warrant for Klages's electronics. Klages had voluntarily turned over all her electronic devices to the MSU police department for inspection, thereby waiving any privacy interest she may have had. Dwyre's claim that he did not think he "had the probable cause to get the search warrant" is not credible or legally supportable. And Dwyre never explained why he had not just asked Klages for the devices.

gather proof that Klages had previously stated, falsely, that she had no memory of the conversations with Boyce and RF.

The prosecution offered no witness other than Dwyre to support the materiality of Klages's denials. And instead of testifying that the *Attorney General's* decision-making regarding whom to charge had been thrown off-track by Klages's denial of the 1997 conversations, Dwyre offered only conjecture and supposition about his *personal* investigative methods, none of which described a materially different course of investigation. Like a skilled lawyer or judge, a skilled investigator can always identify, in retrospect, sources or leads not pursued. The materiality of those omissions depends on whether they made a difference in the final product. Like a single case not cited, a question not asked is unlikely to determine the outcome. If it did in Klages's case, that evidence was simply not presented to the jury.

Had Klages admitted to having participated in the conversation with Boyce and RF, no evidence supports that the investigation would have yielded a different decision regarding whether to charge others for criminal sexual conduct or misconduct in office. Accordingly, viewing the evidence and inferences in the light most favorable to the prosecution, Klages's lie regarding her memory of the 1997 conversations did not result in a different course of investigation, lead the investigators astray, or taint the decision made by the decision-maker. Thus, it was inconsequential, rather than material.

We emphasize that the "material fact" requirement incorporated within MCL 750.479c(1)(b) requires proof of something more than an investigator's unsupported and speculative opinion that he may have asked dif-

ferent questions, particularly absent evidence that the "material fact" had any reasonable possibility of influencing the decision that matters—the charging decision. As in *Kungys*, when presented with the question of whether a false statement constitutes a material fact, materiality is not determined by an investigator's belief that more investigation would have been helpful. Rather, as this Court described in *Williams*, 318 Mich App at 240, a lie or "a willful, knowing omission of pertinent information about a crime may lead the police down a fruitless path, permit the destruction of evidence while the police look in another direction, enable the escape of the actual culprit, or precipitate the arrest of an innocent person." In those examples, misleading statements prevent the police from solving a crime and qualify as material because they deprive the decision-makers of the information necessary to make an accurate and informed charging decision. Here, the prosecution never presented evidence of any underlying crime or even suggested that someone "got away." Klages's false statements therefore did not represent or misrepresent any facts material to the Attorney General's investigation.

We vacate Klages's convictions and remand for dismissal of the charges. We do not retain jurisdiction.

STEPHENS, P.J., concurred with GLEICHER, J.

BORRELLO, J. (*dissenting*). I respectfully dissent from the majority's erroneous conclusion that the evidence submitted at trial was insufficient to support defendant's convictions. The error, I believe, lies in the majority's assertion there was no evidence that defendant's "false statement regarding the 1997 conversations was material to the criminal investigation conducted in 2018." In reaching this conclusion, the

majority infers that a false statement is only material if it actually impacted the prosecution's charging decision. I do not believe the language of MCL 750.479c requires such a precise level of specificity, given its focus on prohibiting false and misleading statements during the *investigative* stage. "The plain language of the statute conveys the Legislature's intent to hold fully responsible for accuracy and candor those who provide information to peace officers in the course of a criminal investigation." *People v Williams*, 318 Mich App 232, 241; 899 NW2d 53 (2016).

I also disagree with the majority's insinuation that this investigation could not have truly been a *criminal* investigation merely because it also involved allegations of institutional failures within Michigan State University (MSU). Because I believe there was constitutionally sufficient evidence to support the jury's verdict convicting defendant in this case, I dissent.

I. BACKGROUND

This case stems from allegations that defendant was told in 1997 about sexually assaultive acts committed by Larry Nassar and that she lied to law enforcement during a 2018 interview by denying that she had received such information.

Defendant began coaching gymnastics at MSU in 1990. She had previously been a "club coach" and had coached at Great Lakes Gymnastics from 1985 to 1990. While she was coaching at Great Lakes Gymnastics, defendant met Nassar. Defendant and Nassar initially had a professional relationship that developed into a friendship. Defendant did not see Nassar "outside of the gymnastics world," but she had considered him a very good friend, professionally.

Spartan Youth Gymnastics used MSU facilities and began operating in approximately 1992 or 1993. Defendant and Rick Atkinson, who was the MSU men's gymnastics coach at the time, started Spartan Youth Gymnastics to help raise funds for the MSU gymnastics programs. Defendant's involvement with the Spartan Youth Gymnastics program ended in approximately 2000.

Former Spartan Youth Gymnastics athletes Larissa Boyce and RF both provided detailed testimony about their 1997 conversation with defendant, during which they disclosed Nassar's abuse to defendant.

Boyce testified that in 1997, she told defendant about what Nassar was doing to her. The conversation took place in defendant's office at Jenison Field House. Boyce told defendant that Nassar "was sticking his fingers inside of me and it felt like he was fingering me." Defendant told Boyce that she had known Nassar for years, and " '[t]here's no way that he would do anything inappropriate.' " According to Boyce, defendant then had different gymnasts from the Spartan Youth program enter the room one, two, or three at a time, and defendant asked them if Nassar was doing anything to them that was inappropriate or that felt uncomfortable. Boyce did not remember the details of how defendant called them in or how many people came and went. Boyce felt mortified and embarrassed that others were being brought into a private conversation she was having with defendant. When defendant brought in other gymnasts who said that they did not feel uncomfortable with Nassar, Boyce felt like "a liar," "dirty," and "destroyed," and like defendant "thought [she] was making it up."

Boyce told defendant that Nassar was doing the same types of things to RF, too.[1] Defendant called RF into the room, and RF verified that it was happening to her. Boyce testified that defendant did not believe them or did not want to believe them. Boyce further testified that defendant "called in a couple of the college age gymnasts that happened to still be there." Boyce stated:

> Well, I always looked up to them, so when they came in I—I felt a little intimidated. But I also knew the truth of what I was saying. So I remember us sitting on the floor on the green carpet in [defendant's] office and I remember them saying, "You know, his hands will get close to certain areas, but he's never inappropriate." And I said, "Well, that's not what's happening to me. His fingers are going inside of me and it feels like he's fingering me."

Boyce testified that RF responded by indicating that maybe she had misunderstood, after which RF left the room. According to Boyce, defendant spoke to the college gymnasts in the hallway and then returned to the office and asked Boyce what was happening. Boyce testified:

> And I said, "It feels like he's fingering me." And she said she would—she raised a piece of paper and said, "I can file this, but there's going to be very serious consequences for you and Larry Nassar."
>
> [*Prosecutor*]: How'd that make you feel?
>
> [*Boyce*]: I mean, I was 16. I didn't want to cause problems. I wasn't trying to get anybody in trouble, so I just felt defeated. I felt like I was trying to do the right thing, but then I also felt like I must have a dirty mind. I must be thinking of this wrong. What's wrong with me?

---

[1] Both Boyce and RF had different last names when they were athletes with Spartan Youth Gymnastics. Their current last names are their respective married names.

> And, as a 16 year old you don't want to feel that way. And I wanted to impress [defendant] because I wanted to be on her team.

Boyce testified that she replied that it was all a " 'big misunderstanding' " and left the room. Boyce did not discuss the matter with her parents because she "did not want to talk about it ever again." Boyce continued to see Nassar, who brought up Boyce's conversation with defendant at Boyce's next appointment. Boyce testified:

> So I sat in [Nassar's] office and he came in and said, "So, I talked to [defendant]. She told me you had concerns." And I remember sitting there feeling mortified. And I remember raising my hands up and saying, "I'm so sorry. It's all my fault. It's a big misunderstanding." And so I hopped back up on his table and continued to be abused by him because I wanted to prove that I was not dirty. That I didn't have—I wasn't thinking of it wrong. That I didn't have a dirty mind.

Boyce stopped participating in Spartan Youth Gymnastics in 1998 because she "ended up hating gymnastics after that point" and felt as if others looked at her like she was a troublemaker.

RF also testified about the 1997 conversation in defendant's office. She stated that a girl from another team came up to RF during practice and told her to go to defendant's office for a meeting. Defendant and Boyce were in the office, and RF sat down. Other girls from the Spartan Youth Gymnastics program and the college team, as well as coaches, were going in and out of the office.[2]

---

[2] RF later testified that the other people were from the Spartan Youth Gymnastics team.

According to RF, she sat on the floor in defendant's office, and defendant said that Boyce told her that Nassar had touched Boyce under her shirt and shorts. Defendant also said that Boyce told her that she did not like what Nassar had done. RF testified that defendant asked her if the same thing was happening to her when she saw Nassar for treatments, and RF indicated that it was. Defendant then said that "he's a really good doctor" and that "we're not going to talk about this anymore." Defendant further indicated that the girls were "really lucky" to see Nassar and that Nassar had just come back from the Olympics. According to RF, defendant had a "piece of paper" and was indicating that "a lot could go wrong if we continue to talk about it and there would be problems for everybody involved." RF testified, "[T]hat made me feel like the—all the treatment that Dr. Nassar was doing was actual treatment, even though I was trying to say that I didn't like the treatment." RF "felt like [she] was in trouble and everything stopped," and she was told to go back to practice.

RF did not talk to anybody else about what Nassar was doing to her, but she continued to see Nassar until approximately 2012. Nassar continued to touch RF "[u]nderneath [her] shirt, underneath [her] shorts, anywhere he wanted to that he said it was okay for him to do." However, RF stopped participating in Spartan Youth Gymnastics shortly after the 1997 meeting with defendant because Nassar said that RF's back was too injured for her to continue to compete.

In 2016, RF read an article in the IndyStar about Nassar and she thought, "I could have written it myself." She eventually spoke to law enforcement about what had happened with Nassar and defendant.

Boyce also saw the IndyStar article in 2016. She testified as follows about her reaction:

> I thought oh my gosh, this absolutely happened to me. Oh my gosh, this really was sexual assault. This—how is this happening? I was right. I was right all those years ago. But I didn't—I also wasn't sure what to do with it because I had come forward before and I was told that I was wrong. So I was afraid at first to come forward.

Nevertheless, Boyce also eventually came forward and spoke with law enforcement about the matter, including what had happened with defendant.

As noted by the majority, David Dwyre testified that one goal of the Attorney General's investigation into MSU was to find out "who knew about Larry Nassar, when did you know it, and what was done about it, essentially." Dwyre provided further explanation of this goal of the investigation:

> [*Prosecutor*]: [Were] individuals from Michigan State University included in that group?
>
> [*Dwyre*]: Yes.
>
> [*Prosecutor*]: Okay. And the sexual assaults of Ms. Boyce and [RF], were they another facet of your investigation?
>
> [*Dwyre*]: Not as it pertained to criminal prosecution of Larry Nassar, because he had already been prosecuted by that point. *But was anyone else in—did anyone else know about it and did they do anything to notify—notify Michigan State University, because it was important. That was, kind of, like one of the main reasons of the investigation*. [Emphasis added.]

Dwyre testified that during the course of this investigation, he sought to interview defendant because he had "information that two student athletes had disclosed being sexually abused by Larry Nassar to her," and "it was important to interview her to see what she

was going to say about that." Dwyre was also concerned that defendant may have lied during a previous statement she made about the matter. He explained:

> I wanted to know what was told to her, and then what did she do with that information. Who did she tell that the victims had sexually—had disclosed sexual assault, what did you tell them, when did you tell them, did you—because that was going to change, really, the course of—it potentially could change the course of my direction of my investigation.

Dwyre and Mary Sclabassi, another special agent with the Department of Attorney General, interviewed defendant, whose counsel was present, on June 21, 2018. The interview was recorded and transcribed. The audio recording and transcript were admitted as exhibits at trial. The audio recording was played for the jury, and the jurors received copies of the transcript.

At the beginning of defendant's interview, Dwyer told defendant that he was conducting a criminal investigation of MSU to determine whether any other individuals had committed criminal misconduct related to Nassar's criminal activity. During the interview, defendant was asked if Larissa Boyce had complained to her about Nassar in 1997 and defendant stated, "I don't recall Larissa Boyce." Defendant was subsequently asked regarding that subject, "You know what we're talking about, right?" Defendant responded, "Because of the media, yes." Defendant agreed that if one of her gymnasts had claimed to have been touched in a sexual way, she would not be able to forget it. However, defendant stated that Boyce "was not a gymnast of mine," and "I never coached her." The following exchange then took place:

> *Mr. Dwyre*: You never coached her.

Ms. Klages: She keeps saying that I was her coach. I was the administrator of Spartan Youth Gymnastics. I did not coach out on the competition floor.

Mr. Dwyre: Perfect. If a student athlete came to you and said they were sexually assaulted by a—would you—

Ms. Klages: Absolutely.

Mr. Dwyre: You couldn't forget that, would you agree?

Ms. Klages: Right.

Mr. Dwyre: I just want to lock that down, okay, perfect.

Ms. Klages: Yes.

Mr. Dwyre: And you're saying that you don't recall—do you even recall who she is?

Ms. Klages: No, I do not.

Mr. Dwyre: Okay. You have no . . . not until this all blew up did you even know who she was?

Ms. Klages: Correct. And when she first came out as a Jane Doe and I had heard her (inaudible) I had no idea, and then when she came out with her name I still had no idea.

Defendant also indicated that she did not remember ever telling Boyce that if Boyce filed a complaint about Nassar there would be serious consequences for Boyce and Nassar.

In response to being asked if RF told defendant in 1997 that Nassar "penetrated her vaginally and anally," defendant stated, "I do not remember that either." Defendant explained that RF was not one of defendant's gymnasts, but she was a Spartan Youth athlete. Defendant also affirmed that she remembered RF because RF was on the same team as defendant's daughter. The following exchange then took place:

> *Mr. Dwyre*: So you wouldn't have forgotten if she would have came to you about Larry Nassar and said somebody stuck his fingers inside of her, you wouldn't have forgotten that, correct?
>
> *Ms. Klages*: I do not believe I would have ever forgot that.

However, when asked if RF told her about a sexual assault, defendant stated, "No, [not] that I recall." She repeated that she did not recall RF ever discussing her treatment by Nassar with defendant. When asked if she would remember if RF had said something about "this is funny" or "this doesn't look right," defendant responded, "I would think I would remember that." Defendant stated that she did not recall any conversations with Boyce or RF.

Dwyre was asked at defendant's trial what he would have done differently if defendant had corroborated Boyce's and RF's accounts when he interviewed defendant. Dwyre testified:

> Had she corroborated, had Kathie Klages corroborated what Larissa Boyce and [RF] had said previously to investigators, it would have changed the direction of my questioning. I would have immediately began questioning who did you tell. Recognizing that Ms. Klages potentially could become a Defendant. She had a duty to report. So I would have wanted to know who she reported this information to, and it would have changed that type of direction of my questioning. Had she told me that she told other people, I would have wanted to know more about that. I would have questioned her more vigorously about that because I would have tried to obtain, if possible, search warrants about their two conversations, if they would have been in text or any type of social media or anything like that. I also would have—had she not—had she told me I never—I was given this information, but I never told anyone, I would have then changed again my direction of

> questioning and I would have asked her why didn't you, and did—and knowing this, why did you continue to send athletes to Dr. Nassar?

Defendant was charged with one count of lying to a peace officer on the basis that "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" when Dwyre was investigating first-degree criminal sexual conduct (CSC-I) and one count of lying to a peace officer on the basis that "she lied when she denied that she was told by witnesses that they were sexually assaulted by Larry Nassar" related to the officers' criminal investigation for misconduct in office.

At trial, defendant testified in her own defense and maintained that she did not remember any comments made to her in 1997 by Boyce or RF. Defendant testified that when she first learned of Boyce's claim about disclosing the abuse to defendant in 1997 and learned of Boyce's identity, defendant did not remember Boyce by either her former or current last name. Further, defendant testified that even after having observed Boyce at trial, "I don't remember her nor her like gymnastics like some athletes you might be, ah, she was working on a back handspring on beam, I don't remember any of that with her." As noted, defendant testified that she remembered RF, because RF was on a Spartan Youth team with defendant's daughter. When she was asked if she remembered any conversation in 1997 with RF, however, defendant testified:

> Not casual hello, type of things, but, no, I mean if I happened to see somebody I would speak as I was sitting on the table, young ladies were walking in I would say hello, I wasn't rude or nasty but I just, I don't recall any conversation.

Defendant indicated during her trial testimony that she answered the questions during her interview with Dwyre and Sclabassi to the best of her ability. Defendant also testified that Nassar had treated defendant's children and granddaughter for various injuries after 1997, and defendant had personally referred her children and granddaughter to Nassar for those treatments. Defendant also testified that there was no form to fill out if an athlete reported a sexual assault.

On cross-examination, defendant testified as follows:

> *Q*. Let's talk a little bit about, ah, I mean, you're, you're essentially what you're telling the jury is you don't remember, correct?
>
> *A*. Correct.
>
> *Q*. Okay. The, ah, I mean would you agree with me that something like, ah, Larissa Boyce telling you about, um, what Nassar is doing to me, it feels like he's fingering me, is that something you'd be likely to forget?
>
> *A*. I don't know that the conversation occurred as she recalls if a conversation even did occur, but I would think that I wouldn't (sic) remember something like that. I would think I would.

Apparently, the jury did not believe defendant's testimony, as they convicted her of both counts of lying to a peace officer.

II. ANALYSIS

The majority concludes that defendant's convictions should be vacated because the evidence was insufficient to show that defendant's denial as to taking part in a 1997 conversation about Nassar constituted a material fact under MCL 750.479c(1)(b). Defendant argued that there was no evidence that her statements

involved facts material to the investigation because Dwyre's testimony that he would have acted differently was speculative and his search-warrant testimony was baseless.

"This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction." *People v Miller*, 326 Mich App 719, 735; 929 NW2d 821 (2019). This Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find the crime's elements proven beyond a reasonable doubt. *Id*. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "Conflicting evidence and disputed facts are to be resolved by the trier of fact." *Miller*, 326 Mich App at 735. Issues of statutory interpretation are reviewed de novo as a matter of law. *People v Van Tubbergen*, 249 Mich App 354, 360; 642 NW2d 368 (2002).

MCL 750.479c(1)(b) provides that "a person who is informed by a peace officer that he or she is conducting a criminal investigation shall not . . . [k]nowingly and willfully make any statement to the peace officer that the person knows is false or misleading *regarding a material fact in that criminal investigation*." (Emphasis added.)[3] In general, a " 'material fact' " is one that is " 'significant or essential to the issue or matter at hand.' " *McCormick v Carrier*, 487 Mich 180, 194; 795 NW2d 517 (2010), quoting *Black's Law Dictionary* (8th ed); see also *People v Katt*, 468 Mich 272, 292; 662

[3] An investigator for the Department of Attorney General is a peace officer. MCL 750.479c(5)(b)(*xii*).

NW2d 12 (2003) ("A material fact is '[a] fact that is significant or essential to the issue or matter at hand.' "), quoting *Black's Law Dictionary* (7th ed) (alteration in original).

Consistent with the general rule, the Model Criminal Jury Instructions for misleading the police provide:

> A material fact is information that a reasonable person would use to decide whether to do or not do something. A fact is material if it has the capacity or natural tendency to influence an officer's decision how to proceed with an investigation. [M Crim JI 13.20(7).]

The Model Criminal Jury Instructions further provide regarding this specific crime:

> (8) You may consider whether the officer relied on the information in deciding whether it was a material fact. However, it is not a defense to the charge that the officer did not rely on the information if you determine beyond a reasonable doubt that the defendant intended to [conceal the information from the officer by trick, scheme, or device / provide false information].
>
> (9) It is not a defense to the charge that the officer was able to obtain the information from another source or by different means if you determine beyond a reasonable doubt that the defendant intended to [conceal the information from the officer by trick, scheme, or device / provide false information]. [M Crim JI 13.20(8) and (9).][4]

Accordingly, the question becomes whether defendant's false statement involved a fact that was significant or essential to the criminal investigation Dwyre was conducting, which is determined by considering whether the false statement related to a fact that had the capacity or natural tendency to influence the officer's decisions about how to proceed with the inves-

[4] The jury in this case was instructed consistently with the quoted provisions of M Crim JI 13.20.

tigation. In this case, Dwyre informed defendant at the outset of the interview that he was conducting a criminal investigation to determine whether any other individuals at MSU had committed criminal misconduct related to Nassar's criminal activity.[5] At trial, Dwyre explained that the investigation was intended to identify any new Nassar victims and to find out "who knew about Larry Nassar, when did you know it, and what was done about it, essentially." Dwyre also testified at trial that in interviewing defendant, he "wanted to know what was told to her, and then what did she do with that information," as well as "[w]ho did she tell that the victims had sexually—had disclosed sexual assault, what did you tell them, when did you tell them."

Dwyre testified that if defendant had corroborated what Boyce and RF said, it would have "changed the direction of [his] questioning." He would have wanted to know whom defendant told, because she had a duty

[5] At the beginning of defendant's interview, Dwyer stated in relevant part as follows:

> *Mr. Dwyre*: All right, wonderful. We are police detectives so this is a criminal investigation, so it's maybe just a little bit different in what—because you probably would have talked to a handful of investigators by now, right, you probably have given your story a zillion times?
>
> *Ms. Klages*: Two, not too many, though, I'm kind of surprised.
>
> *Mr. Dwyre*: Okay. We got asked by MSU to conduct an investigation, independent investigation. And so it's a criminal investigation in that in the event that we found criminal misconduct by anyone involving the MSU allegations as—because we were tasked with investigating MSU as it pertains to Larry Nassar. But there's branches that go off, so we had a branch of Dean Strampel, you probably followed that a little bit in the media, so he got charged. So there is a—we don't know but if we find—if there's something that is criminal we will pursue it.

to report the allegations.[6] He "would have questioned her more vigorously about that because [he] would have tried to obtain, if possible, search warrants . . . ." He agreed that defendant had already turned over her phone and computers to MSU during the investigation, but he testified that he did not believe that he had probable cause at the time of defendant's interview to obtain search warrants for those devices or defendant's "communications" because he did not have any evidence of whom she may have communicated with about Nassar. Dwyre also would have asked defendant why she continued to send athletes to Nassar after the disclosures by Boyce and RF. However, Dwyre testified that when defendant denied having been told about Nassar's misconduct, there was "nothing I could do at that point."

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that defendant's statements that she did not remember the disclosures made by Boyce and RF were false with respect to facts that were "material" because they were significant or essential to the criminal investigation Dwyre was conducting and influenced his decisions about how to proceed with the *investigation*. MCL 750.479c(1)(b); *Miller*, 326 Mich App at 735; *Katt*, 468 Mich at 292; M Crim JI 13.20(7).

---

[6] Even assuming that defendant was not a mandatory reporter, as the majority asserts, that does not mean that she was absolved of all responsibility to take steps to protect the gymnasts in her program from sexual abuse if such allegations were brought to her attention. To this point: Had defendant properly reported the victim's assertions, it is possible that countless young women would have been spared the catastrophes of torture, rape, and criminal sexual assault to which they were subjected by Nassar. There were, as the victims asserted, adults at MSU who could have stopped Nassar. Clearly, the jury viewed defendant as one of those adults.

Contrary to the holding by the majority, the statutory language does not require the prosecution to prove that the false statement prevented a specific criminal charge from being filed. The statutory language also does not require that the criminal investigation at issue pertain to criminal activity by the person alleged to have made the false or misleading statement, nor does the statutory language require that the false or misleading statement be material to that person's own potential criminal liability. There is no requirement in the statute that the peace officer must be investigating a crime of which the person alleged to have provided the false or misleading statement could potentially be charged. MCL 750.479c(1)(b) criminalizes "[k]nowingly and willfully mak[ing] any statement to the peace officer that the person knows is false or misleading regarding a material fact" in the criminal investigation that the peace officer is conducting if that person was "informed by a peace officer that he or she is conducting a criminal investigation . . . ." As previously stated, "[t]he plain language of the statute conveys the Legislature's intent to hold fully responsible for accuracy and candor those who provide information to peace officers in the course of a criminal investigation." *Williams*, 318 Mich App at 241.

Viewing the evidence in a light most favorable to the prosecution, the jury could have found the testimony of Boyce and RF credible with respect to whether the conversation occurred and what transpired during the conversation, and the jury could also have found defendant's claim that she did not remember the conversation not to be credible. It would also have been reasonable for the jury to believe, as defendant testified, that defendant would have remembered such disclosures as those Boyce and RF testified they made to defendant. The evidence, viewed in a light most

favorable to the prosecution, permits a rational inference that defendant falsely claimed not to remember the conversation in response to the allegations that she had been told about Nassar's sexual misconduct long before Nassar was finally held criminally responsible. Viewing the evidence in this light also permits the rational inference that the false statement was material for purposes of this statute. The resolution of conflicting evidence and disputed facts is a task not for this Court, but for the jury. *Miller*, 326 Mich App at 735.

It is also left to the jury in a prosecution under MCL 750.479c to determine whether a person's claim that he or she did not remember a fact is a falsehood or an innocent statement. See *Williams*, 318 Mich App at 241 ("At trial, [the defendant's] claim that he simply forgot about the [facts omitted in his statement to police] due to physical and emotional exhaustion may prevail."). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *Kanaan*, 278 Mich App at 619. Here, the evidence was sufficient to establish defendant's knowledge and intent. A defendant's state of mind on issues such as knowledge and intent can be difficult to prove and, consequently, "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *Id.* at 622.

Because I find no error in this case, I dissent. I would affirm defendant's convictions.

In re TATO

Docket No. 353884. Submitted December 7, 2021, at Grand Rapids. Decided December 28, 2021, at 9:00 a.m.

Allegan County Sheriff's Department Animal Control filed a complaint in the 57th District Court alleging that Tato, a dog owned by Ray and Katie Lopez, was a dangerous animal under MCL 287.321 and seeking a summons commanding Katie to appear and show cause why Tato should not be destroyed. Ava Caswell and Kimberly Nienhuis were walking their dogs in a residential neighborhood when one of their dogs, Piper, was attacked by Tato as they walked past the Lopez home. The two dogs were eventually separated, with Piper suffering a minor ear injury. Piper was taken to an emergency veterinarian, but he did not receive any stitches. At some point during the incident, Caswell was on the ground holding onto Piper. While Caswell was on her knees, Tato pushed off Caswell's legs using his back paws in an attempt to get to Piper. Caswell incurred minor scrapes on her knees, hip, and hand as a result of the incident. Both Caswell and Nienhuis described the incident as a dog-on-dog attack and said that Tato did not attack any people. No other animals or people were injured during the incident. Several months later, a sheriff's deputy took Tato from the Lopez home and placed him in a shelter. Petitioner filed the complaint the next day, and the magistrate held a show-cause hearing. The magistrate concluded that Tato was a dangerous animal and ordered that the dog be euthanized. The Lopezes appealed in the district court, which held a bench trial. At the bench trial, the Lopezes testified that Tato had never exhibited any aggressive behavior toward people or other dogs, even though Tato was frequently around children and small dogs. The district court, William Baillargeon, J., found that Tato was a dangerous animal because Tato attacked Piper and the people around Piper. The district court reasoned that Tato attacked Nienhuis because she was connected to Piper via a leash at the time of the attack, Tato attacked Caswell because Caswell was injured in the incident, and Tato attacked the group of people as a whole because it was foreseeable that they would get involved to try to save Piper. Accordingly, the district court concluded that Tato posed a danger to others and ordered that

Tato be euthanized. The Lopezes appealed in the Allegan Circuit Court, and the circuit court, Margaret Zuzich Bakker, J., held that the district court erred by finding that Piper suffered a serious injury in the attack; however, the circuit court concluded that Tato did attack Caswell, that Tato was a dangerous animal, and that Tato should be euthanized. Katie sought leave to appeal, which the Court of Appeals, SHAPIRO, P.J., and SAWYER, J. (BOONSTRA, J., dissenting), denied. Katie moved for reconsideration, and the Court of Appeals, SHAPIRO, P.J., and SAWYER and BOONSTRA, JJ., granted the motion for reconsideration and granted the application for leave to appeal, limited to consideration of whether the circuit court erred by finding that Tato was a dangerous animal and by ordering that Tato be euthanized.

The Court of Appeals *held*:

MCL 287.321(a) defines a "dangerous animal" as (1) a dog or other animal that bites or attacks a person, or (2) a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner. MCL 287.321 does not define "attack," but the Court of Appeals has previously defined "attack" for purposes of MCL 287.321 as to set upon or work against forcefully, to begin to affect or to act on injuriously, to set upon with violent force, and to act on in a detrimental way, cause harm to. Taken together, these definitions require targeted conduct by the attacker against the attackee. Thus, an attacker "attacks" its target, not individuals or animals who are simply in the area or incidentally hurt as a result of the attack. In this case, it was undisputed that Tato's focus during the incident was on Piper, not Caswell or any other person. While Tato did scratch Caswell's hand and cause her to scrape her hip and knees, these minor injuries were a result of Tato attacking Piper, not from Tato attacking Caswell. Thus, Tato did not attack Caswell within the meaning of the statute. Nor was there any evidence or argument that Tato bit Caswell or another person. Given this, the circuit court erred by concluding that Tato was a dangerous animal under the "bites or attacks a person" portion of the "dangerous animal" definition. Although petitioner did not file a cross-appeal, the Court of Appeals also considered whether Tato was a dangerous animal under the portion of the statute defining "dangerous animal" as a dog that bites or attacks and causes serious injury to another dog because the issue presented an alternative ground for affirmance. The circuit court correctly concluded that Piper did not suffer a serious injury. MCL 287.321(e) defines "serious injury" as a permanent, serious disfigurement, serious impairment of health, or serious impairment

of a bodily function of a person. The record confirmed that Piper suffered a cut to one ear and that a part of that ear was lost. The record further confirmed that, a couple of weeks after the attack, Piper's injury was barely noticeable. Importantly, there was no evidence that the injury affected Piper's hearing or otherwise impaired her health. These injuries did not amount to a disfigurement or impairment that could be deemed to rise to the level of a "serious injury" under the statute. Accordingly, Tato was not a dangerous animal under MCL 287.321(a), and the circuit court's order to euthanize Tato had to be reversed. The remaining issues required a finding that Tato was a dangerous animal; therefore, those remaining issues were moot.

Reversed and remanded.

ANIMALS – DANGEROUS ANIMALS – WORDS AND PHRASES – "ATTACKS."

MCL 287.321(a) defines a "dangerous animal" as a dog or other animal that bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner; "attack" for purposes of MCL 287.321(a) means to set upon or work against forcefully, to begin to affect or to act on injuriously, to set upon with violent force, and to act on in a detrimental way, cause harm to; these definitions require targeted conduct by the attacker against the attackee; thus, an attacker "attacks" its target, not individuals or animals who are simply in the area or incidentally hurt as a result of the attack.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Myrene K. Koch*, Prosecuting Attorney, and *Molly S. Schikora*, Assistant Prosecuting Attorney, for Allegan County Sheriff's Department Animal Control.

Celeste M. Dunn, PLC (by *Celeste M. Dunn*) and *Chartier & Nyamfukudza, PLC* (by *Mary Chartier*) for Katie Lopez.

Amicus Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Andrea Muroto*) for the Animal Law Section of the State Bar of Michigan.

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

SWARTZLE, J. Ava Caswell and Kimberly Nienhuis were walking their dogs in a residential neighborhood when one of their dogs, Piper, was attacked by Tato, a pit bull. The two dogs were eventually separated, with Piper suffering a minor injury to his ear. Petitioner sought to euthanize Tato, alleging that the dog was a "dangerous animal" under the law. The district court agreed and ordered that Tato be euthanized, and the circuit court affirmed on appeal. We conclude, however, that at this point, Tato does not meet the statutory definition of a "dangerous animal." As explained below, we reverse.

I. BACKGROUND

On April 8, 2019, Caswell and Nienhuis were walking on a residential sidewalk with four other people and three small dogs. One of the dogs was a 19-pound dog named Piper, who was on a leash being held by Nienhuis. As the group was walking past the home of Katie and Ray Lopez[1]—Tato's owners—Tato, who was inside the house, pushed out a window screen, jumped out the window, and ran toward Piper. Tato bit down on Piper's ear and shook the smaller dog back and forth. The people in the group hit and kicked Tato in an attempt to get Tato to release Piper.

At some point during the melee, Caswell was on the ground holding onto Piper. Caswell was able to put her hand in Tato's mouth and pull Piper's ear out of Tato's mouth. While Caswell was on her knees, Tato pushed off Caswell's legs using his back paws in an attempt to

[1] Because Katie and Ray share the same last name, we will refer to them by their first names for clarity.

get to Piper. Both Caswell and Nienhuis described the incident as a dog-on-dog attack and said that Tato did not attack any people.

The Lopezes first noticed the situation when they looked outside and saw a group of people beating Tato. When Katie and Ray went outside, the group of people screamed and cursed at them. Ray eventually removed Tato from the area.

As a result of the attack, Piper suffered an injury to one ear. The injury was described by several witnesses as a "nick" of Piper's ear, which created a "crooked ear" and left the edge of that ear jagged. Piper was taken to an emergency veterinarian, but he did not receive any stitches. After a couple of weeks and a trip to the groomer to even out Piper's hair, Piper's injured ear looked even with her uninjured ear. Caswell suffered minor scrapes on her knees, hip, and hand as a result of the incident. No other animals or people were injured during the incident.

Several months later, a sheriff's deputy took Tato from the Lopezes' home and placed him in a shelter. Petitioner filed a complaint the next day, seeking to destroy Tato because he was a "dangerous animal." The magistrate held a show-cause hearing and concluded that Tato was a dangerous animal; accordingly, the magistrate ordered that the dog be euthanized. The Lopezes appealed in the district court, which held a bench trial on the issue. At the bench trial, Katie testified that Tato had never exhibited any aggressive behavior toward people or other dogs, despite the fact that Tato was frequently around children and small dogs. Ray also testified that he had never seen Tato exhibit any aggressive behavior. The sheriff's deputy who picked up Tato said that Tato was very friendly to him but noted that Tato became aggressive toward

other dogs when Tato arrived at the animal shelter. Ray testified that he did not consider Tato's behavior in the incident with Piper to be aggressive, but he said that he would take any protective measures necessary to save Tato.

Following the bench trial, the district court found that Tato was a "dangerous animal" under MCL 287.321(a) because Tato had attacked Piper and the people around Piper. The district court reasoned that Tato attacked Nienhuis because she was connected to Piper via a leash at the time of the attack, Tato attacked Caswell because Caswell was injured in the incident, and Tato attacked the group of people as a whole because it was foreseeable that they would get involved to try to save Piper. The district court concluded that Tato posed a danger to others and considered whether there were any remedial measures that it could order to safeguard the public. On the basis of the "disturbing" testimony from Ray and Katie—that they did not consider Tato's behavior to be aggressive—and the "callous[ness]" demonstrated by them regarding the incident, the district court found that there were no remedial measures that it could order that would safeguard the public from Tato. The district court ordered that Tato be euthanized.

The Lopezes appealed in the circuit court. The circuit court found that Piper did not suffer serious injury in the attack and thus that the district court had erred. The circuit court concluded, however, that Tato did attack Caswell:

> Tato worked against Ms. Caswell when he dragged her across the cement, resulting her in [sic] knees being scraped. He acted in a detrimental way that caused harm to Ms. Caswell and the other individuals by scratching

> them during the incident. The district court was proper in finding that Tato is a Dangerous Animal because he attacked Ms. Caswell.

The circuit court affirmed the district court's finding that Tato was a dangerous animal as defined by MCL 287.321(a). The circuit court also affirmed the district court's conclusion that Tato should be euthanized, finding that the "callousness" demonstrated by Ray and Katie "and their belief that Tato did nothing wrong" provided sufficient evidence to support the finding that Tato was likely to cause serious injury or death to a person in the future. Katie now appeals by leave granted.[2]

II. ANALYSIS

Katie's first claim of error is that the circuit court erred when it affirmed the district court's conclusion that Tato was a "dangerous animal" under MCL 287.321(a). "Issues of statutory interpretation are reviewed de novo." *Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). "Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011) (citation omitted). Absent an outcome-determinative genuine factual dispute, the issue of threshold injury is a question of law, which is reviewed de novo. *Kern v Blethen-Coluni*, 240 Mich App 333, 341-342; 612 NW2d 838 (2000). The application of the facts to the law is reviewed de novo. *Van*

[2] *In re Tato*, unpublished order of the Court of Appeals, entered November 13, 2020 (Docket No. 353884).

Buren Charter Twp v Garter Belt, Inc, 258 Mich App 594, 598; 673 NW2d 111 (2003). Finally, "[t]his Court reviews a trial court's findings of fact for clear error." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 368; 937 NW2d 716 (2019).

The purpose of the dangerous animals act, MCL 287.321 *et seq*., is "to prevent dangerous animals from running at large or injuring persons." *People v Janes*, 302 Mich App 34, 53; 836 NW2d 883 (2013). MCL 287.321(a) defines a "dangerous animal" as "a dog or other animal that bites or attacks a person, or a dog that bites or attacks and causes serious injury or death to another dog while the other dog is on the property or under the control of its owner." MCL 287.321 does not define "attack," but this Court has previously defined "attack" for the purposes of MCL 287.321 as "to set upon or work against forcefully," "to begin to affect or to act on injuriously," "[t]o set upon with violent force," and "[t]o act on in a detrimental way, cause harm to." *People v Ridge*, 319 Mich App 393, 407; 901 NW2d 406 (2017) (quotation marks and citations omitted). Taken together, these definitions require targeted conduct by the attacker against the attackee. Thus, an attacker "attacks" its target, not individuals or animals who are simply in the area or incidentally hurt as a result of the attack. See *id*. at 408.

The circuit court concluded that Tato was a dangerous animal because the dog attacked Caswell.[3]

[3] Based on our reading of the circuit court's order, the circuit court did not find that Tato attacked the other individuals present during the incident. Any such finding would have been clearly erroneous because no evidence was presented establishing that Tato scratched or bit any person other than Caswell. See *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 579; 939 NW2d 705 (2019).

The circuit court concluded that Tato attacked Caswell because he "worked against" her when he pulled Piper and, as a result, Caswell was dragged on the cement. As discussed, however, an "attack" requires a finding that the attacker targeted the attackee. It is undisputed that Tato's focus during the incident was on Piper, not Caswell or any other person. While Tato did scratch Caswell's hand and cause her to scrape her hip and knees, these minor injuries were a result of Tato attacking Piper, not from Tato attacking Caswell. Thus, Tato did not attack Caswell within the meaning of the statute. Nor has there been any evidence or argument that Tato bit Caswell or another person. Given this, the trial court erred by concluding that Tato was a dangerous animal under the statute.

Our inquiry does not stop there, however, because petitioner argues that Tato is a dangerous animal given that Piper suffered a serious injury. Although petitioner did not file a cross-appeal, we consider this issue because it presents an alternative ground for affirmance. See *Ass'n of Businesses Advocating Tariff Equity v Pub Serv Comm*, 192 Mich App 19, 24; 480 NW2d 585 (1991). MCL 287.321(e) defines "serious injury" as a "permanent, serious disfigurement, serious impairment of health, or serious impairment of a bodily function of a person." The record confirms that Piper suffered a cut to one ear and that a part of that ear was lost. The record further confirms that, a couple of weeks after the attack, Piper's injury was barely noticeable. Importantly, there is no evidence that the injury affected Piper's hearing or otherwise impaired her health. These injuries do not amount to a disfigurement or impairment that could be deemed to rise to the level of a "serious injury" under the statute. Thus, the circuit court correctly concluded that Piper did not suffer a serious injury. Accordingly, Tato is not a

"dangerous animal" under the statute because he did not bite or attack a person and he did not seriously injure an animal.

The remaining issues presented on appeal all require a finding that Tato was a dangerous animal, and, therefore, those issues are now moot. We note, however, that even though Tato is not a dangerous animal as defined by statute, it is concerning that Tato attacked another dog in this manner and that the Lopezes were apparently indifferent to their dog's aggressive behavior. Ray made clear to the district court that he would take whatever precautions were necessary to counteract Tato's aggression and protect people and animals in the future, and we expect that both he and Katie will follow through with these representations made to the district court.

III. CONCLUSION

Tato does not meet the Legislature's definition of a "dangerous animal" under MCL 287.321(a). We reverse the circuit court's order to euthanize Tato and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

GADOLA, P.J., and CAMERON, J., concurred with SWARTZLE, J.

PEOPLE v SAMUELS

Docket No. 353302. Submitted December 7, 2021, at Detroit. Decided December 28, 2021, at 9:05 a.m. Leave to appeal sought.

Dwight T. Samuels was charged in the Wayne Circuit Court as a fourth-offense habitual offender, MCL 769.12, with seven felony counts: one count of assault with intent to commit murder (AWIM), MCL 750.83; one count of assault with intent to do great bodily harm less than murder, MCL 750.84; one count of being a felon in possession of a firearm, MCL 750.224f; one count of carrying a concealed weapon, MCL 750.227; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, one as a second offense. Defendant's identical twin brother, Duane, was charged with the same offenses as defendant, except all of Duane's felony-firearm charges were as first offenses. Defendant and Duane were involved in a fight at a restaurant, which led to these charges. The prosecution offered the brothers a joint plea agreement, under which each of them would plead guilty to AWIM and one count of felony-firearm, conditioned on both brothers agreeing to plead guilty. At the plea hearing on November 4, 2019, defendant indicated that he believed that the conditional nature of the joint plea offer was "not right" and that he wished to proceed to trial. However, once Duane's counsel indicated that Duane wished to plead guilty to the terms of the prosecution's plea offer, defendant stated that he wished to also plead guilty. Defendant and Duane then proceeded to each plead guilty to AWIM and felony-firearm in exchange for the prosecution dropping all other charges and the fourth-offense habitual offender enhancements against them, in accordance with the joint plea offer. Thus, defendant agreed to serve 13 to 30 years' imprisonment for the AWIM conviction plus five years' consecutive imprisonment for his felony-firearm conviction, and Duane agreed to serve 11 to 30 years' imprisonment for the AWIM conviction plus two years' consecutive imprisonment for his felony-firearm conviction. Defendant, Duane, and their respective attorneys did not raise any issue with the voluntariness of the pleas during the plea colloquy, and the trial court accepted the pleas as being entered freely, knowingly, and voluntarily. At sentencing, defendant and Duane moved to withdraw their guilty

pleas and proceed to trial. The trial court then asked defendant and Duane if they believed that the conditional format of the joint plea offer caused them to feel that they had no choice but to plead guilty, to which both responded in the affirmative. On the basis of the gravity of the circumstances and the nature of the offenses, the trial court, Qiana D. Lillard, J., denied defendant's motion to withdraw his plea and sentenced him according to the joint plea offer. The trial court concluded that there was no reason to allow defendant or Duane to withdraw his plea and reiterated that the pleas were entered freely, knowingly, and voluntarily. Defendant sought leave to appeal in the Court of Appeals, and the Court of Appeals, MURRAY, P.J., and KELLY and LETICA, JJ., denied the application in an unpublished order entered on July 9, 2020. Defendant sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted, directing the Court of Appeals to address (1) whether a trial court is required to hold an evidentiary hearing on the voluntariness of a guilty plea that is induced, in part, by an offer of leniency to a relative and, if so, (2) how a trial court is to determine whether an offer of leniency to a relative rendered the defendant's plea involuntary in fact. 507 Mich 928 (2021).

The Court of Appeals *held*:

A guilty plea is valid only if it is understanding, voluntary, and accurate. When a defendant moves to withdraw the plea before sentencing, the burden is on the defendant to establish a fair and just reason for withdrawal of the plea; the burden then shifts to the prosecutor to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. Fair and just reasons may include a claim of actual innocence, a valid defense to a charge, or an involuntary plea. When considering a motion to withdraw a plea as involuntary, a trial court generally must employ the decisional process and make findings in a hearing to support the application of discretion. A trial court may deny a motion to withdraw a guilty plea without holding an evidentiary hearing if the defendant's offer of proof as to the involuntariness of the plea contradicts the defendant's own testimony at the plea hearing. On the other hand, a trial court typically must hold an evidentiary hearing when a question of fact is raised by the defendant's substantiated allegations that the guilty plea was involuntary because it was improperly induced. Courts generally reject assertions that a promise of leniency to the defendant induced the defendant to plead guilty unless the record contains some factual support for the claim. The

general rule governing evidentiary hearings as to the voluntariness of a guilty plea also governs whether trial courts must hold an evidentiary hearing to determine the voluntariness of a guilty plea that was induced by a promise of leniency to a relative. Accordingly, when the record contains some substantiated allegation that raises a question of fact as to the defendant's claim that the guilty plea was involuntary because it was entered on the basis of a promise of leniency to a relative, and when the defendant's testimony at the plea hearing does not directly contradict that allegation, the trial court must hold an evidentiary hearing to determine whether the plea was involuntary. At the evidentiary hearing on a motion to withdraw a guilty plea, the trial court must consider the facts of the particular case to determine whether the defendant's plea was voluntary. Generally, to be entitled to withdraw a plea, the defendant must present sufficient proof to satisfy the trial court by a preponderance of credible evidence that the plea was the product of fraud, duress, or coercion. A trial court determines the voluntariness of a guilty plea induced by a promise of leniency to a relative, or any other third party, by assessing whether the prosecution had probable cause to prosecute the third party at the time the defendant pleaded guilty. If probable cause to prosecute the third party did exist at the time the defendant pleaded guilty, then the defendant cannot show that their guilty plea was involuntary because it was induced by the promise of leniency to a third party. In this case, defendant would have been entitled to an evidentiary hearing on the question of involuntariness if the record contained some substantiated allegation that raised a question of fact as to whether the prosecution had probable cause to prosecute Duane at the time defendant pleaded guilty. There was no factual dispute that the prosecution did have such probable cause. The video of the incident clearly showed both Duane and defendant seriously assaulting the defenseless victim with deadly weapons until he lay nearly dying on the floor. This evidence, by itself, was more than sufficient to establish probable cause to charge Duane with a variety of felony offenses, including the charges that the prosecution actually filed against him. Further, there was nothing in the record to suggest that the prosecution did not otherwise act in good faith. Accordingly, defendant was not entitled to an evidentiary hearing on the question of involuntariness, and the trial court did not abuse its discretion by denying his motion to withdraw his plea.

Affirmed.

1. PLEADING – VOLUNTARINESS OF GUILTY PLEA – PROMISE OF LENIENCY TO A RELATIVE.

The general rule governing evidentiary hearings as to the voluntariness of a guilty plea also governs whether trial courts must hold an evidentiary hearing to determine the voluntariness of a guilty plea that was induced by a promise of leniency to a relative; accordingly, when the record contains some substantiated allegation that raises a question of fact as to the defendant's claim that the guilty plea was involuntary because it was entered on the basis of a promise of leniency to a relative, and when the defendant's testimony at the plea hearing does not directly contradict that allegation, the trial court must hold an evidentiary hearing to determine whether the plea was involuntary.

2. PLEADING – VOLUNTARINESS OF GUILTY PLEA – PROMISE OF LENIENCY TO A RELATIVE.

A trial court determines the voluntariness of a guilty plea induced by a promise of leniency to a relative, or any other third party, by assessing whether the prosecution had probable cause to prosecute the third party at the time the defendant pleaded guilty; if probable cause to prosecute the third party did exist at the time the defendant pleaded guilty, then the defendant cannot show that the guilty plea was involuntary because it was induced by the promise of leniency to a third party.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jon P. Wojtala*, Chief of Research, Training, and Appeals, and *Valerie M. Steer*, Assistant Prosecuting Attorney, for the people.

Melvin Houston for defendant.

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

RIORDAN, J. Defendant pleaded guilty to assault with intent to commit murder (AWIM), MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. At sentencing, defendant moved to withdraw his guilty plea, asserting that it was involuntary because it was

at least partially induced by a plea offer made to his identical twin brother and codefendant, Duane T. Samuels. The trial court denied defendant's motion without holding an evidentiary hearing on the matter of involuntariness and sentenced him to 13 to 30 years' imprisonment for the AWIM conviction and five years' consecutive imprisonment for the felony-firearm conviction, as contemplated by the plea offer. Defendant appeals as on leave granted from our Supreme Court.[1] We affirm.

I. BACKGROUND

This case arises out of the conduct of defendant and Duane on June 19, 2019, at a Coney Island restaurant in Detroit, Michigan. Following a fight at the restaurant with another patron, defendant was charged, as a fourth-offense habitual offender, MCL 769.12, with seven felony counts: one count of AWIM; one count of assault with intent to do great bodily harm less than murder, MCL 750.84; one count of being a felon in possession of a firearm, MCL 750.224f; one count of carrying a concealed weapon, MCL 750.227; and three counts of felony-firearm, one as a second offense. Duane was charged with the same offenses as defendant, except all of Duane's felony-firearm charges were

[1] This Court denied defendant's application for leave to appeal for lack of merit in the grounds presented. *People v Samuels*, unpublished order of the Court of Appeals, entered July 9, 2020 (Docket No. 353302). Our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration as on leave granted, stating as follows: "Among the issues to be considered, the Court of Appeals shall address: (1) whether a trial court is required to hold an evidentiary hearing on the voluntariness of a guilty plea that is induced in part by an offer of leniency to a relative, see *People v James*, 393 Mich 807 (1975); and if so, (2) how a trial court is to determine whether an offer of leniency to a relative 'rendered the defendant's plea involuntary in fact.' *Id*." *People v Samuels*, 507 Mich 928, 928 (2021).

as first offenses. The prosecution offered the brothers a joint plea agreement under which each of them would plead guilty to AWIM and one count of felony-firearm, conditioned upon both brothers agreeing to plead guilty.

At the plea hearing on November 4, 2019, defendant indicated that he believed that the conditional nature of the joint plea offer was "not right" and that he wished to proceed to trial. However, once Duane's counsel indicated that Duane wished to plead guilty to the terms of the prosecution's proffered plea offer, defendant stated that he wished to also plead guilty. Defendant and Duane then proceeded to each plead guilty to AWIM and felony-firearm in exchange for the prosecution dropping all other charges and the fourth-offense habitual offender enhancements against them, in accordance with the joint plea offer. Thus, defendant agreed to serve 13 to 30 years' imprisonment for the AWIM conviction plus five years' consecutive imprisonment for his felony-firearm conviction, and Duane agreed to serve 11 to 30 years' imprisonment for the AWIM conviction plus two years' consecutive imprisonment for his felony-firearm conviction. Defendant, Duane, and their respective attorneys did not raise any issue with the voluntariness of the pleas during the plea colloquy, and the trial court accepted the pleas as being entered freely, knowingly, and voluntarily.

At sentencing, defendant and Duane moved to withdraw their guilty pleas and proceed to trial. Defendant indicated that he wished to withdraw his plea because he was "dissatisfied" with the agreed-upon sentence, that he believed the pleas were not voluntary because of "an . . . atmosphere of coercion," and that he and Duane "were unduly influenced by the potential consequences of these charges." The trial court then asked

defendant and Duane if they believed that the conditional format of the joint plea offer caused them to feel that they had no choice but to plead guilty, to which both responded in the affirmative.

The prosecution opposed the motion, arguing that withdrawal of the pleas was improper because neither defendant nor Duane made a claim of innocence, alleged any error in the plea proceeding, or explained why withdrawal of his plea would be in the best interests of justice. The prosecution explained that it made the plea offers conditional because it would have been at a tactical disadvantage to proceed to trial against only one of the brothers.

On the basis of the gravity of the circumstances and the nature of the offenses, the trial court concluded that there was no reason to allow defendant or Duane to withdraw his plea. The trial court reiterated that the pleas were entered freely, knowingly, and voluntarily. The trial court added that "the interest of justice" required it to proceed with sentencing. Therefore, the trial court denied defendant's motion to withdraw his plea and sentenced him according to the joint plea offer. Defendant now appeals, arguing that (1) he "was induced to plead guilty by a specific form of coercion—not pleading would have jeopardized his brother's right to do so" and that (2) this Court should remand to the trial court for an evidentiary hearing "to determine whether the conditional joint plea required by Mr. Samuels was involuntary in fact because it forced him to do something he didn't want to do but did it anyway because he believed it was in his brother's best interest."

II. DISCUSSION

A. STANDARD OF REVIEW

"A trial court's decision on a motion to withdraw a plea is reviewed for an abuse of discretion." *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Anderson*, 501 Mich 175, 189; 912 NW2d 503 (2018). A trial court also "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, such as constitutional issues and the proper application of a court rule, are reviewed de novo. *Cole*, 491 Mich at 330.

B. NECESSITY OF AN EVIDENTIARY HEARING

The first issue that our Supreme Court directed us to address is "whether a trial court is required to hold an evidentiary hearing on the voluntariness of a guilty plea that is induced in part by an offer of leniency to a relative, see *People v James*, 393 Mich 807 (1975)[.]" *Samuels*, 507 Mich at 928.

A guilty plea is valid only if it is understanding, voluntary, and accurate. *Cole*, 491 Mich at 330-331; MCR 6.302(A). "Where, as here, a defendant moves to withdraw the plea before sentencing, the burden is on the defendant to establish a fair and just reason for withdrawal of the plea; the burden then shifts to the prosecutor to establish that substantial prejudice would result from allowing the defendant to withdraw the plea." *People v Jackson*, 203 Mich App 607, 611-612; 513 NW2d 206 (1994); MCR 6.310(B). Such "fair and just" reasons may include a claim of actual innocence, a valid defense to a charge, or an involuntary

plea. *People v Fonville*, 291 Mich App 363, 378; 804 NW2d 878 (2011); *People v Wilhite*, 240 Mich App 587, 596-597; 618 NW2d 386 (2000).

When considering a motion to withdraw a plea as involuntary, a trial court generally "must employ the decisional process . . . and make findings in a hearing to support the application of discretion." *People v Plumaj*, 284 Mich App 645, 652; 773 NW2d 763 (2009). A trial court may deny a motion to withdraw a guilty plea without holding an evidentiary hearing if the defendant's offer of proof as to the involuntariness of his plea contradicts his own testimony at the plea hearing. See *People v White*, 307 Mich App 425, 430-431; 862 NW2d 1 (2014) ("We conclude that because defendant's offer of proof, i.e., his own affidavit, is inconsistent with defendant's own testimony during the plea hearing, the trial court did not abuse its discretion when it denied defendant's request for an evidentiary hearing."). On the other hand, a trial court typically must hold an evidentiary hearing when a question of fact is raised by the defendant's substantiated allegations that his or her guilty plea was involuntary because it was improperly induced. See *Jackson*, 203 Mich App at 612. For example, a trial court usually must conduct an evidentiary hearing when a defendant files an affidavit or makes an offer of proof on the record that his or her plea was induced by counsel's faulty legal advice or by a promise that he or she would receive a lenient sentence. *Id*. Courts generally reject assertions that a promise of leniency to the defendant induced him or her to plead guilty unless the record contains "some [factual] support" for the claim. *Id*. at 612-613 (quotation marks and citation omitted). Simply put, whether a trial court must hold an evidentiary hearing on a motion to withdraw an

allegedly involuntary guilty plea is generally dependent on the facts of the case.

With regard to the particular allegation of involuntariness at hand, our Supreme Court directed our attention to *James*, 393 Mich 807. In that case, the Court remanded to the trial court for an evidentiary hearing, stating as follows:

> While a promise of leniency for a relative does not in itself amount to coercion so as to make a guilty plea involuntary as a matter of law, we recognize that it may render a plea involuntary as a matter of fact. The trial judge shall determine after an evidentiary hearing whether the promise of leniency to defendant's wife in this case rendered the defendant's plea involuntary in fact. [*Id*. (citations omitted).][2]

Thus, *James* stands for the proposition that a promise of leniency to a relative "may" render the defendant's guilty plea "involuntary in fact."[3] Consistent with that holding, we conclude that the general rule governing evidentiary hearings as to the voluntariness of a guilty plea also governs whether trial courts must hold an evidentiary hearing to determine the voluntariness of a guilty plea that was induced by a promise of leniency to a relative. In other words, a promise of leniency to a relative is one of countless facts that may render a guilty plea involuntary; we discern no principled reason why that particular fact should be treated differently than any other fact that may render

---

[2] This order of our Supreme Court is precedentially binding because it contains "a concise statement of the applicable facts and the reason for the decision." *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993).

[3] In its remand order, our Supreme Court used the term "*offer* of leniency." However, *James* used the term "*promise* of leniency." In this context, there is no meaningful distinction between "offer" and "promise."

a guilty plea involuntary. Thus, the relevant rule may be stated as follows: when the record contains some substantiated allegation that raises a question of fact as to the defendant's claim that his or her guilty plea was involuntary because it was entered on the basis of a promise of leniency to a relative, and when the defendant's testimony at the plea hearing does not directly contradict that allegation, the trial court must hold an evidentiary hearing to determine whether the plea was involuntary. See *Jackson*, 203 Mich App at 612-613; *White*, 307 Mich App at 430-431. We therefore answer the first issue posed by our Supreme Court in the affirmative, with the caveat that the alleged promise of leniency to a relative rendering the guilty plea involuntary must somehow be substantiated before the defendant is entitled to an evidentiary hearing, and the caveat that the trial court may summarily deny an evidentiary hearing if the defendant's testimony at the plea hearing contradicts the new allegation.

C. THE EVIDENTIARY HEARING QUESTION

The second issue that our Supreme Court directed us to address is "how a trial court is to determine whether an offer of leniency to a relative 'rendered the defendant's plea involuntary in fact.' " *Samuels*, 507 Mich at 928 (citation omitted).

1. LEGAL PRINCIPLES

At the evidentiary hearing on a motion to withdraw a guilty plea, the trial court must consider the facts of the particular case to determine whether the defendant's plea was voluntary. See *Plumaj*, 284 Mich App at 652. See also *People v Forrest*, 45 Mich App 466, 469; 206 NW2d 745 (1973) ("[T]he question in each case is whether the inducement for the guilty plea was one

which necessarily overcame the defendant's ability to make a voluntary decision."). Generally, to be entitled to withdraw a plea, the defendant must present sufficient proof to "satisfy the trial court by a preponderance of credible evidence that the plea was the product of fraud, duress, or coercion." *People v Patmore*, 264 Mich App 139, 151-152; 693 NW2d 385 (2004) (quotation marks and citation omitted). Although a trial court is generally barred at the evidentiary hearing "from considering testimony or affidavits inconsistent with statements made during the plea hearing," *White*, 307 Mich App at 430, "guilty pleas may be withdrawn on the basis of promises of leniency if the record contains some [other] support for the defendant's claim," *Jackson*, 203 Mich App at 612-613 (quotation marks and citation omitted).

We emphasize that the case before us involves what defendant characterizes as a promise of leniency to a relative through a joint plea offer by the prosecution.[4] Apparently, surmising from our Supreme Court's remand order, Michigan courts have not yet specifically addressed how a trial court should determine whether a promise of leniency to a relative rendered a guilty plea involuntary. Federal courts, however, have addressed this issue in great detail.

The United States District Court for the District of Minnesota has explained that promises of leniency to a relative are not particularly problematic:

> Generally speaking, a guilty plea is not rendered involuntary simply because it is based in part on a prosecutor's promise of leniency toward some friend or relative of the

[4] It does not involve, for example, an off-the-record promise of leniency by defense counsel. For purposes of our discussion, we refer to a "promise of leniency" as contemplating only those promises by the prosecution to a defendant.

> defendant. A plea agreement containing such a condition is proper so long as the government acts in good faith based upon probable cause to file charges against or to prosecute the third party named in the agreement. Only physical harm, threats of harassment, misrepresentation, or promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes) render a guilty plea legally involuntary. Almost anything lawfully within the power of a prosecutor acting in good faith can be offered in exchange for a guilty plea. [*Anderson v United States*, opinion of the United States District Court for the District of Minnesota, issued May 15, 2003 (Case No. Civ. 02-3655 RHK), p 9 (cleaned up).]

Other federal courts are in accord with the proposition that the mere promise of leniency to a third party does not render a plea constitutionally invalid without other aggravating facts. See, e.g., *United States v Messino*, 55 F3d 1241, 1251 (CA 7, 1995) (ruling that the defendant was not allowed to challenge his guilty plea as involuntary despite the prosecution's threat to subpoena the defendant's children); *United States v Marquez*, 909 F2d 738, 741 (CA 2, 1990) ("[A]ll of the other circuits that have considered the issue have concluded that a plea is not invalid if entered (a) under a plea agreement that includes leniency for a third party or (b) in response to a prosecutor's justifiable threat to prosecute a third party if the plea is not entered[.]"). *Marquez* further explained why the promise of leniency to a third party does not render a guilty plea particularly suspect:

> The question in every case resolved by a guilty plea is whether the plea is voluntary. "Voluntary" for purposes of entering a lawful plea to a criminal charge has never meant the absence of benefits influencing the defendant to plead. Since a defendant's plea is not rendered involuntary because he enters it to save himself many years in

> prison, it is difficult to see why the law should not permit the defendant to negotiate a plea that confers a similar benefit on others. Some courts have expressed the view that the prospect of a benefit to a third party poses a greater risk of undue pressure upon a defendant than the chance to secure a reduced sentence for himself, though this view has been doubted. [*Id*. at 742 (citations omitted).]

More recently, in *United States v Seng Chen Yong*, 926 F3d 582, 591-592 (CA 9, 2019), the United States Court of Appeals for the Ninth Circuit summarized the relevant caselaw and articulated the following principles for determining whether a guilty plea induced by a promise of leniency to a third party is involuntary:

> This circuit has yet to provide a standard for determining whether a guilty plea conditioned on leniency for a third party is voluntary. Every federal court of appeal to consider the issue, however, has held that plea agreements that condition leniency for third parties on the defendant's guilty plea are permissible so long as the Government acted in "good faith," meaning that it had probable cause to prosecute the third party. *See United States v. McElhaney*, 469 F.3d 382, 385 (5th Cir. 2006); *United States v. Vest*, 125 F.3d 676, 680 (8th Cir. 1997); *United States v. Wright*, 43 F.3d 491, 499 (10th Cir. 1994); *United States v. Pollard*, 959 F.2d 1011, 1021–22 (D.C. Cir. 1992); *United States v. Marquez*, 909 F.2d 738, 742 (2d Cir. 1990); *Martin v. Kemp*, 760 F.2d 1244, 1248 (11th Cir. 1985); *Harman v. Mohn*, 683 F.2d 834, 837 (4th Cir. 1982); *United States v. Nuckols*, 606 F.2d 566, 569–70 (5th Cir. 1979); *see also Politte v. United States*, 852 F.2d 924, 929 (7th Cir. 1988) ("We hold that a good faith prosecution of a third party, coupled with a plea agreement which provides for a recommendation of a lenient sentence for that third party, cannot form the basis of a claim of coercion by a defendant seeking to show that a plea was involuntarily made."). As the Fifth Circuit explained in *Nuckols*:

> Recognizing, however, that threats to prosecute third persons can carry leverage wholly unrelated to the validity of the underlying charge, we think that prosecutors who choose to use that technique must observe a high standard of good faith. Indeed, absent probable cause to believe that the third person has committed a crime, offering "concessions" as to him or her constitutes a species of fraud. At a minimum, we think that prosecutors may not induce guilty pleas by means of threats which, if carried out, would warrant ethical censure.

606 F.2d at 569.

> We agree with these courts and hold that the Government must have probable cause to prosecute a third party when it conditions leniency for that party in exchange for a defendant's guilty plea. We note that these courts have used wording that focuses on whether probable cause was present at the time the threat was made or lenity offered. *See, e.g., Marquez*, 909 F.2d at 742 ("Where the plea is entered after the prosecutor threatens prosecution of a third party, courts have afforded the defendant an opportunity to show that probable cause for the prosecution was lacking when the threat was made."); *Wright*, 43 F.3d at 499. A prosecutor's improper coercion actually takes effect, though, when a defendant pleads guilty as a result of the threat or offer of lenity. Therefore, a defendant may successfully challenge the voluntariness of his plea by showing that probable cause to prosecute the third party did not exist at the time the defendant pleaded guilty, even if the Government had probable cause to prosecute at an earlier time.

Although we are not bound by these federal decisions, see *Sharp v Lansing*, 464 Mich 792, 809; 629 NW2d 873 (2001), we find them persuasive in this case, particularly given that the question of "voluntariness" in the guilty-plea context is one of due process. See *Bordenkircher v Hayes*, 434 US 357, 363; 98 S Ct 663; 54 L Ed 2d 604 (1978).

Therefore, to answer the second issue posed to us by our Supreme Court, we conclude that a trial court determines the voluntariness of a guilty plea induced by a promise of leniency to a relative, or any other third party, by assessing whether the prosecution had probable cause to prosecute the third party at the time the defendant pleaded guilty. "[A] defendant may successfully challenge the voluntariness of his plea by showing that probable cause to prosecute the third party did not exist at the time the defendant pleaded guilty . . . ." *Seng Chen Yong*, 926 F3d at 592. On the other hand, if probable cause to prosecute the third party did exist at the time the defendant pleaded guilty, then the defendant cannot show that his or her guilty plea was involuntary because it was induced by the promise of leniency to a third party. See *Politte*, 852 F2d at 930 ("[A] good faith prosecution of a third party, coupled with a plea agreement which provides for a recommendation of a lenient sentence for that third party, cannot form the basis of a claim of coercion by a defendant seeking to show that a plea was involuntarily made.").

We acknowledge that some state courts have identified the risks inherent in package familial plea agreements. See, e.g., *State v Danh*, 516 NW2d 539, 542 (Minn, 1994) (" 'Package deal' agreements are generally dangerous because of the risk of coercion; this is particularly so in cases involving related third parties, where there is a risk that a defendant, who would otherwise exercise his or her right to a jury trial, will plead guilty out of a sense of family loyalty."). However, this seems to be overcome by the federal courts' analytical framework, which requires an inquiry into whether the prosecution had probable cause to prosecute the third-party relative of the defendant. Moreover, creating a bright-line prohibition, or presumption, against such agreements potentially is

counterproductive and harmful to those defendants who find themselves in possible jeopardy with a family member.[5] It also would impinge on the right of a defendant to choose whether a plea agreement would be in his or her best interests. "Only a defendant can weigh the benefits of assenting to a plea agreement or the potential downsides of rejecting one." *People v Smith (On Remand)*, 321 Mich App 80, 104; 922 NW2d 615 (2017) (RIORDAN, J., dissenting), rev'd in part on other grounds 502 Mich 624 (2018). As illustrated by this case itself, had defendant not accepted the plea offer, the case would have proceeded to trial with overwhelming video evidence against him, and he would have been confronted with far more mandatory time in prison following a finding of guilt by the jury. We discern no principled reason why someone in defendant's position should not be able to benefit from a highly favorable plea offer which incidentally may also benefit a family member.

2. APPLICATION

Applying these principles to the instant case, defendant is entitled to an evidentiary hearing on the question of involuntariness if the record contains some substantiated allegation that raises a question of fact as to whether the prosecution had probable cause to prosecute Duane at the time defendant pleaded guilty. Having reviewed the record, there is no factual dispute whatsoever that the prosecution did have such prob-

[5] Further, such a bright-line prohibition or presumption begs the threshold question of how "family member" is to be defined. Is a "family member" an individual who is at least a third-degree relative, such as a first cousin, or does it include ninth-degree relatives such as a second cousin three times removed as well? Or will the codefendants define "family" according to whatever fits their circumstances?

able cause.[6] The video of the incident clearly shows both Duane and defendant seriously assaulting the defenseless victim with deadly weapons until he lay nearly dying on the floor. This evidence, by itself, is more than sufficient to establish probable cause to charge Duane with a variety of felony offenses, including the charges that the prosecution actually filed against him.[7] Further, there is nothing in the record to suggest that the prosecution did not otherwise act in good faith.

Accordingly, we conclude that defendant is not entitled to an evidentiary hearing on the question of involuntariness, and the trial court did not abuse its discretion by denying his motion to withdraw his plea.

III. CONCLUSION

The trial court did not abuse its discretion by denying defendant's motion to withdraw his plea without an evidentiary hearing. Therefore, we affirm.

SAWYER, P.J., and REDFORD, J., concurred with RIORDAN, J.

---

[6] At oral argument, defendant's appellate counsel conceded, in good faith, that there was probable cause to prosecute both brothers.

[7] There was other evidence as well, such as the victim's testimony, that additionally supported probable cause.

MILNE v ROBINSON

Docket No. 354534. Submitted November 2, 2021, at Grand Rapids. Decided December 28, 2021, at 9:10 a.m. Leave to appeal sought. Oral argument ordered on the application 510 Mich 947 (2022).

Rebecca Milne, personal representative of the estate of Riley Robinson, filed a negligence action in the Missaukee Circuit Court against Larry Robinson, Sr., and Ann Robinson (Riley's grandparents) in connection with an off-road recreational vehicle (ORV) accident that resulted in Riley's death. Defendants owned a cabin up north. The ORV accident occurred when Riley, her siblings, and her mother, plaintiff Rebecca Milne, were visiting defendants at the cabin. Riley was riding as the passenger on an all-terrain vehicle (ATV) owned by defendants and operated by her sister when the accident occurred; under MCL 324.81101(u), an ATV is an ORV. Although Riley's sister had been on an ATV more than 30 times before the accident and had received informal training on operating an ATV from her father, the ATV she was driving at the time of the accident was bigger and more powerful than those she had previously driven. Defendants separately moved for summary disposition, arguing that the negligence claim was barred under the recreational land use act (RUA), MCL 324.73301, because (1) Riley was using defendants' land to participate in the outdoor recreational activity of riding an ORV and (2) plaintiff failed to plead gross negligence or willful and wanton misconduct, a necessary requirement for liability to attach under the RUA. In response, plaintiff moved to amend her complaint to add a claim against defendant Larry Robinson, Sr., for owner's liability under MCL 257.401(1) of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*., and, to the extent the RUA applied, to allege that he was grossly negligent. The court, William M. Fagerman, J., granted defendants' motions for summary disposition, concluding that the RUA applied to the facts of the case and that any claim under the MVC would be trumped by the RUA. In addition, the court concluded that the record did not support a finding of gross negligence or willful and wanton misconduct to establish a question of material fact regarding the level of defendant Larry Robinson, Sr.'s negligence. Accordingly,

the court denied plaintiff's motion to amend because the amendment would have been futile. Plaintiff appealed.

The Court of Appeals *held*:

In the absence of gross negligence or willful and wanton misconduct, the RUA precludes a cause of action from arising when a person is injured while on the land of another without paying to the owner, tenant, or lessee of the land a valuable consideration for the purpose of hunting, trapping, camping, hiking, sightseeing, motorcycling, snowmobiling, or any other outdoor recreational use or trail use. In other words, an owner of land is not liable to a person who injures himself on the owner's land if that person has not paid for the use of the land and the person was using the land for a specified purpose unless the injuries were caused by the owner's gross negligence or willful and wanton misconduct. The RUA limits liability rather than imposing liability; thus, it eliminates liability for negligence, leaving liability under the act only for gross negligence and willful and wanton misconduct. In contrast, the owner's liability provision of the MVC, MCL 257.401(1), provides that the owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary-care standard required by common law; the owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. Stated differently, the provision broadly imposes liability for the negligent operation of a motor vehicle if the owner knows or has consented to the operation of that motor vehicle. Under the MVC, an ORV is a motor vehicle for purposes of MCL 257.401(1), and an ATV is an ORV as defined in MCL 324.73301(1); the RUA similarly includes the use of an ORV or ATV within the meaning of "outdoor recreational use or trail use." The RUA deals directly with the potential liability of landowners when another person recreationally uses their property with ATVs, while the MVC applies to all motor vehicles in all places and circumstances. Because the RUA is the more-specific statute as related to the recreational use of ATVs and ORVs, it—rather than the owner's liability provision of the MVC—applies when a person who is on the land of another, without paying the owner, for the purpose of motorcycling, snowmobiling, or any other outdoor recreational use or trail use is injured. Riley did not pay Larry Robinson, Sr., any consideration to use his land for riding the ATV. Accordingly, plaintiff's action was subject to the RUA, and Larry Robinson, Sr., could not be held liable under a theory of negligence. Plaintiff conceded on appeal that Larry Robinson, Sr.,

was not grossly negligent and that his actions did not constitute wanton and willful misconduct. Consequently, plaintiff was unable to assert a viable claim under the RUA. The trial court correctly dismissed plaintiff's negligence claim and granted summary disposition in favor of defendant. The trial court did not abuse its discretion by denying plaintiff's motion to amend the complaint because plaintiff's proposed amendment to add an owner's liability claim would have been futile.

Affirmed.

Giroux Trial Attorneys, PC (by *Matthew D. Klakulak*) for Rebecca Milne, Personal Representative of the Estate of Riley Robinson.

Garon Lucow Miller, PC (by *Daniel S. Saylor*) and *Ogne Alberts & Stuart, PC* (by *Jeffrey Bullard* and *Jared J. Andrzejewski*) for Larry Robinson, Sr.

Before: MURRAY, C.J., and MARKEY and RIORDAN, JJ.

MURRAY, C.J. Plaintiff, as personal representative of the estate of Riley Robinson, appeals as of right the trial court's order granting defendant Larry Robinson, Sr., summary disposition under MCR 2.116(C)(10).[1] Plaintiff argues that the trial court erred when it determined that the recreational land use act (RUA), MCL 324.73301, applied to this case over the owner's

[1] While plaintiff indicated in her brief that she is also challenging the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendant Ann Robinson, plaintiff does not argue that the trial court erred by granting her motion. As plaintiff has failed to adequately brief this argument, it is abandoned. See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008) ("Defendant's failure to properly address the merits of his assertion of error constitutes an abandonment of this issue on appeal."). Therefore, we will address plaintiff's arguments on appeal solely as to defendant Larry Robinson, Sr. Moreover, because plaintiff moved to add owner's liability claims under MCL 257.401(1) against Larry Robinson, Sr., only, all references to "defendant" in this opinion are to Larry Robinson, Sr., only.

liability provision, MCL 257.401(1), of the Michigan Vehicle Code (MVC), MCL 257.1 *et seq*. Plaintiff also challenges the trial court's denial of her motion for leave to amend her complaint on the basis that adding an owner's liability claim under the MVC was futile. For the reasons expressed below, we affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

This action arises as a consequence of an ORV[2] accident occurring on defendant's property, involving his grandchildren, Payton Robinson and Riley Robinson, which resulted in Riley's death. Rebecca Milne took her children, Payton, Riley, and Tyler Robinson, to visit defendant at his cabin in northern Michigan. The northern Michigan land consists of a cabin, pole barn, several wooded acres, and three trails often used for riding ORVs. On the day of the accident, 14-year-old Payton operated defendant's ATV on the trail while 12-year-old Riley sat as her passenger. After some time, Tyler borrowed his mother's keys to go looking for the girls. Tyler traveled down the trail where he discovered the ATV flipped over with Payton stuck underneath the center portion and Riley lying down in front of it. Payton and Riley were immediately transported to the hospital with life-threatening injuries, with Riley passing away soon after. Payton could not recall the details of the accident.

Before the accident, Payton and Riley frequently took ATV rides on their grandfather's property. Payton testified that she had been on an ATV more than 30 times before the accident and had received informal

[2] An "ORV" is a "motor-driven off-road recreation vehicle capable of cross-country travel without benefit of a road or trail, on or immediately over land, snow, ice, marsh, swampland, or other natural terrain. . . . An ATV is an ORV." MCL 324.81101(u).

training on operating an ATV from her father, Larry Robinson, Jr. However, the ATV used on the day of the accident was bigger and more powerful than the ATVs Payton previously rode.

Plaintiff filed the instant action, alleging that defendant was liable for Riley's injuries because defendant was negligent. Defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that the claim was barred under the RUA because Riley was using defendant's land to participate in the outdoor recreational activity of riding an ORV. Defendant also argued that he was entitled to summary disposition because plaintiff failed to plead gross negligence or willful and wanton misconduct, a consideration required for liability to attach under the RUA. MCL 324.73301(1).

In response, plaintiff argued that the owner's liability provision of the MVC should instead be imposed on defendant for negligent operation of the ORV notwithstanding the protections afforded landowners under the RUA. However, because plaintiff had failed to specifically state a claim under the MVC in her complaint, she sought leave to amend her complaint under MCR 2.118 to cure the deficiency. Plaintiff argued in the alternative that, to the extent the RUA was applicable, there were questions of material fact as to whether defendant's conduct amounted to gross negligence.

The trial court granted summary disposition to defendant under MCR 2.116(C)(10), concluding that the RUA applies to the underlying activities and that plaintiff's ordinary negligence claims under the MVC were "trumped" by the RUA. The court denied plaintiff's motion to amend her complaint to include the MVC claim since the amendment would have been

futile or moot. The court also concluded that the record did not support a finding of gross negligence or willful and wanton misconduct sufficient to establish a question of material fact regarding the level of defendant's negligence.

Plaintiff now raises only two issues on appeal. First, plaintiff argues that the RUA does not apply to her claim because the owner's liability provision of the MVC, MCL 257.401(1), is the more applicable statute. Second, plaintiff argues that she should have been permitted to amend her complaint to add a claim under the owner's liability provision of the MVC.

II. ANALYSIS—THE RECREATIONAL LAND USE ACT

Plaintiff argues that the trial court erred by granting summary disposition because the RUA does not apply to these circumstances, and thus she can maintain an owner's liability claim against defendant.

A trial court's decision on a motion for summary disposition is reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). This Court also reviews de novo whether a trial court properly interpreted a statute. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). Summary disposition is appropriate under MCR 2.116(C)(10) when, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) "tests the factual sufficiency of a claim." *El-Khalil*, 504 Mich at 160 (emphasis omitted). When the record "leave[s] open an issue upon which reasonable minds might differ," a genuine issue of material fact exists. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks and citation omitted; alteration in

original). When reviewing a motion under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*.

The RUA applies to ATV accidents on recreational property, and it provides:

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

Simply put, "an owner of land is not liable to a person who injures himself on the owner's land if that person has not paid for the use of the land and the person was using the land for a specified purpose, unless the injuries were caused by the owner's gross negligence or willful and wanton misconduct." *Neal*, 470 Mich at 667-668. The purpose of the RUA is to "provide immunity for landowners from personal-injury lawsuits by persons using their property recreationally, regardless of age, i.e., even when minors are injured." *Woodman v Kera LLC*, 486 Mich 228, 291; 785 NW2d 1 (2010) (opinion by MARKMAN, J.). The RUA is "a liability-limiting," rather than "a liability-imposing, act," meaning that it "did not create a cause of action against landowners" but instead "eliminated liability for negligence," leaving "liability only for gross negli-

gence and wilful and wanton misconduct." *Ballard v Ypsilanti Twp*, 457 Mich 564, 577-578; 577 NW2d 890 (1998).

Plaintiff's complaint alleges that defendant was liable in negligence for the injuries plaintiff sustained while riding the ATV on defendant's property and argues that she has a viable owner's liability claim against defendant notwithstanding the RUA. The owner's liability provision of the MVC, MCL 257.401(1), provides:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge.

The MVC broadly imposes liability for the negligent operation of a motor vehicle if the owner knows or has consented to the operation of that motor vehicle. *Id*. Under the MVC, an ORV is a motor vehicle for the purposes of MCL 257.401(1), and an ATV is an ORV, MCL 324.81101(u).[3] Similarly, the RUA, MCL 324.73301(1), undoubtedly includes the use of an ORV or ATV within the meaning of "outdoor recreational use or trail use." See *Neal*, 470 Mich at 670-671 ("Plaintiff does not contest the fact that riding an ATV on another's land is an outdoor recreational use of another's land within the meaning of the RUA."). Additionally,

[3] An "ATV" is currently defined as "a vehicle with 3 or more wheels that is designed for off-road use, has low-pressure tires, has a seat designed to be straddled by the rider, and is powered by a 500 cc to 1,000 cc gasoline engine or an engine of comparable size using other fuels." MCL 324.81101(b).

the statute lists both "motorcycles" and "snowmobiles" as types of vehicles covered by the act, and an ATV is similar in nature to those.

Because both the RUA and the MVC apply to ATVs, we must determine which to apply. Typically, the statute that more specifically applies to the subject matter must control. *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003) ("When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails."); see also *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008) ("In order to determine which provision is truly more specific and, hence, controlling, we consider which provision applies to the more narrow realm of circumstances, and which to the more broad realm."). We conclude that the RUA governs as it applies with greater specificity to the circumstances of the case than does the MVC. The RUA applies when a person who is on the land of another, without paying the owner, for the purpose of "motorcycling, snowmobiling, or any other outdoor recreational use or trail use" is injured. See MCL 324.73301(1). Clearly, the RUA is the more-specific statute as it deals directly with the potential liability of landowners when other persons recreationally use their property with ATVs. By contrast, the MVC applies to all motor vehicles in all places and circumstances. The Legislature's intention to have the provisions of the RUA apply to ATV accidents on recreational property is clear from the express language of the statute.

Having determined that the RUA applies, we turn to the question of whether the circumstances surrounding the accident on defendant's property fall directly within the purview of the statute so as to bar plaintiff's

claims. Riley did not pay defendant any consideration to use his land for the recreational activity, riding ATVs. As such, plaintiff's action is clearly subject to the RUA. Accordingly, defendant cannot be liable under a theory of negligence[4] as the "liability-limiting" nature of the RUA eliminates a landowner's liability for negligence. *Ballard*, 457 Mich at 577-578.

Given our conclusion that the MVC does not apply, we also hold that the trial court did not abuse its discretion by denying plaintiff's motion to amend the complaint because plaintiff's proposed amendment to add an owner's liability claim would be futile. *Wolfenbarger v Wright*, 336 Mich App 1, 21; 969 NW2d 518 (2021).

Affirmed.

MARKEY and RIORDAN, JJ., concurred with MURRAY, C.J.

---

[4] Plaintiff concedes on appeal that defendant was not grossly negligent and that his actions did not constitute wanton and willful misconduct.