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TABLE OF CASES REPORTED

PAGE

COURT OF APPEALS CASES

PROCTOR v SAGINAW COUNTY BOARD OF COMMISSIONERS
MAYNARD v COUNTY OF BENZIE
MORRIS v COUNTY OF MONTMORENCY
CARLSON v WITKOWSKI
SMITH v COUNTY OF WASHTENAW

Docket Nos. 349557, 349633, 349636, 350394, and 350406. Submitted November 10, 2021, at Detroit. Decided January 6, 2022, at 9:00 a.m. Leave to appeal sought.

In each consolidated case, the named plaintiff or plaintiffs failed to pay property taxes on their real property and forfeited their property to their county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. After the plaintiffs' defaults, the county treasurer in the county in which their property was located initiated tax foreclosure under the General Property Tax Act (GPTA), MCL 211.1 *et seq*. The county treasurers foreclosed on the properties, and the individual circuit courts entered judgments of foreclosure; title to the properties vested in the respective county treasurers when the plaintiffs failed to redeem their individual properties. Thereafter, the county treasurers sold the properties at auction and, in accordance with the then-existing provisions of the GPTA, retained the proceeds in excess of those needed to satisfy plaintiffs' outstanding taxes and associated fees or penalties. In identical complaints, the named plaintiff or plaintiffs filed an action against the involved county and the involved county's treasurer for the deprivation of the excess proceeds, including claims against the counties and individual government officials for inverse condemnation, taking in violation of the Fifth Amendment of the United States Constitution, unjust enrichment, excessive-fine in violation of the Eighth Amendment of the United States Constitution, and excessive-fine in violation of Michigan's 1963 Constitution. Plaintiffs sued the county treasurers in their individual capacities related to their federal constitutional claims and asserted their state-law claims for unjust enrichment and excessive-fine under the state Constitution against the county treasurers in their official capacity. The counties alone were sued under the inverse-condemnation claim. The named plaintiffs also filed a putative class action against several additional counties and their

respective treasurers, seeking to obtain relief for purported similarly situated persons. In each case, the trial court concluded that the individual officials sued in their personal capacities were entitled to qualified immunity and granted summary disposition to defendants on plaintiffs' claims. Plaintiffs appealed, and the Court of Appeals ordered the cases consolidated.

The Court of Appeals *held*:

1. As long as a governmental entity receives notice and an opportunity to respond, an official-capacity lawsuit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally because the real party in interest is the entity. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. If the law at the time was not clearly established at the time an action occurred, an official could not reasonably be expected to anticipate subsequent legal developments, nor could they fairly be said to "know" that the law forbade conduct not previously identified as unlawful. If the law was clearly established, an official's immunity defense should ordinarily fail because a reasonably competent public official should know the law governing their conduct. Thus, a governmental official has qualified immunity from suits under 42 USC 1983 when the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was clearly established at the time of the defendant's alleged misconduct. The focus of the inquiry is on whether the official had fair notice that their conduct was unlawful, and, for that reason, the reasonableness of the act must be judged against the backdrop of the law at the time of the conduct. The allegations and facts must show that it would have been clear to a reasonable official in the defendant's position that their conduct was unlawful under the situation they confronted. Relevant here, given the existing precedent applicable when defendant officials foreclosed on and sold the named plaintiffs' properties and retained the surplus proceeds from those sales, any existing constitutional takings question was not beyond debate. For that reason, the trial courts respectively did not err by holding that the individual governmental officials named in plaintiffs' respective actions were

entitled to qualified governmental immunity regarding plaintiffs' claims under the Fifth and Eighth Amendments of the United States Constitution.

2. Before plaintiffs' appeals were decided, the Michigan Supreme Court decided *Rafaeli, LLC v Oakland Co*, 505 Mich 429 (2020). Therein, the Court noted that Michigan's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property—including through unjust-enrichment and inverse-condemnation claims—and that property right is protected under Michigan's Takings Clause. Accordingly, when the government takes property to satisfy an unpaid tax debt, Michigan's Takings Clause requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure sale and sale of the property as just compensation. To the extent the GPTA permitted the government to retain the surplus proceeds, the *Rafaeli* Court declared the GPTA unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties.

3. Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants only prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. Relevant here, *Rafaeli* involved an action authorized by statute that the Court held unconstitutional. And given prior Michigan and United State Supreme Court caselaw, *Rafaeli* did not overrule clear and uncontradicted caselaw or specifically announce a new rule that at least had not been previously foreshadowed. Accordingly, *Rafaeli*'s holding applied retroactively to pending cases in which a challenge had been raised and preserved.

4. In response to *Rafaeli*, the Legislature amended the GPTA with 2020 PA 256, establishing a mechanism for persons to obtain surplus proceeds after a tax-foreclosure sale; in particular, MCL

211.78t(1)(b)(*i*) provides the exclusive mechanism for claiming surplus proceeds for properties sold under MCL 211.78m before July 18, 2020, the day after the *Rafaeli* opinion was issued. Relevant here, plaintiffs' properties in this case were sold under MCL 211.78m before July 18, 2020. Although MCL 211.78t(1)(b)(*i*) provides that a claim may be made for foreclosure sales before that date only if the Michigan Supreme Court orders the decision to apply retroactively, the act was effective December 22, 2020, the Legislature did not specify that it had retroactive application, and plaintiffs' lawsuits were filed well before the effective date of 2020 PA 256. Further, notwithstanding the wording of MCL 211.78t(1)(b)(*i*), the Court of Appeals is empowered to rule that *Rafaeli* applies retroactively to plaintiffs' claims because they were pending on appeal at the time *Rafaeli* was issued and before 2020 PA 256 was enacted. Plaintiffs had already made their claims before the *Rafaeli* decision and before the statute was enacted, and it would be illogical and unjust not to apply the ruling retroactively to this case. Applying *Rafaeli* to the facts of this case, plaintiffs alleged viable claims of violation of their common-law property rights protected under Michigan's Takings Clause to collect surplus proceeds that were realized from the tax-foreclosure sale of property, and the respective trial courts erred by holding otherwise.

5. Michigan's Takings Clause offers broader protection than the federal Takings Clause. Under *Rafaeli*, any federal claim for an unconstitutional taking provides no greater relief than that provided under the Michigan Constitution for such a takings claim. Relevant here, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property, no more, no less. Once the sale produces a surplus, the former owner may make a claim for the surplus proceeds, and the claimant is due interest from the date of the sale. To the extent a takings claim arises under the Fifth Amendment, interest is therefore due from the time a governmental unit obtains the surplus proceeds. A Fifth Amendment takings claim involving civil actions for the deprivation of rights must be made solely through 42 USC 1983. Local governing bodies can be sued directly under § 1983 for monetary, declaratory, or injunctive relief, where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by the body's officers. Although the touchstone of a § 1983 action against a governmental body is an allegation that

official policy is responsible for a deprivation of rights protected by the Constitution, local government, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision-making channels. Relevant here, MCL 211.78 allows counties to elect to have the state foreclose properties forfeited to the county treasurer under MCL 211.78g or to elect to act as the foreclosing governmental unit under the GPTA for all property forfeited to the county treasurer. By electing to act as the foreclosing governmental unit, a county may be sued for constitutional deprivations; stated differently, a county's decision to act as the foreclosing governmental unit constitutes a policy or practice for purposes of § 1983 analysis, and plaintiffs may bring a Fifth Amendment takings claim against the relevant governmental unit under 42 USC 1983 on that basis. While defendants in this case foreclosed on plaintiffs' respective properties by following the procedures set forth in the GPTA, the counties decided to act or had the custom of acting as the foreclosing governmental units, even though they were not required to do so by MCL 211.78. Thus, plaintiffs stated valid federal takings claims. Plaintiffs were not entitled to any recovery beyond the surplus proceeds from the tax-foreclosure sale, i.e., they were not entitled to recover their loss of equity that resulted from the forfeiture and sale of their properties for less than market value; however, plaintiffs were entitled to interest accrued after the tax-foreclosure sale on the surplus proceeds.

6. The Eighth Amendment of the United States Constitution and Article 1, § 16 of the Michigan Constitution prohibit excessive fines. Claims under those clauses generally apply to forfeitures associated with criminal activity. Applicable here, the purpose of the GPTA is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes; therefore, the GPTA is not punitive in nature. For that reason, the trial courts here did not err by dismissing plaintiffs' excessive-fines claims because there was no legal basis for applying either the federal or state Excessive Fines Clause to a nonpunitive taking associated with noncriminal activity.

7. With regard to class actions, an individual plaintiff who seeks to represent a class must in fact have standing to sue each of the named plaintiffs. Under the federal juridical-link doctrine, however, traditional standing requirements in class actions may

be dispensed with in cases in which a uniform policy is being applied consistently by state-actor defendants and is the sole basis for liability. While the doctrine has been applied by a federal court to an action brought under the GPTA, Michigan procedural rules apply to actions brought in Michigan courts. Further, 2020 PA 256, through MCL 211.78t, now sets forth the specific procedure under which a person may claim surplus proceeds under the GPTA. The named plaintiffs in this case were allowed to pursue their claims because their cases were pending on appeal at the time the *Rafaeli* decision was issued and because their claims were made before 2020 PA 256 was enacted and became effective. In contrast, the surplus-proceeds claims of the unnamed putative class members had not been raised and preserved, and the trial courts correctly denied plaintiffs' requests for class certification. The unnamed individuals and their still-to-be-made claims were, instead, subject to the requirements of MCL 211.78t.

Each case affirmed in part, reversed in part, and remanded for further proceedings.

CONSTITUTIONAL LAW – PROPERTY – TAKINGS CLAUSE – GENERAL PROPERTY TAX ACT – TAX-FORECLOSURE SALES – SURPLUS PROCEEDS – RETROACTIVE EFFECT OF RAFAELI, LLC V OAKLAND CO.

Under *Rafaeli, LLC v Oakland Co*, 505 Mich 429 (2020), when the government takes property to satisfy an unpaid tax debt, Michigan's Takings Clause requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property as just compensation; *Rafaeli* applies retroactively to all pending cases in which the same challenge was raised and preserved (Const 1963, art 10, § 2; MCL 211.1 *et seq*.).

Outside Legal Counsel PLC (by *Philip L. Ellison*) and *Matthew E. Gronda* for plaintiffs.

Cummings, McClorey, Davis & Acho, PLC (by *Allan C. Vander Laan*, *Douglas Curlew*, and *Timothy S. Ferand*) for defendants in Docket Nos. 349557, 349633, 349636 (except for Alcona County and Cheryl Franks), 350394 (except for Van Buren County, Trisha Nesbitt, and Karen Makay), and Docket No. 350406 (except for Washtenaw County and Catherine McClary).

Dykema Gossett PLLC (by *Theodore W. Seitz* and *Kyle M. Asher*) for defendants Van Buren County, Trisha Nesbitt, Karen Makay, Washtenaw County, and Catherine McClary.

Warner Norcross + Judd LLP (by *Matthew T. Nelson* and *Conor B. Dugan*) for defendants Alcona County and Cheryl Franks.

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

REDFORD, J. In these consolidated appeals involving the General Property Tax Act (GPTA), MCL 211.1 *et seq*., the named plaintiffs[1] appeal as of right from orders in each case granting summary disposition to the respective defendants under MCR 2.116(C)(7) and (8). For each case, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTUAL BACKGROUND

The underlying operative facts in each of these cases are not in dispute. Each named plaintiff failed to pay property taxes on his or her real property and forfeited their properties to their respective county treasurer for the total amount of those unpaid delinquent taxes, interest, penalties, and fees. Their defaults resulted in the county treasurers in the county where their properties were located to initiate tax foreclosures pursuant to MCL 211.78 *et seq*. The county treasurers foreclosed upon the properties and circuit court judgments of foreclosure were entered. Each plaintiff failed to redeem his or her respective property by the statutory deadline, resulting in the vesting of title to the

[1] Although parties sought class certification in each case, no court granted such motion.

properties in the respective county treasurers. The county treasurers thereafter sold the properties at auction. In accordance with the GPTA, each county retained the proceeds beyond those needed to satisfy outstanding taxes and associated fees or penalties.[2] In

[2] Defendants, in foreclosing on the properties and retaining "surplus proceeds," acted in accordance with then-existing provisions of the GPTA. Later, in *Rafaeli, LLC v Oakland Co*, 505 Mich 429, 446-448; 952 NW2d 434 (2020), our Supreme Court explained the statutory procedure for distributing tax-foreclosure proceeds under the version of MCL 211.78m that defendants adhered to in these cases:

> The foreclosing governmental unit then distributes the proceeds in [the account designated as the 'delinquent tax property sales proceeds for the year that the taxes became delinquent'] in a specific order of priority. The first priority is to reimburse the delinquent tax revolving fund for the full amount of unpaid taxes, interest, and fees owed on the property. This is followed by the annual costs incurred as a result of conducting foreclosure sales and general overhead in conducting the foreclosure proceedings for the year. The statutory scheme for reimbursement is quite exhaustive and even includes costs for maintaining property foreclosed under the GPTA, defending title actions, and administering the foreclosure and the disposition of forfeited property for delinquent taxes.
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> . . . But when there are excess proceeds from individual sales, such as the sale of plaintiffs' properties in this case, those proceeds are used to subsidize the costs for *all* foreclosure proceedings and sales for the year of the tax delinquency, as well as any years prior or subsequent to the delinquency. Then, after the required statutory disbursements are made, surplus proceeds may be transferred to the county general fund in cases in which the county is the foreclosing governmental unit. Of particular importance here, the GPTA does not provide for any disbursement of the surplus proceeds to the former property owner, nor does it provide former owners a right to make a claim for these surplus proceeds. Michigan is one of nine states with a statutory scheme that requires the foreclosing governmental unit to disburse the surplus proceeds to someone other than the former owner. [Citations omitted.]

each case, the named plaintiff or plaintiffs sued the involved county and the involved county's treasurer[3] for the deprivation of such monies but also filed a putative class action against several additional counties and their respective treasurers[4] in an attempt to obtain relief for purported similarly situated persons. In each case, the lower court granted summary disposition to the respective defendants under MCR 2.116(C)(7)[5] and (8). Later, but before the filing of the briefs in these appeals, our Supreme Court decided *Rafaeli, LLC v Oakland Co*, 505 Mich 429; 952 NW2d 434 (2020), wherein it concluded that a government unit's retention of surplus proceeds after a tax-foreclosure sale amounts to an unconstitutional taking. Later still, in response to *Rafaeli*, the Michigan Legislature amended the GPTA to provide a limited mechanism for persons to obtain surplus proceeds after a tax-foreclosure sale. These appeals involve,

[3] In some cases, former treasurers were also sued.

[4] In Docket No. 349557, Delores Proctor sued not only Tuscola County and its treasurer but also Bay, Midland, Gratiot, Saginaw, and Isabella counties and their treasurers. In Docket No. 349633, Ronald Maynard sued not only Newaygo County and its treasurer but also Benzie, Manistee, Wexford, Missaukee, Mason, Lake, Osceola, and Oceana counties and their treasurers. In Docket No. 349636, Stephen Morris and Robin Morris sued not only Roscommon County and its treasurer but also Montmorency, Alpena, Oscoda, Alcona, Arenac, Ogemaw, Clare, and Gladwin counties and their treasurers. In Docket No. 350394, Larry Carlson and Mary Jo Carlson sued not only Berrien County and its treasurer but also Cass, Van Buren, Kalamazoo, and St. Joseph counties and their treasurers. In Docket No. 350406, JoAnn Smith sued not only Monroe County and its treasurer but also Washtenaw, Hillsdale, and Lenawee counties and their treasurers.

[5] The grants of summary disposition under MCR 2.116(C)(7) involved immunity for certain claims against the individual treasurers.

among other issues, a consideration of whether *Rafaeli* or the amendments of the GPTA apply to plaintiffs' cases.[6]

II. ANALYSIS

A. QUALIFIED IMMUNITY

Plaintiffs contend that the lower courts erred by concluding that the individual officials sued in their personal capacities were entitled to qualified immunity. We disagree and affirm on this issue.

We review de novo a trial court's decision regarding a motion for summary disposition. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012). "We review de novo the applicability of government immunity." *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009). As stated in *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010):

> MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if

[6] The Court thanks and acknowledges appellants' and appellees' excellent initial briefs and oral arguments in this matter as well as the supplemental briefing following oral arguments, particularly in light of the ongoing federal litigation involving these same issues and attorneys.

> a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [Citations omitted.]

The identical complaints in these cases contained claims against the counties and individual government officials for inverse condemnation, taking in violation of the Fifth Amendment of the United States Constitution, unjust enrichment, excessive-fine in violation of the Eighth Amendment of the United States Constitution, and excessive-fine in violation of the state Constitution. Plaintiffs sued the county treasurers in their individual capacities related to their federal constitutional claims. Plaintiffs asserted their state-law claims for unjust enrichment and excessive-fine under the state Constitution against the county treasurers in their "official capacity." The counties alone were sued under the inverse-condemnation claim.[7]

As stated in *Kentucky v Graham*, 473 US 159, 166; 105 S Ct 3099; 87 L Ed 2d 114 (1985):

> As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *It is* not *a suit against the official personally, for the real party in interest is the entity*. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself. [Citation omitted; emphasis added.]

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[7] In *Lawson v Bouck*, 747 F Supp 376, 379-380 (WD Mich, 1990), the court considered the circumstances in which an individual would be deemed sued in his or her official capacity, and that case is instructive here. In this case, plaintiffs' explicit wording in the complaints indicates that the unjust-enrichment and state-law excessive-fine claims were asserted against the individual defendants in their official capacities.

In *Mays v Governor*, 323 Mich App 1, 89; 916 NW2d 227 (2018), aff'd 506 Mich 157 (2020), this Court similarly explained that official-capacity lawsuits are "nominal only[.]" Plaintiffs admit on appeal that in an official-capacity claim, "the claim is actually against the official's office and thus the government entity itself despite being in the name of an individual."

The question on which plaintiffs focus is whether the claims under the Fifth and Eighth Amendments could be maintained against the individual officials or whether the lower courts could dismiss those claims on qualified-immunity grounds. In relation to those claims, plaintiffs invoked 42 USC 1983. In *Harlow v Fitzgerald*, 457 US 800, 817-819; 102 S Ct 2727; 73 L Ed 2d 396 (1982), the United Sates Supreme Court stated:

> [W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
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> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should

> not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors. [Citations omitted.]

In *Holeton v Livonia*, 328 Mich App 88, 102-103; 935 NW2d 601 (2019), this Court recently explained:

> An official has qualified immunity from suits under 42 USC 1983 when the official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v Hughes*, 584 US ___, ___; 138 S Ct 1148, 1152; 200 L Ed 2d 449 (2018) (quotation marks and citation omitted). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v Callahan*, 555 US 223, 231; 129 S Ct 808; 172 L Ed 2d 565 (2009) (quotation marks and citation omitted). Before allowing a claim to proceed, courts must determine that the plaintiff has established two elements that defeat qualified immunity:
>
> > First, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. [*Id*. at 232 (quotation marks and citations omitted).]
>
> The focus of the inquiry is on whether the official had "fair notice that her conduct was unlawful," and, for that reason, the reasonableness of the act must be judged against the backdrop of the law at the time of the conduct. *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks

> and citations omitted). The allegations and facts must show that it would have been clear to a reasonable official in the defendant's position that his or her conduct was unlawful under the situation that he or she confronted. *Wood* [*v Moss*], 572 US [744,] 758; 134 S Ct 2056[; 188 L Ed 2d 1039 (2014)]. The Supreme Court of the United States has also repeatedly admonished lower courts "not to define clearly established law at a high level of generality." *Kisela*, 584 US at ___; 138 S Ct at 1152 (quotation marks and citation omitted). Although there need not be a case directly on point for a right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id*.

"Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v Callahan*, 555 US 223, 232; 129 S Ct 808; 172 L Ed 2d 565 (2009); see also *id*. at 243-244. "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v Luna*, 577 US 7, 11; 136 S Ct 305; 193 L Ed 2d 255 (2015) (quotation marks and citation omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 12 (quotation marks and citation omitted). "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id*. (quotation marks and citation omitted).

At the time of the wrongdoing alleged in the cases at bar, our Supreme Court had not yet issued its decision in *Rafaeli*. Further, at the time, governmental entities and their officials could reasonably rely on *Nelson v City of New York*, 352 US 103, 110-111; 77 S Ct 195; 1 L Ed 2d 171 (1956), which explained:

> What the City of New York has done is to foreclose real property for charges four years delinquent and, in the

> absence of timely action to redeem or to recover any surplus, retain the property or the entire proceeds of its sale. We hold that nothing in the Federal Constitution prevents this where the record shows adequate steps were taken to notify the owners of the charges due and the foreclosure proceedings.
>
> It is contended that this is a harsh statute. The New York Court of Appeals took cognizance of this claim and spoke of the "extreme hardships" resulting from the application of the statute in this case. But it held, as we must, that relief from the hardship imposed by a state statute is the responsibility of the state legislature and not of the courts, unless some constitutional guarantee is infringed.[8]

Moreover, in *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380, 386-387; 863 NW2d 745

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[8] The *Rafaeli* Court concluded that *Nelson* was not dispositive regarding the question facing the Michigan Supreme Court. The Court stated that in *Nelson*, there had been a statutory path for the plaintiff to obtain surplus proceeds, but the plaintiff had not followed it. *Rafaeli*, 505 Mich at 460. The *Rafaeli* Court explained:

> Read together, [*United States v Lawton*, 110 US 146; 3 S Ct 545; 28 L Ed 100 (1884)] and *Nelson* establish that the Takings Clause under the United States Constitution may afford former property owners a remedy when a tax-sale statute provides the divested property owner an interest in the surplus proceeds and the government does not honor that statutory interest. What [*People ex rel Seaman v Hammond*, 1 Doug 276 (Mich, 1844)], *Lawton*, and *Nelson* do not tell us, however, is what occurs when the statutes governing foreclosure make no mention of, or expressly preclude, a divested property owner's right to the surplus proceeds, but the divested property owner establishes a property right to the surplus proceeds through some other legal source, such as the common law. . . . Michigan's statutory scheme under the GPTA does not recognize a former property owner's statutory right to collect these surplus proceeds. Therefore, we must determine whether plaintiffs have a vested property right to these surplus proceeds through some other legal source, such as the common law. [*Rafaeli*, 505 Mich at 461-462.]

(2014), this Court explained a county treasurer's obligation to follow the statutory scheme of MCL 211.78m and use funds only for limited, permitted purposes. Under the existing precedent applicable at the times when the lower courts made their respective decisions in the cases at bar, it cannot be said that any constitutional takings question was beyond debate. *Mullenix*, 577 US at 12. Accordingly, the individual government officers against whom plaintiffs made their allegations were entitled to qualified governmental immunity regarding plaintiffs' claims under the Fifth and Eighth Amendments.[9] Further, the lower courts did not err by ruling early in the cases that the government officials were protected by qualified governmental immunity. "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell v Forsyth*, 472 US 511, 526; 105 S Ct 2806; 86 L Ed 2d 411 (1985). Plaintiffs' claims of error in this regard, therefore, fail as a matter of law.

B. VIABILITY OF INVERSE-CONDEMNATION AND UNJUST-ENRICHMENT CLAIMS

Plaintiffs contend that the lower courts erred by dismissing their unjust-enrichment and inverse-condemnation claims because, under the *Rafaeli* Court's interpretation of the Michigan Constitution, such claims are viable.[10] We hold that, as explained in

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[9] As for the Eighth Amendment claim, plaintiffs have not established that an Eighth Amendment violation was apparent *at any time* (see Part IV of this opinion), including at the time the treasurers acted.

[10] "Michigan recognizes the theory of inverse condemnation as a means of enforcing the constitutional ban on uncompensated takings of property." *Biff's Grills, Inc v State Hwy Comm*, 75 Mich App 154,

Rafaeli, in their inverse-condemnation and unjust-enrichment claims, plaintiffs alleged viable claims of violation of their common-law property rights protected under Michigan's Takings Clause to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. We therefore reverse the decision of the trial courts on this issue and remand to them for further proceedings.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Spohn*, 296 Mich App at 479. "A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery." *Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001).

In *Rafaeli*, 505 Mich at 468-489, our Supreme Court discussed *Dean v Dep't of Natural Resources*, 399 Mich 84; 247 NW2d 876 (1976), in analyzing whether Michigan law recognized a former property owner's right to collect, under a common-law claim of unjust enrichment, the surplus proceeds following a failure to redeem property after a tax foreclosure and sale of the property. The *Rafaeli* Court stated:

> In *Dean*, the plaintiff-property owner failed to pay her property taxes for both the city of Flint and Genesee County in the amount of $230.68 and $146.90, respectively. After the plaintiff failed to appear at the foreclosure hearing, the court issued a judgment authorizing the sale

156-157; 254 NW2d 824 (1997). Plaintiffs attempt to argue in these appeals that their inverse-condemnation claims are somehow separate from their state unconstitutional takings claims, but this is not the case.

of the plaintiff's property at a tax sale and stating that if the property was sold to the state, the state's title would become absolute unless the plaintiff timely redeemed the property. The state successfully bid on the plaintiff's property, starting the one-year redemption period for the plaintiff. During the redemption period, the plaintiff paid her delinquent city-property taxes in full but mistakenly failed to pay her delinquent county-property taxes. After she failed to timely redeem her property during the redemption period, the State Treasurer deeded the plaintiff's property to the state, which received absolute title to the property and then sold it to a private investor for $10,000. The plaintiff filed an action against the state, alleging, in relevant part, that the state had been unjustly enriched by retaining the $10,000 following the sale of her property. The circuit court granted summary disposition to the defendant, but this Court reversed, holding that the plaintiff could bring her suit for unjust enrichment[.]

* * *

Dean stands for more than just a recognition of the plaintiff's right to bring a claim under unjust enrichment for the surplus proceeds. Inherent in *Dean*'s holding is Michigan's protection under our common law of a property owner's right to collect the surplus proceeds that result from a tax-foreclosure sale. A viable claim for unjust enrichment requires the complaining party to show that the other party retained a *benefit* from the complaining party. In concluding that the plaintiff in *Dean* stated an actionable claim for unjust enrichment, this Court did not rely on any statutory right that the plaintiff had to collect the surplus proceeds. As is the case here, title to the plaintiff's property in *Dean* had already vested with the state. Without a statutory right, the plaintiff must have had a common-law right to these surplus proceeds. Otherwise, her claim of unjust enrichment would not be actionable because it could not have been said that the state retained a *benefit* at her expense. In sum, *Dean* supports the proposition that a property owner has a

> recognized common-law property right to the surplus proceeds from a tax-foreclosure sale.
>
> We conclude that our state's common law recognizes a former property owner's property right to collect the surplus proceeds that are realized from the tax-foreclosure sale of property. . . . [*Id*. at 468-470 (citations omitted).]
>
> * * *
>
> . . . Further, the prohibitions against collecting excess taxes, selling more land than needed to collect such taxes, and taking more property than necessary to serve the public all underlie a property owner's right to collect the surplus proceeds and were well-established legal principles before 1963. Therefore, we hold that the ratifiers would have commonly understood this common-law property right to be protected under Michigan's Takings Clause at the time of the ratification of the Michigan Constitution in 1963. [*Id*. at 472 (citation omitted).]
>
> * * *
>
> It is clear that our 1963 Constitution protects a former owner's property right to collect the surplus proceeds following a tax-foreclosure sale under Article 10, § 2. This right existed at common law; was commonly understood to exist in the common law before the 1963 ratification of our Constitution; and continues to exist after 1963, as our decision in *Dean* demonstrates. Because this common-law property right is constitutionally protected by our state's Takings Clause, the Legislature's amendments of the GPTA could not abrogate it. While the Legislature is typically free to abrogate the common law, it is powerless to override a right protected by Michigan's Takings Clause. [*Id*. at 473 (citations omitted).]

In the present cases, defendants contend that the unjust-enrichment claims lacked viability, but *Rafaeli* plainly indicates otherwise as a common-law right that

preexisted our state Constitution and continued to exist after the Constitution's ratification. *Rafaeli* clarified that an unjust-enrichment claim for recovery of the surplus proceeds following a tax-foreclosure sale is a right protected by and enforceable under our Constitution's Takings Clause, and the Legislature could not abrogate that right through amendments of the GPTA. *Id*. Our Supreme Court concluded:

> Once defendants foreclosed on plaintiffs' properties, obtained title to those properties, and sold them to satisfy plaintiffs' unpaid taxes, interest, penalties, and fees related to the foreclosures, any surplus resulting from those sales belonged to plaintiffs. That is, after the sale proceeds are distributed in accordance with the GPTA's order of priority, any surplus that remains is the property of plaintiffs, and defendants were required to return that property to plaintiffs. Defendants' retention of those surplus proceeds under the GPTA amounts to a taking of a vested property right requiring just compensation. To the extent the GPTA permits defendants to retain these surplus proceeds and transfer them into the county general fund, the GPTA is unconstitutional as applied to former property owners whose properties were sold at a tax-foreclosure sale for more than the amount owed in unpaid taxes, interest, penalties, and fees related to the forfeiture, foreclosure, and sale of their properties. [*Id*. at 474-475.]

The concept of unjust enrichment is also important in analyzing defendants' contention that plaintiffs sued the wrong parties and that the state constituted the only proper defendant for an assertion of the GPTA's unconstitutionality and the return of the surplus proceeds. In these cases, the *counties* foreclosed and plaintiffs forfeited their properties to the counties and nominally, to the counties' treasurers who obtained judgments and later sold the properties at tax sales, and the counties retained the surplus proceeds

as permitted under the GPTA. We note, too, that in *Rafaeli*, wherein the plaintiffs asserted inverse condemnation and an unconstitutional taking, the named defendants were the county and its treasurer. Therefore, we reject defendants' argument about the wrong defendants having been sued.

Defendants also contend that any relief proposed by the *Rafaeli* decision is not available to plaintiffs because *Rafaeli*, decided on July 17, 2020, should be given prospective application only, and all the foreclosure proceedings in these cases occurred before July 17, 2020. We disagree.

In *Paul v Wayne Co Dep't of Pub Serv*, 271 Mich App 617, 620-621; 722 NW2d 922 (2006), this Court stated:

> Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [Quotation marks and citations omitted.]

In *Paul*, our Supreme Court overruled prior caselaw in concluding that defects in the shoulder of a highway do not fall within the duty of repair and maintenance set forth in MCL 691.1402(1). *Id.* at 619. The Court stated that the newer "shoulder" decision had been

"foreshadowed" but that this newer decision did, in fact, establish a new rule of law requiring consideration of the three factors. *Id*. at 621. It therefore analyzed the three factors to determine whether retroactive application applied. *Id*. at 621-624.

Highly instructive is *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), which bears some similarities to *Rafaeli*. In *Hathcock*, our Supreme Court ruled that although certain condemnations of property for a particular purpose were authorized *by statute*, they were unconstitutional. *Id*. at 451. In making this finding of unconstitutionality, the Court overruled one of its previous decisions. *Id*. at 483. The *Hathcock* Court stated that many government actors had relied on the prior decision, but added:

> Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand. Our decision today does not announce a new rule of law, but rather returns our law to that which existed before [the prior decision] *and which has been mandated by our Constitution since it took effect in 1963*. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.
>
> Therefore, our decision to overrule [the prior decision] should have retroactive effect, *applying to all pending cases in which a challenge . . . has been raised and preserved*. [*Id*. at 484 (citations omitted; emphasis added).]

Rafaeli, like *Hathcock*, involved an action authorized by statute that the Court held unconstitutional. The *Hathcock* Court emphasized that "complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Id*. at 485 n 98 (quotation marks, citation, and brackets omitted); see also *Hyde v Univ of Mich Bd of*

Regents, 426 Mich 223, 240; 393 NW2d 847 (1986). Given the existence of cases such as *Dean*, 399 Mich at 93-95, and *Lawton*, 110 US at 150 (finding that a taking had occurred in connection with tax-sale proceeds), we do not conclude that our Supreme Court in *Rafaeli* overruled clear and uncontradicted caselaw or specifically announced a new rule that at least had not been previously foreshadowed. We hold that *Rafaeli*, like *Hathcock*, should be applied to pending cases, such as those of the named plaintiffs, in which a challenge has been raised and preserved.[11]

Relevant to our review of these matters is 2020 PA 256, which was clearly enacted in response to *Rafaeli*. MCL 211.78t(1), added by this public act, states:

> A claimant may submit a notice of intention to claim an interest in any applicable remaining proceeds from the transfer or sale of foreclosed property under section 78m, subject to the following:
>
> (a) For foreclosed property transferred or sold under section 78m after July 17, 2020, the notice of intention must be submitted pursuant to subsection (2).
>
> (b) For foreclosed property transferred or sold under section 78m before July 18, 2020, both of the following:
>
> (*i*) A claim may be made only if the Michigan supreme court orders that its decision in *Rafaeli, LLC v Oakland County*, docket no. 156849, applies retroactively.

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[11] A ruling that *Rafaeli* was not establishing a new rule of law *for purposes of a retroactivity analysis*, however, does not mean that the unconstitutionality of the former version of MCL 211.78m was so clear that individual officials could be held personally liable, as discussed in Part II(A) of this opinion.

(*ii*) Subject to subparagraph (*i*), the notice of intention must be submitted pursuant to subsection (6).

* * *

(6) For a claimant seeking remaining proceeds from the transfer or sale of a foreclosed property transferred or sold under section 78m pursuant to this subsection, the claimant must notify the foreclosing governmental unit using the form prescribed by the department of treasury under subsection (2) in the manner prescribed under subsection (2) by the March 31 at least 180 days after any qualified order. By the following July 1, the foreclosing governmental unit shall provide each claimant seeking remaining proceeds for the property and notifying the foreclosing governmental unit under this subsection with a notice relating to the foreclosed property in the form and manner provided under subsection (3). To claim any applicable remaining proceeds to which the claimant is entitled, the claimant must file a motion with the circuit court in the same proceeding in which a judgement [sic] of foreclosure was effective under section 78k by the following October 1. The motion must be certified . . . [.]

* * *

(11) This section is the exclusive mechanism for a claimant to claim and receive any applicable remaining proceeds under the laws of this state. A right to claim remaining proceeds under this section is not transferable except by testate or intestate succession.[12]

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[12] MCL 211.78*l* states:

(1) If a judgment for foreclosure is entered under section 78k and all existing recorded and unrecorded interests in a property are extinguished as provided in section 78k, the owner of any extinguished recorded or unrecorded interest in that property shall not bring an action, including an action for possession or recovery of the property or any interests in the property or of any proceeds from the sale or transfer of the property under this act, or other violation of this act or other law of this state, the state

The properties at issue in the present case were sold under § 78m "before July 18, 2020"; accordingly, MCL 211.78t(1)(b)(*i*) now provides the exclusive mechanism for the former property owners to claim the surplus proceeds from a tax sale. The statute indicates plaintiffs' claims would not be viable unless our Supreme Court issues a ruling that *Rafaeli* is to be applied retroactively. However, 2020 PA 256 had an effective date of December 22, 2020, and the Legislature did not specify that the new statute had retroactive application. Plaintiffs' lawsuits and claims of appeal were all filed well before the effective date. Further, despite the wording of MCL 211.78t(1)(b)(*i*), this Court is empowered to rule that *Rafaeli* applies to plaintiffs' claims because they were pending on appeal at the time of the *Rafaeli* decision and the enactment of 2020 PA 256. See *Hathcock*, 471 Mich at 484; see also *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006) ("[S]tatutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary.").[13] MCL 211.78t(1)(b)(*i*)

> constitution of 1963, or the Constitution of the United States more than 2 years after the judgment of foreclosure of the property is effective under section 78k. Nothing in this section authorizes an action not otherwise authorized under the laws of this state. An action to recover any proceeds from the sale or transfer of property foreclosed for nonpayment of real property taxes under this act must be brought as provided under section 78t.
>
> (2) The right to sue recognized by this section is not transferable except by testate or intestate succession.

In addition, MCL 211.78i now states that notice must include a statement about a person's right to claim surplus proceeds under MCL 211.78t. See, e.g., MCL 211.78i(7)(i).

[13] "An exception to the general rule presuming prospective application only is a statute that is remedial or procedural in nature and whose retroactive application will not deny vested rights." *Nortley v Hurst*, 321

sets forth when a claim can be made, but plaintiffs *had already made their claims* before the *Rafaeli* decision and before the enactment of the statute. It would neither be logical nor just for the plaintiffs in *Rafaeli* to be entitled to relief, see *Rafaeli*, 505 Mich at 485, but the present plaintiffs denied relief, even though both sets of plaintiffs raised and preserved the pertinent issue.[14] This result is further buttressed by the detailed analysis and conclusion in *Rafaeli*, which our Supreme Court reached by consideration and application of the constitutional rights that existed at the time of the adoption of the 1963 Michigan Constitution.

Plaintiffs also cite *Jackson v Southfield Neighborhood Revitalization Initiative*, 507 Mich 866 (2021), in which our Supreme Court stated:

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Oakland Circuit Court for reconsideration of the defendants' motions for summary disposition in light of *Rafaeli* . . . . In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should now be reviewed by this Court.

Plaintiffs contend that if our Supreme Court intended that *Rafaeli* be prospective only in application, it would never have issued this order in *Jackson*. We agree that our Supreme Court has indicated its intent that *Rafaeli*

Mich App 566, 571; 908 NW2d 919 (2017). Applying MCL 211.78t(1)(b)(*i*) to deny plaintiffs an avenue for relief under *Rafaeli* would be denying them existing rights.

[14] This result is further supported by *Buhl v Oak Park*, 507 Mich 236; 968 NW2d 348 (2021), in which the Supreme Court ruled that an amendment of the governmental tort liability act, which allowed governmental entities to plead the open and obvious danger doctrine in defense of claims, MCL 691.1402a(5), could "only be applied to causes of action that accrued after the effective date of the amendment."

be applied to cases in which the parties are similarly situated to the named plaintiffs' claims in these cases.

C. AVAILABLE REMEDIES AND FEDERAL TAKINGS CLAIMS

Plaintiffs contend that they are entitled to more relief than that set forth in *Rafaeli* on state-law grounds and on Fifth Amendment grounds.[15] We disagree with plaintiffs' contention that they are entitled to any recovery beyond the surplus proceeds from the tax-foreclosure sale, but we agree that plaintiffs are entitled to interest accrued after the tax-foreclosure sale on the surplus proceeds.

Plaintiffs argue that, under the state Constitution, plaintiffs are entitled to recover more than merely the difference between the foreclosure-sale price and the delinquent taxes (plus interest, costs, and penalty fees, etc.). Plaintiffs claim that they are also entitled to recover their loss of equity that resulted from the forfeiture and sale of the properties for less than market value. The *Rafaeli* Court, however, already considered this issue and ruled to the contrary:

> Defendants submit that if plaintiffs have, in fact, pleaded a viable takings claim, then the amount of compensation due could be more than the surplus proceeds from the tax-foreclosure sale. Plaintiffs make this point in their postargument briefing, arguing that a full remedy for an unconstitutional taking requires property owners to be put in as good of position had their properties not been taken at all. That is, while the surplus proceeds from a tax-foreclosure sale are some evidence of the value of the property and compensation due, plaintiffs contend that it may be less than just compensation and may instead constitute the fair market value of their properties.

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[15] For this part of our opinion and for Part IV of the opinion, the standard of review is the same as that set forth in Part II.

> We reject the premise that just compensation requires that plaintiffs be awarded the fair market value of their properties so as to be put in as good of position had their properties not been taken at all. First, this would run contrary to the general principle that just compensation is measured by the value of the property *taken*. In this case, the property improperly taken was the surplus proceeds, not plaintiffs' real properties. Second, plaintiffs are largely responsible for the loss of their properties' value by failing to pay their taxes on time and in full. If plaintiffs were entitled to collect more than the amount of the surplus proceeds, not only would they be taking money away from the public as a whole, but they would themselves benefit from their tax delinquency.
>
> Accordingly, when property is taken to satisfy an unpaid tax debt, just compensation requires the foreclosing governmental unit to return any proceeds from the tax-foreclosure sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property—no more, no less. [*Rafaeli*, 505 Mich at 482-484 (citations omitted).]

Plaintiffs contend that they had viable federal takings claims and that these federal claims allowed for greater relief than that allowed by *Rafaeli*. The *Rafaeli* Court stated, in summarizing its holding, that it was operating under the state Constitution. See *id*. at 437 ("We hold that defendants' retention of . . . surplus proceeds is an unconstitutional taking without just compensation under Article 10, § 2 of our 1963 Constitution."). However, the Court noted that it had also asked the parties to brief a takings claim under the federal Constitution. *Id*. at 441. The Court then cited the Takings Clauses of both the state and federal Constitutions. *Id*. at 453.[16] The Court stated:

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[16] The Fifth Amendment provides, in part, "[N]or shall private property be taken for public use, without just compensation." US Const, Am V. Const 1963, art 10, § 2, states, in part, that "[p]rivate property shall

> *While we draw on authority discussing and interpreting both clauses*, we must keep in mind that Michigan's Takings Clause has been interpreted to afford property owners greater protection than its federal counterpart when it comes to the state's ability to take private property for a public use under the power of eminent domain. [*Id*. at 454 (emphasis added).]

The Court went on to address some federal cases, *id*. at 457-461, 476 nn 111-112, and it again noted that the state Takings Clause had been interpreted as offering broader protection than the federal Takings Clause, *id*. at 477. Reading *Rafaeli* as a whole, it is apparent that our Supreme Court concluded that any federal claim would provide no greater relief than the state-Constitution-based relief set forth in *Rafaeli* itself. Also, *Freed v Thomas*, ___ F Supp 3d ___, ___; slip op at 4 (ED Mich, 2021), is instructive because the federal court, analyzing a Fifth Amendment takings claim, rejected the same argument being made by the current plaintiffs and stated that the relief available consisted of that specified in *Rafaeli*.[17] Moreover, in *Phillips v Washington Legal Foundation*, 524 US 156, 164; 118 S Ct 1925; 141 L Ed 2d 174 (1998), the United States Supreme Court explained, "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to existing rules or understandings that stem from an independent source such as state law." (Quotation marks and citation omitted.) The *Rafaeli* Court found a property interest in "surplus proceeds," which it defined as "any proceeds from the tax-foreclosure

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not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law."

[17] Decisions of lower federal courts are not binding on this Court, even for purposes of federal law, although they may be viewed as persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

sale in excess of the delinquent taxes, interest, penalties, and fees reasonably related to the foreclosure and sale of the property . . . ." *Rafaeli*, 505 Mich at 482-484. Accordingly, *Rafaeli* clarified the extent of the property interest for Fifth Amendment purposes in cases such as the cases at bar.

We note, however, that the *Freed* court did state that interest from the date of the foreclosure sale would also be due. *Freed*, ___ F Supp 3d at ___; slip op at 4, 8. *Rafaeli* remained silent regarding the issue of interest from the date of the foreclosure sale. See, e.g., *Rafaeli*, 505 Mich at 484-485. The *Rafaeli* Court, however, stated that "[*o*]*nce the sale produces a surplus*, the former owner may make a claim for the surplus proceeds." *Id*. at 477 (emphasis added). A reasonable implication from this latter statement is that a claimant would be due interest from the date of the sale. Also, in *Knick v Scott Twp, Pennsylvania*, 588 US ___, ___; 139 S Ct 2162, 2170; 204 L Ed 2d 558 (2019), the United States Supreme Court stated that, under the Fifth Amendment, interest is due from the time of a taking. *Knick* makes clear that, to the extent that plaintiffs' claims arise under the Fifth Amendment, interest would be due from the time that the counties obtained the surplus proceeds.

In *Fox v Saginaw Co*, ___ F Supp 3d ___, ___ (ED Mich, 2021); slip op at 13, the federal district court noted that a Fifth Amendment takings claim involving civil actions for the deprivation of rights must be made solely through 42 USC 1983.[18] Plaintiffs have conceded

[18] 42 USC 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

as much in the present appeal. The parties spend considerable time discussing whether plaintiffs satisfied the requirements for bringing a § 1983 claim as specified in *Monell v Dep't of Social Servs of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In *Monell*, *id*. at 690, the United States Supreme Court stated:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

Defendants contend that the counties, in foreclosing on plaintiffs' properties, were simply following a law

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thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

adopted by the Michigan Legislature, that no county policy was at issue, and that, therefore, no § 1983/Fifth Amendment claim was available for plaintiffs against the named defendants. In *Fox*, ___ F Supp 3d at ___; slip op at 10-11, the federal district court rejected this same argument, stating that the county officials had a policy or practice of acting as the foreclosing governmental units, even though they were not required to do so.

MCL 211.78 states, in part:

> (3) Not later than December 1, 1999, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and the county executive, if any, may elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g. At any time during December 2004, the county board of commissioners of a county, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, may do either of the following:
>
> (a) Elect to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (b) Rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.
>
> (4) Beginning January 1, 2009 through March 1, 2009, the county board of commissioners of a county in which is located an eligible city, as that term is defined in section 89d, may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its

prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(5) The county board of commissioners of a county that has elected to have property forfeited under section 78g foreclosed by this state under this act may, by a resolution adopted at a meeting held pursuant to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, and with the written concurrence of the county treasurer and county executive, if any, rescind its prior resolution by which it elected to have this state foreclose property under this act forfeited to the county treasurer under section 78g. A county board of commissioners shall forward a copy of the resolution and any concurrence to the department of treasury not later than November 30 in the year in which the resolution is adopted. A county that rescinds its prior election under this subsection shall act as the foreclosing governmental unit under this act for all property forfeited to the county treasurer under section 78g after February 1 in the year immediately following the year in which the resolution is adopted.

(6) The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963.

* * *

(8) As used in this section and sections 78a through 1554 for purposes of the collection of taxes returned as delinquent:

(a) "Foreclosing governmental unit" means 1 of the following:

(*i*) The treasurer of a county.

(*ii*) This state if the county has elected under subsection (3) to have this state foreclose property under this act forfeited to the county treasurer under section 78g.

(b) "Forfeited" or "forfeiture" means a foreclosing governmental unit may seek a judgment of foreclosure under

> section 78k if the property is not redeemed as provided under this act, but does not acquire a right to possession or any other interest in the property.

From this statutory language, it can be deduced that the counties made the decision to act or had the custom of acting as the foreclosing governmental units.[19] We find that the reasoning of *Fox* is persuasive and that plaintiffs stated valid federal takings claims. Accordingly, interest should be added to any judgments if they prevail. *Knick*, ___ US at ___; 139 S Ct at 2170.

D. EXCESSIVE FINES

Plaintiffs claim that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution and that the trial courts' orders must be reversed accordingly. We disagree.

The Eighth Amendment of the United States Constitution prohibits "excessive fines[.]"[20] In *Ingraham v Wright*, 430 US 651, 664; 97 S Ct 1401; 51 L Ed 2d 711 (1977), the United States Supreme Court explained:

> The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit*

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[19] Also, plaintiffs pleaded as much in the complaints and provided certain opt-in documents. Defendants claim that, in light of the language of the GPTA, the counties had no discretion regarding what to do with the surplus proceeds. This is true, but the counties did have discretion regarding whether to act as the foreclosing governmental units.

[20] This provision is applicable to the states. See *Timbs v Indiana*, 586 US ___, ___; 139 S Ct 682, 687; 203 L Ed 2d 11 (2019).

> *the power of those entrusted with the criminal-law function of government*. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools. [Emphasis added.]

In *Austin v United States*, 509 US 602; 113 S Ct 2801; 125 L Ed 2d 488 (1993), the United States Supreme Court applied the excessive-fines language of the Eighth Amendment to a criminal forfeiture of property related to the commission of a criminal offense. *Id*. at 620, 622. The application of the excessive-fines language of the Eighth Amendment to a forfeiture of money in *United States v Bajakajian*, 524 US 321; 118 S Ct 2028; 141 L Ed 2d 314 (1998), also rested on the fact that the person in question committed a criminal offense. See *id*. at 328, 332.

The Michigan Constitution states that "[e]xcessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16. In *In re Forfeiture of 5118 Indian Garden Rd*, 253 Mich App 255, 258-260; 654 NW2d 646 (2002), this Court noted that the state Excessive Fines Clause applies to forfeitures associated with criminal activity. In *Rafaeli*, 505 Mich at 449, our Supreme Court, in distinguishing a case in which a forfeiture occurred in connection with criminal activity, stated, "the GPTA is not punitive in nature. Its aim is to encourage the timely payment of property taxes and to return tax-delinquent properties to their tax-generating status, not necessarily to punish property owners for failing to pay their property taxes."

In the cases at bar, the deprivation of property did not result from criminal activity. Plaintiffs have provided no legal basis for applying either the state Constitution or United States Constitution Excessive Fines Clauses to a nonpunitive taking associated with noncriminal activity. The lower courts, therefore, did not err by dismissing plaintiffs' claims based on the Excessive Fines Clauses.

E. CLASS ACTIONS

Some of the lower courts concluded that plaintiffs' lawsuits were not properly structured and that claims against nonforum counties needed to be dismissed. Plaintiffs argue that their lawsuits were procedurally sound and that the lower courts erred by not certifying the cases as class actions.[21] We disagree.

We review de novo the proper interpretation and application of a court rule. We review for clear error the trial

[21] In Docket No. 350406, plaintiff moved for a stay of the class-certification deadline but withdrew the motion without prejudice, and the lower court extended the deadline until after it decided defendants' motion for summary disposition. The lower court granted Monroe County and its treasurer's motion for summary disposition and dismissed all other defendants without prejudice. In Docket Nos. 349557 and 349633, plaintiffs moved for a stay of the class-certification deadline, and the lower court did not address or decide the motion or the class-certification issue. In Docket No. 349636, the lower courts concluded that a class action was not available to allow the joinder of the "additional" counties and their treasurers. In Docket No. 350394, the lower court concluded that plaintiffs had no standing to pursue claims against Van Buren County or its officials because those defendants had not harmed the named plaintiffs and the claims were speculative. The court also concluded that the juridical-link doctrine (discussed in this opinion) was a federal doctrine and not applicable in Michigan courts. It concluded that the Van Buren defendants' motion for a change of venue was moot. Contrary to plaintiffs' suggestion, the lower courts were not relying on the venue rules in dismissing the "additional" counties and their treasurers.

> court's factual findings regarding class certification, and review for an abuse of discretion the trial court's discretionary decisions. A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake. [*Duskin v Dep't of Human Servs*, 304 Mich App 645, 651; 848 NW2d 455 (2014) (citations omitted).]

Plaintiffs claim entitlement to certification of their cases as class actions as a matter of law. We review questions of law—including questions of standing—de novo. *Groves v Dep't of Corrections*, 295 Mich App 1, 4; 811 NW2d 563 (2011); *Palo Group Foster Care, Inc v Dep't of Social Servs*, 228 Mich App 140, 145; 577 NW2d 200 (1998).

The parties spend time discussing jurisdiction, venue, and joinder, but the dispositive question, as acknowledged by plaintiffs, is whether class actions were appropriate. They concede, for example, that the class-action court rule, and not the general rules for joinder, govern this issue. In *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398, 399-400; 309 NW2d 615 (1981),[22] this Court stated:

> In August, 1975, plaintiff, a member of defendant Dearborn Indoor Racquet Club, filed the instant class action suit in Wayne County Circuit Court on behalf of himself and all males similarly situated. Defendants are the Dearborn Indoor Racquet Club, five other tennis clubs in the Wayne County area, the Michigan Indoor Tennis Association and Edward C. Roney, Jr., its president. Suit against all defendants is based on the differential price charged for male and female memberships. In the case of the Dearborn Club the membership charge was $85 for

[22] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

> males and $65 for females. Similar, though not identical, differential charges were made by the other five named defendant clubs.

The Court ruled that the plaintiff could maintain a class action against the Dearborn Indoor Racquet Club but not against the other defendants, stating that "one may not sue in a class action a defendant whom one could not sue individually." *Id*. at 406-407; see also *Magid v Oak Park Racquet Club Assoc, Ltd*, 84 Mich App 522, 531; 269 NW2d 661 (1978) ("[P]laintiffs may not sue in a class action a defendant whom they could not individually sue."). In *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999), this Court similarly stated that a "plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." These cases stand for the proposition that the individual plaintiff who seeks to represent a class must in fact have standing to sue each of the named defendants.

Michigan law does not allow plaintiffs to bring class actions in the manner of the present cases. Plaintiffs contend that this Court should adopt the "juridical-link doctrine" to overcome the barrier to standing discussed in *Tucich* and *Magid*. This federal doctrine allows for dispensation of the traditional standing requirements in class actions in cases in which a uniform policy is being applied consistently by state-actor defendants and is the sole basis for liability. See *Fox*, ___ F Supp 3d at ___; slip op at 3-6; see also *Payton v Kane Co*, 308 F3d 673, 678-682 (CA 7, 2002) (discussing the doctrine but declining to apply it directly and instead remanding the case for further development). The federal court in *Fox* applied the doctrine to allow for a class action, opining that the defendant counties' actions under the GPTA were juridically linked. *Fox*, ___ F

Supp 3d at ___; slip op at 6. The present cases, however, were brought in Michigan courts, so Michigan procedural rules apply.

Further, the Michigan Legislature has now adopted a specific procedure for a person to claim surplus proceeds under the GPTA. The Legislature has expressed its clear intent as to how claims for surplus proceeds must be made. As discussed in this opinion, we have concluded that the named plaintiffs, because their cases were pending on appeal at the time of the Supreme Court's *Rafaeli* decision and because their claims were made before the enactment of 2020 PA 256 and its effective date, should be allowed to pursue their claims. As noted, we relied in large part on *Hathcock*, 471 Mich at 484, wherein the Court applied its decision to "all pending cases in which a challenge . . . has been raised and preserved." We decline to conclude that the unnamed putative class members "raised and preserved" claims to the surplus proceeds given that the lower courts never granted class certification. Such unnamed persons and their still-to-be-made claims should be subject, instead, to the requirements of 2020 PA 256, MCL 211.78t.[23]

III. CONCLUSION

Therefore, in each case, we affirm in part, reverse in part, and remand for further proceedings in accordance with this opinion.

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[23] Plaintiffs have not argued in these appeals that class certification should go forward for counties involved with the named plaintiffs. They state only that "[r]eversal is minimally required for each plaintiff individually against each county/treasurer even if this Court declines to approve the juridical link doctrine." The putative plaintiffs had no pending claims such that the rule from *Hathcock* should be applied. As discussed in this opinion, any federal claim ultimately derives from

We specifically conclude as follows:

A. The individual officials sued in their personal capacities were entitled to qualified immunity, and therefore, we affirm all trial court decisions related to these claims.

B. Plaintiffs have alleged in their inverse-condemnation and unjust-enrichment claims, potentially viable claims of violation of their common-law property rights protected under Michigan's Takings Clause, which, if successful, could allow them to collect the surplus proceeds that are realized from the tax-foreclosure sale of property, and therefore, we reverse all trial court decisions related to these claims.

C. Plaintiffs' claims that they are entitled to recovery beyond the surplus proceeds from the tax-foreclosure sale is unsupported by the law, and therefore, we affirm the trial courts' decisions to dismiss these claims. As to plaintiffs' claims that they are entitled to interest accrued after the tax-foreclosure sale on any amounts that represent an inverse condemnation of their property, we agree these claims are potentially viable and we reverse the trial courts' decisions to dismiss those portions of the claims.

D. Plaintiffs' claims that they had viable causes of action for excessive fines under the Eighth Amendment of the United States Constitution and under the state Constitution are without merit, and therefore, we affirm the trial courts' decisions in this regard.

E. Plaintiffs' argument that their purported class-action claims were sound and should have been certi-

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Rafaeli's conclusion that surplus proceeds after a foreclosure sale constitute a constitutionally protected property interest. Accordingly, it cannot be said that the putative class members have a federal claim in the absence of an application of *Rafaeli*.

fied by the trial courts is without merit, and therefore, we affirm the trial courts' decisions in this regard.

We do not retain jurisdiction.

STEPHENS, P.J., and LETICA, J., concurred with REDFORD, J.

BRUSKY v DEPARTMENT OF TREASURY

Docket No. 355670. Submitted January 4, 2022, at Lansing. Decided January 13, 2022, at 9:00 a.m.

Larry Brusky, doing business as Brusky Construction, brought an action in the Court of Claims against the Department of Treasury, seeking to enjoin defendant from enforcing final tax assessments for the tax period September 2013 to December 2016. During this tax period, plaintiff, a licensed motor carrier that transported aggregate material in bulk quantities for its customers engaged in construction projects, had purchased aggregate material for its customers and billed them for both the material and delivery charges. While plaintiff's customers paid the sales tax on the aggregate material, neither plaintiff nor its customers paid sales tax on the delivery charges. Notably, for the tax period at issue, plaintiff claimed an exemption from sales tax on the delivery charges in its tax returns. In August 2017, defendant initiated an audit of plaintiff for the tax years at issue and determined that a sales-tax deficiency of $192,273 existed for failure to remit sales taxes related to delivery charges. The auditor determined that the delivery charges were taxable because plaintiff bore the risk of loss during delivery, ownership of the aggregate material transferred after delivery, payment was due after delivery, and plaintiff's books and records did not separately identify delivery income to determine tax on the sales at retail or whether the delivery service was profitable. Plaintiff sought an informal conference to appeal the audit, and after the hearing, the referee issued an informal conference recommendation upholding the assessments. Defendant adopted the referee's recommendation and issued a decision and order of determination upholding the assessments. Defendant then issued final assessments for each of the tax years at issue. Plaintiff subsequently brought this action to enjoin defendant from enforcing the final assessments. Plaintiff asserted that it was not liable for the assessed sales tax on delivery charges under MCL 205.51(1)(d)(*iv*) of the General Sales Tax Act (the GSTA), MCL 205.51 *et seq*., because it had acted as a purchasing agent for its customers, not a seller of aggregate material. Plaintiff averred that the transfer of ownership occurred before the delivery charges were incurred and, thus, it was

not liable for the assessed tax. The parties filed cross-motions for summary disposition. Defendant argued that summary disposition in its favor was proper because the evidence established that plaintiff was a retailer that purchased aggregate material tax-free using an exemption certificate and resold it to its customers, charging its customers the sales tax for that material. Because plaintiff's customers "incurred" the delivery charges before transfer of ownership to the ultimate customer, defendant asserted that delivery charges should have been included in plaintiff's tax base. The Court of Claims, COLLEEN A. O'BRIEN, J., granted summary disposition in favor of defendant, determining that imposition of the tax was proper. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 205.52(1) of the GSTA provides, in relevant part, that there is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business. MCL 205.51(1)(c) defines "gross proceeds" to mean "sales price." MCL 205.51(1)(d) defines "sales price," in relevant part, as the total amount of consideration for which tangible personal property or services are sold. Under MCL 205.51(1)(d)(*iv*), delivery charges are included within the meaning of sales price: delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property are subject to the tax levied under the GSTA from the seller to the purchaser; a seller is not liable under the GSTA for delivery charges allocated to the delivery of exempt property. Accordingly, the sales tax base for "all persons engaged in the business of making sales at retail" includes "delivery charges," so long as such charges are incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser. In this case, the undisputed evidence demonstrated that plaintiff engaged in sales at retail and thus was liable for sales tax, which included delivery charges incurred before the transfer of ownership of the property. The evidence did not demonstrate a genuine question of material fact that plaintiff acted as a purchasing agent; rather, the undisputed facts demonstrated a simple buyer-seller transaction between plaintiff and its customers. That plaintiff bought the material upon request and resold it to its customers did not transform plaintiff into a purchasing agent, given that plaintiff's customers did not control plaintiff's conduct and there was no evidence that plaintiff represented its customers as an agent in

transactions with the aggregate suppliers. Furthermore, the GSTA does not require mutual assent to engage in sales at retail; accordingly, plaintiff's argument that it was not engaged in retail sales because it did not agree to be a seller was without merit.

2. MCL 205.54d(i) provides that a person is exempt from sales tax if the sale is made outside of the ordinary course of the seller's business. Consequently, all sales at retail are subject to taxation, regardless of whether a person's primary business is retail sales, so long as the sales are made within the person's ordinary course of business. Plaintiff's argument that *Midwest Power Line, Inc v Dep't of Treasury*, 324 Mich App 444 (2018)—which construed the phrase "persons engaged in the business of" in the Use Tax Act, MCL 205.91 *et seq*., to mean that a taxpayer must be *primarily* engaged in a particular type of business to qualify for an exemption—applied here because the GSTA uses the same language was without merit. It was improper to simply insert this meaning into the language of the GSTA without regard to its larger context. Reading MCL 205.52(1) in context of the GSTA evinced no intent that only persons who engage *primarily* in retail sales are subject to sales tax. Accordingly, *Midwest Power Line* was inapplicable in this case.

3. The Court of Claims correctly found that the incidental-to-services test of *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13 (2004), was irrelevant to the facts of this case. *Catalina Marketing* held that when a single transaction involves both the provision of services and the transfer of tangible personal property, it must be categorized as either a service or a tangible property transaction. However, the *Catalina Marketing* Court recognized instances in which services may be subject to sales tax. Because the Legislature expressed a clear intent that delivery services related to the transfer of ownership of tangible personal property are subject to sales tax under MCL 205.52(1) and MCL 205.51(1)(d)(*iv*), *Catalina Marketing*'s incidental-to-services test was not applicable.

Affirmed.

TAXATION – GENERAL SALES TAX ACT – DELIVERY SERVICES – TAXATION OF DELIVERY CHARGES.

Under the General Sales Tax Act, MCL 205.51 *et seq*., the sales tax base for all persons engaged in the business of making sales at retail includes delivery charges so long as such charges are incurred before the completion of the transfer of ownership of tangible personal property from the seller to the purchaser (MCL 205.52(1); MCL 205.51(1)(d)(*iv*)).

Sullivan & Leavitt, PC (by *Michael J. Leavitt* and *George L. Howell*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Emily C. Zillgitt* and *Genevieve T. Fischré*, Assistant Attorneys General, for defendant.

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

PER CURIAM. Plaintiff, Larry Brusky, doing business as Brusky Construction, appeals by right the Court of Claims opinion and order granting summary disposition in favor of defendant, the Department of Treasury. The court concluded that plaintiff engaged in retail sales under MCL 205.52(1) and that its tax base included "delivery charges" under the General Sales Tax Act (the GSTA), MCL 205.51 *et seq*., because plaintiff incurred the charges before the transfer of ownership from plaintiff to its customers. Finding no error warranting reversal, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff is a licensed motor carrier that transports aggregate material, such as sand or gravel, in bulk quantities for its customers engaged in construction projects. For the tax period at issue, September 2013 through December 2016, plaintiff purchased aggregate material for its customers and billed them for both the material and delivery charges. In a typical transaction, a customer would solicit a bid for certain aggregate material. Plaintiff, in turn, would obtain quotes from multiple aggregate suppliers for the requested material. Plaintiff calculated delivery charges for the aggregate material on the basis of an hourly rate, taking

time and distance into consideration. Although plaintiff calculated the cost of material and delivery separately for purposes of preparing the bid, plaintiff quoted a price to its customers in a single, whole number that included delivery charges and sales tax.

Plaintiff did not enter into contracts with its customers. Once a customer accepted a bid, however, a purchase order would be created reflecting the singular, agreed-upon price. While plaintiff's customers paid the sales tax on the aggregate material, neither plaintiff nor its customers paid sales tax on the delivery charges. Notably, for the tax period at issue, plaintiff claimed an exemption from sales tax on the delivery charges in its tax returns.

With respect to plaintiff's acquisition of the aggregate material to fulfill an accepted bid, plaintiff paid for the material itself but did not pay sales tax. Plaintiff provided a sales-tax-exemption certificate predicated on the fact that it would be reselling the material to its customers. At the time plaintiff took possession of the aggregate material at a supplier's aggregate pit, a load ticket was created showing the amount of aggregate material plaintiff received. The supplier would invoice plaintiff later for the material taken. Neither the load tickets nor the invoices identified the end user or specific project for which the aggregate material was ultimately intended.

In August 2017, defendant initiated an audit of plaintiff for the tax years at issue and determined that a sales-tax deficiency of $192,273 existed for failure to remit sales taxes related to delivery charges. Relying on Revenue Administrative Bulletin (RAB) 2015-17,[1] the auditor determined that the delivery charges were

[1] RAB 2015-17 states, in relevant part:

taxable because plaintiff bore the risk of loss during delivery, ownership of the aggregate material transferred after delivery, payment was due after delivery, and plaintiff's books and records did not separately identify delivery income to determine tax on the sales at retail or whether the delivery service was profitable.

> The tax base includes delivery or installation charges that are incurred prior to the completion of transfer of ownership of tangible personal property subject to the Act. Therefore, whether ownership of the property is transferred *before* or *after* the delivery or installation charges are *incurred* determines if those charges are subject to tax. The Department will consider all facts and circumstances of the transfer of ownership of the property to determine if delivery or installation charges are taxable, including, but not limited to:
>
> 1. Whether the customer has the option to either pick up the property or have the property delivered;
>
> 2. Whether the delivery or installation charge is separately negotiated and contracted for on a competitive basis;
>
> 3. Whether the property and delivery or installation charges are separately invoiced;
>
> 4. Whether the taxpayer's books and records separately identify the transactions used to determine the tax on the sale at retail;
>
> 5. Whether delivery or installation service records indicate a net profit (i.e., the delivery or installation service is a commercial endeavor separate from the retail business);
>
> 6. The time at which risk of loss transfers from seller to buyer;
>
> 7. The time at which title to the property passes from seller to buyer;
>
> 8. Any other information that is relevant in determining when ownership transfers.
>
> None of the above factors, standing alone, conclusively determine the taxability of delivery or installation charges; the Department will look at the entire transaction when making its determination. [Citation omitted.]

Plaintiff subsequently sought an informal conference to appeal the audit. After the hearing, the referee issued an informal conference recommendation upholding the assessments. The referee found that plaintiff failed to rebut the presumption that the assessment was valid by producing evidence showing that the delivery charges were wrongly assessed. Although plaintiff argued that it acted as a purchasing agent, the referee found that the evidence demonstrated that the delivery charges were taxable. Plaintiff's books and records did not separately invoice delivery charges and sales of aggregate material, thereby making it impossible to determine whether the deliveries themselves reflected a profit; no evidence supported that plaintiff never took ownership of the aggregate material before delivery; no evidence showed that plaintiff did not bear the risk of loss before delivery; and plaintiff collected and remitted sales tax. Defendant adopted the referee's recommendation and issued a decision and order of determination upholding the assessments. It then issued final assessments for each of the tax years at issue.

On January 23, 2019, plaintiff filed a complaint seeking to enjoin defendant from enforcing the final assessments. Plaintiff asserted that it was not liable for the assessed sales tax on delivery charges under MCL 205.51(1)(d)(*iv*) because plaintiff allegedly acted as a purchasing agent for its customers, not a seller of aggregate material. Plaintiff averred that the transfer of ownership occurred before the delivery charges were incurred and, thus, it was not liable for the assessed tax.

Thereafter, the parties filed cross-motions for summary disposition under MCR 2.116(C)(10). In its motion, defendant argued that summary disposition in its

favor was proper because the evidence established that plaintiff was a retailer that purchased aggregate material tax-free using an exemption certificate and resold it to its customers, charging its customers the sales tax for that material. Because plaintiff's customers "incurred" the delivery charges before transfer of ownership to the ultimate customer, defendant asserted that delivery charges should have been included in plaintiff's tax base.

Plaintiff countered that it was not primarily engaged in making retail sales and, therefore, it was not subject to sales tax. Relying on *Midwest Power Line, Inc v Dep't of Treasury*, 324 Mich App 444; 921 NW2d 543 (2018), in which this Court construed the phrase "persons engaged in the business of" in the Use Tax Act (the UTA), MCL 205.91 *et seq*., to mean that a taxpayer must be *primarily* engaged in a particular type of business to qualify for an exemption, plaintiff explained that because the GSTA uses the same language, plaintiff must be primarily engaged in retail sales to be subject to sales tax. Because plaintiff characterized its primary business as transportation services—given that it was hired to pick up and deliver aggregate material as a purchasing agent—it was not subject to sales tax. Additionally, plaintiff argued that it was engaged in the sale of a service (delivery) and, therefore, not subject to sales tax under the incidental-to-services test of *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13; 678 NW2d 619 (2004).

The court granted summary disposition in favor of defendant, finding first that plaintiff failed to keep separate books and records reflecting its allegedly nontaxable delivery services business. Accordingly, the court determined that imposition of the tax was proper under MCL 205.52(3), which allows for imposition of

sales tax on entire gross proceeds of plaintiff's business if separate books and records are not kept to show the separate transactions. The court otherwise found that the documentary evidence supported that the delivery charges were subject to tax. Focusing its analysis on whether ownership transferred after delivery under MCL 205.51(1)(d)(*iv*) and RAB 2015-17, the court found that plaintiff's invoices, which included delivery charges and materials in a single document, as well as its trial balance showing "sales" without distinguishing delivery from materials, supported the determination that plaintiff's customers did not take ownership of the aggregate material until after delivery. The court found *Catalina Marketing* inapplicable because in that case, the Michigan Supreme Court expressly recognized that while there is a general rule that sales tax only applies to the sale of tangible personal property, some services may be subject to taxation if expressly prescribed by the Legislature. Finally, the court declined to apply *Midwest Power Line*'s interpretation of language used in the UTA, noting that to do so would render nugatory provisions of the GSTA that impose tax on delivery charges even when the taxpayer is not primarily engaged in the business of delivery.

II. STANDARD OF REVIEW

This Court reviews de novo a decision of the Court of Claims granting summary disposition. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 372; 781 NW2d 310 (2009). This Court reviews a motion under MCR 2.116(C)(10) by considering "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party. Summary disposition is appropriate if there is no genuine issue regard-

ing any material fact and the moving party is entitled to judgment as a matter of law." *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012) (quotation marks and citations omitted).

Questions of statutory interpretation are also reviewed de novo. *Ford Motor Co v Dep't of Treasury*, 288 Mich App 491, 494; 794 NW2d 357 (2010). "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the Legislature's intent." *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 276; 621 NW2d 233 (2000). "Where the language poses no ambiguity, this Court need not look outside the statute, nor construe the statute, but need only enforce the statute as written." *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 648; 732 NW2d 116 (2007).

III. ANALYSIS

The GSTA imposes a tax on the privilege of making retail sales of tangible personal property in the state of Michigan. *Andrie Inc v Dep't of Treasury*, 496 Mich 161, 168-169; 853 NW2d 310 (2014). Specifically, under MCL 205.52(1):

> [T]here is levied upon and there shall be collected from *all persons engaged in the business of making sales at retail*, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the *gross proceeds* of the business . . . . [Emphasis added.]

The GSTA defines "gross proceeds" to mean "sales price." MCL 205.51(1)(c). "Sales price," in turn, is defined, in relevant part, as "the total amount of consideration . . . , for which tangible personal property or services are sold . . . ." MCL 205.51(1)(d). The definition of "sales price" includes a specific list of

items that are included or excluded from the definition of sales price. See MCL 205.51(1)(d). "Delivery charges" are included within the meaning of "sales price" and are defined as follows:

> Delivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property subject to the tax levied under this act from the seller to the purchaser. A seller is not liable under this act for delivery charges allocated to the delivery of exempt property. [MCL 205.51(1)(d)(*iv*).]

Accordingly, the sales tax base for "all persons engaged in the business of making sales at retail" includes "delivery charges," so long as such charges are incurred "before the completion of the transfer of ownership of tangible personal property . . . from the seller to the purchaser."

A. RETAIL SALES

On appeal, plaintiff asserts that the Court of Claims erred when it granted summary disposition in defendant's favor because it disregarded the agency relationship between plaintiff and its customers. According to plaintiff, only persons making sales at retail are liable for sales tax under the GSTA, including sales tax on delivery charges. Plaintiff contends that it was acting as a purchasing agent—not a seller at retail—and is, therefore, not liable for the tax on delivery charges.

Even assuming that a purchasing agent is not liable for sales tax under the GSTA, the evidence submitted to the court does not demonstrate a genuine question of material fact that plaintiff acted as a purchasing agent. "Under the common law of agency, in determining whether an agency has been created, we consider the relations of the parties as they in fact exist under

their agreements or acts and note that in its broadest sense agency includes every relation in which one person acts for or represents another by his authority." *Wigfall v Detroit*, 504 Mich 330, 340; 934 NW2d 760 (2019) (quotation marks and citation omitted). "Fundamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent." *Id*. (quotation marks and citation omitted).

The undisputed facts demonstrate a simple buyer-seller transaction between plaintiff and its customers. Nothing in the record shows that plaintiff's customers had any control over where plaintiff purchased aggregate material or the delivery routes that plaintiff chose to deliver the material. Plaintiff's customers sought only to procure the best price of the aggregate material needed for the projects on a timely basis. Moreover, plaintiff's business was to offer to resell aggregate material that it could procure from a third party and deliver to its customers. That plaintiff bought the material upon request and resold it to its customers does not transform plaintiff into a purchasing agent, given that plaintiff's customers did not control plaintiff's conduct and there was no evidence plaintiff represented its customers as an agent in transactions with the aggregate suppliers. In short, the record does not support that plaintiff acted as a purchasing agent for its customers.

Relatedly, plaintiff also asserts that it was not engaged in retail sales under the GSTA because, as a purchasing agent, it did not "agree[]" to be a seller. In support, plaintiff explains that the GSTA does not define "sale" and that *Black's Law Dictionary* (8th ed) defines that term, in part, as an agreement for the transfer of property that includes mutual assent. By plaintiff's logic, because it is a purchasing agent, it

never mutually assented to sell property and, thus, transfer of ownership passed to the purchasers when the supplier delivered the material to plaintiff. This argument is without merit.

First, plaintiff's argument fails at the outset because, as explained, the facts do not support a finding that plaintiff acted as a purchasing agent. Second, the GSTA does not require mutual assent to engage in sales at retail. The GSTA identifies the taxable transaction and the person liable for the tax; it does not require mutual assent between a buyer and seller for imposition of the tax. See MCL 205.52(1). Third, the factual realities of plaintiff's business practices belie that plaintiff did not agree to sell aggregate material: plaintiff purchased the aggregate material with the purpose of reselling it, as reflected by plaintiff's use of the resale exemption certificates and the fact that plaintiff remitted sales tax for the material to defendant. Plaintiff's argument disregards both the plain language of the GSTA and the factual realities of its business model.[2]

In sum, the undisputed evidence demonstrates that plaintiff engaged in sales at retail. Thus, plaintiff, as a seller of tangible personal property, is liable for sales tax, which includes delivery charges incurred before the transfer of ownership of the property. MCL 205.52(1); MCL 205.51(1)(d)(*iv*).

B. APPLICABILITY OF *MIDWEST POWER LINE*

Alternatively, plaintiff argues that if it is engaged in retail sales under MCL 205.52(1), it is not subject to

[2] The conclusion that plaintiff is not a purchasing agent renders immaterial plaintiff's remaining arguments related to its theory that purchasing agents are not liable for sales tax (and delivery charges).

sales tax (and hence tax on delivery charges) because it is not *primarily* engaged in the business of retail sales. In support, plaintiff relies on this Court's decision in *Midwest Power Line*, in which this Court construed language used in the rolling-stock exemption of the UTA, i.e., the phrase "engaged in the business of," which is identical to the language used in MCL 205.52(1) of the GSTA. According to plaintiff, *Midwest Power Line* interpreted that language to mean that the activity referred to in the statute must be the primary purpose of the business. Plaintiff argues, therefore, that because its primary business purpose is transportation services, it is not "engaged in the business of making sales at retail" and is not subject to sales tax on delivery charges.

In *Midwest Power Line*, we considered a dispute concerning the rolling-stock exemption of the UTA, which provides that a person is exempt from taxation if the person satisfies the definition of "interstate fleet motor carrier," which means, in relevant part, "a person *engaged in the business of* carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines . . . ." MCL 205.94k(6)(d) (emphasis added). In that case, the petitioner provided repair and maintenance services to electrical utilities but would sometimes pick up its customer's materials and transport them to out-of-state repair sites. *Midwest Power Line*, 324 Mich App at 445. In determining that the petitioner was not an "interstate fleet motor carrier," we held that the term means "a business that is particularly engaged in providing transportation for hire." *Id*. at 448. Because the customers hired the petitioner to repair power lines, and interstate transportation was incidental to that service, this Court concluded that the petitioner

was not an "interstate fleet motor carrier" and did not qualify for the exemption. *Id*. at 447-448.

Even assuming that *Midwest Power Line* created a primary-purpose test for the rolling-stock exemption on the basis of the "engaged in the business of" language of MCL 205.94k(6)(d), it is improper to simply insert this meaning into the language of the GSTA without regard to its larger context. When construing particular words in a statute, this Court "must consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme." *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008) (quotation marks and citation omitted). "Unless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *In re Smith Estate*, 252 Mich App 120, 124; 651 NW2d 153 (2002). And while it is true that "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law," *Belcher v Ford Motor Co*, 333 Mich App 717, 723; 963 NW2d 423 (2020) (quotation marks and citation omitted), we will "avoid a construction that would render any part of the statute surplusage or nugatory," *In re Smith Estate*, 252 Mich App at 124 (quotation marks and citation omitted).

Reading MCL 205.52(1) in context of the GSTA evinces no intent that only persons who engage *primarily* in retail sales are subject to sales tax. For example, MCL 205.52(3) requires a person engaged in business activities aside from retail sales to maintain separate books and records for that activity. That section also mandates that the failure to do so will

subject the person's entire gross proceeds to sales tax.[3] This provision makes no distinction for a person whose primary business is something other than retail sales. To subject only persons whose primary business is retail sales to sales tax under plaintiff's interpretation would render MCL 205.52(3) meaningless.

Likewise, MCL 205.54d(i) provides that a person is exempt from sales tax if the "sale [is] made outside of the ordinary course of the seller's business." Consequently, all sales at retail are subject to taxation, regardless of whether a person's primary business is retail sales, so long as the sales are made within the person's ordinary course of business. Under plaintiff's interpretation, only a person that is primarily engaged in retail sales would be subject to taxation, which would also render MCL 205.54d(i) meaningless.

In sum, nowhere does the GSTA require that a person be primarily engaged in the business of retail sales to be subject to tax. To agree with plaintiff would be contrary to the Legislature's intent as manifested in the plain language of the GSTA. Rather, when read as a whole and in context, the GSTA recognizes that a person engaged in more than one business activity will be subject to sales tax so long as the sale was within

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[3] MCL 205.52(3) states:

> Any person engaged in the business of making sales at retail who is at the same time engaged in some other kind of business, occupation, or profession not taxable under this act shall keep books to show separately the transactions used in determining the tax levied by this act. If the person fails to keep separate books, there shall be levied upon him or her the tax provided for in subsection (1) equal to 6% of the entire gross proceeds of both or all of his or her businesses. The taxes levied by this section are a personal obligation of the taxpayer.

the person's ordinary course of business and an exemption does not otherwise apply.

C. INCIDENTAL-TO-SERVICES TEST

Finally, plaintiff claims that if it is deemed to be involved in the transfer of tangible personal property, then under the incidental-to-services test of *Catalina Marketing*, it is engaged in the provision of a service (procurement and delivery of aggregate material) and, thus, not subject to tax.

Contrary to plaintiff's argument, the Court of Claims correctly found that *Catalina Marketing* is irrelevant to the facts of this case. In *Catalina Marketing*, which involved the sales-tax liability of a person engaged in providing advertising research and related paper coupons (the transfer of tangible personal property), the Michigan Supreme Court articulated a general rule that "sales tax applies only to sales of tangible personal property, not sales of services." *Catalina Marketing*, 470 Mich at 19. As a consequence, the Court recognized that "[w]hen a single transaction, as here, involves both the provision of services and the transfer of tangible personal property, it must be categorized as either a service or a tangible property transaction." *Id*. The Court, however, recognized instances in which services may be subject to sales tax. Specifically, the Court noted that exceptions to the general rule may exist that will make the rendition of a service taxable, citing as an example the statutory imposition of sales tax on sales of electricity and its related service distribution. *Id*. at 19 n 4.

At issue in this case is the taxability of delivery charges. The Legislature expressly included delivery charges related to the sale of tangible personal property within the definition of "sales price," to which

sales tax applies. MCL 205.51(1)(d)(*iv*). Hence, the Legislature expressed a clear intent that delivery services related to the transfer of ownership of tangible personal property are taxable. See MCL 205.52(1); MCL 205.51(1)(d)(*iv*). Consequently, *Catalina Marketing*'s incidental-to-services test is not applicable because the Legislature expressly mandated that such delivery services be subject to sales tax.

Affirmed. Defendant, as the prevailing party, may tax costs.

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

In re SANGSTER

Docket No. 352147. Submitted December 15, 2021, at Lansing. Decided January 13, 2022, at 9:05 a.m. Leave to appeal denied 509 Mich 1054 (2022).

The Department of Licensing and Regulatory Affairs filed an administrative complaint against Shelly Ann-Marie Sangster, a registered nurse, alleging that she was subject to discipline under MCL 333.16221(a) for violation of general duty, (b)(*iii*) for mental or physical inability to practice in a safe and competent manner, and (b)(*vi*) for lack of good moral character. Respondent met FL in 2016 at a casino and moved into his home shortly after they met. FL suffered from terminal cancer, and respondent told him that she was a nurse, and homeless, and that they could help each other. Respondent claimed that she became a home assistant to FL and helped him with household chores, but FL's adult daughters and FL's doctor testified that respondent held herself out as FL's caregiver. FL added respondent to his checking account and to multiple lines of credit, and he purchased clothing and other items for her. FL developed romantic feelings for respondent, which were not reciprocated, and respondent moved out of FL's home when he began to make romantic advances. FL's daughters testified that around this time, respondent took FL's car and left him stranded at a hotel for multiple days. FL moved in with one of his daughters, who helped him file a personal protection order against respondent. In 2018, FL was interviewed by an investigator with the Bureau of Professional Licensing about his relationship with respondent. Petitioner filed its complaint in 2018, and following a hearing, the Board of Nursing Disciplinary Subcommittee, which is part of petitioner, adopted the findings of fact and conclusions of law of the hearings examiner that respondent had violated MCL 333.16221(a) and (b)(*vi*) and revoked respondent's nursing license. Respondent appealed.

The Court of Appeals *held*:

1. Under MCL 333.16231a, a hearing must be held, in certain circumstances, on a complaint filed by petitioner against a licensee for an alleged violation of MCL 333.16221. The hearings examiner prepares findings of fact and conclusions of law for the

appropriate disciplinary subcommittee, and the disciplinary subcommittee reviews the recommended findings of fact and legal conclusions in imposing a penalty. Respondent argued that the relevant disciplinary subcommittee in this case, the Board of Nursing Disciplinary Subcommittee, lacked jurisdiction because there was no nexus between respondent's relationship with FL and the practice of a health profession as required by MCL 333.16221. Under the statute, petitioner has the authority or jurisdiction to investigate and have a subcommittee hold hearings in relation to activities connected to the practice of a health profession, as well as the authority or jurisdiction to investigate and hold subcommittee hearings on any allegations of a violation set forth in MCL 333.16221. Jurisdiction existed in this case because there were allegations of various violations listed in MCL 333.16221, including that respondent used her status as a registered nurse to exploit and defraud FL. Although respondent's arguments focused on the strength of the allegations, the jurisdiction of petitioner to investigate and the disciplinary subcommittee to conduct a hearing, assess the evidence, and render findings depended only on the nature of the allegations, not on the truth of them.

2. The hearings examiner admitted hearsay evidence at the hearing, including the testimony of FL's daughters, his doctor, and the investigator regarding what they had been told about the events by FL. Respondent argued that this was error requiring reversal, and petitioner did not dispute that the testimony was hearsay. However, under MCL 24.275 of the Administrative Procedures Act, MCL 24.201 *et seq*., an agency may admit and give probative effect to evidence of a type commonly relied upon by "reasonably prudent men" in the conduct of their affairs. Under this standard, evidentiary rulings in administrative proceedings may stray from courtroom rules of evidence. In this case, strict adherence to the Michigan Rules of Evidence was not practicable because FL died before the hearing, and the only way to consider his version of the events was through the testimony of those he shared it with, including his daughters, his doctor, and the investigator. Pursuant to MCL 24.275, a "reasonably prudent" person would have relied on this testimony, given that the information was relayed to the witnesses directly by FL, FL's daughters were familiar with his perspective on respondent, and the investigator and FL's doctor were neutral witnesses with no reason to skew FL's words.

3. When used as a requirement for a professional license, the term "good moral character" means the propensity of an indi-

vidual to serve the public in the licensed area in a fair, honest, and open manner. Respondent argued that the hearing examiner erred by concluding that she lacked good moral character under MCL 333.16221(b)(*vi*), but the evidence was sufficient for a reasonable person to conclude that respondent used her status as a nurse to exploit FL for her own personal and financial benefit. There was testimony that respondent held herself out as FL's caregiver and that her status as a nurse gave her credibility in this regard with FL. The hearings examiner found this testimony more credible than respondent's, and findings that are based on credibility determinations generally are not disturbed on appeal. The record supported the conclusion that respondent lacked the propensity to serve the public in the licensed area in a fair, honest, and open manner and thus that respondent lacked good moral character.

4. Respondent argued that her due-process rights were violated because the state revoked her license on the basis of its disapproval of her "unconventional" but consensual relationship with FL. Citing *Lawrence v Texas*, 539 US 558 (2003), respondent asserted that consenting adults have an absolute right to engage in private relationships of their choosing when there is no evidence that any law is being violated. A mutually consensual relationship that causes no harm and no violation of the law would be an impermissible basis for revoking respondent's license. However, the hearings examiner found that respondent's relationship with FL was exploitative and harmful to FL, and the evidence was sufficient to support these findings. Therefore, there was no due-process violation.

Affirmed.

ADMINISTRATIVE PROCEDURES ACT – ADMINISTRATIVE HEARINGS – EVIDENTIARY RULINGS – "REASONABLY PRUDENT MEN" STANDARD.

Under MCL 24.275 of the Administrative Procedures Act, MCL 24.201 *et seq*., in a contested case, the rules of evidence as applied in nonjury civil cases shall be followed as far as is practicable, but an agency may admit and give probative effect to evidence of a type commonly relied on by "reasonably prudent men" in the conduct of their affairs; under the "reasonably prudent men" standard, in administrative proceedings, evidentiary rulings may stray from rigid courtroom rules regarding the admissibility of evidence.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Bruce Charles*

Johnson, Assistant Attorney General, for the Department of Licensing and Regulatory Affairs.

Fleming Yatooma & Borowicz (by *Gavin J. Fleming*) for Shelly Ann-Marie Sangster.

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

PER CURIAM. Respondent, Shelly Ann-Marie Sangster, R.N., appeals by right the order of the Board of Nursing Disciplinary Subcommittee (BNDS) revoking respondent's nursing license on the basis of MCL 333.16221(a) (violation of general duty) and (b)(*vi*) (lack of good moral character). We affirm.

I. FACTS

A. BACKGROUND

Respondent was a registered nurse but had not been employed in that capacity since 2012. This case arises from a relationship that respondent cultivated with a 75-year-old man, FL. FL died prior to the hearing on this matter; therefore, the facts were derived from the testimony of FL's two adult daughters, FL's doctor, respondent, and an investigator with the Bureau of Professional Licensing who interviewed FL prior to his death. FL's wife of more than 50 years died suddenly shortly before the events that gave rise to this case, and at all relevant times FL was suffering from a terminal form of cancer.

FL was addicted to gambling and frequently patronized a local casino. FL and respondent met in 2016 while both were gambling at the casino, and respondent moved into FL's home shortly after the two met. FL's daughters testified that immediately after meet-

ing, respondent told FL that she was a nurse, that she was homeless, and that the pair could assist one another. Respondent, however, testified that such a conversation never occurred and that FL offered to let her stay with him because he knew that she did not have a home and that she did not want to move back in with her mother. Respondent claimed that she then became a sort of "home assistant" for FL and helped him with cleaning, cooking, shopping, and other household chores. But FL's daughters, as well as FL's doctor, testified that respondent held herself out as FL's caregiver and that her status as a nurse gave her substantial credibility with FL in this regard.

It is undisputed that FL spent substantial sums of money while respondent was living with him and that FL added respondent to his checking account as well as to multiple lines of credit. One of FL's daughters testified that FL spent approximately $40,000 on respondent, although she did not supply any documentation to verify that figure. Respondent admitted that FL spent a lot of money purchasing clothes and other necessities for her, and she also acknowledged that he paid her a few hundred dollars a week for her services. But respondent denied that she "swindle[d]" him for money or gifts, insisted that the checking account and lines of credit were established so that she could purchase groceries for FL, and stated that most of the money FL spent during that time was related to his gambling addiction.

FL had hopes of forming a romantic relationship with respondent, but his feelings for her were unreciprocated. Respondent testified that toward the end of her time living with FL, he began making romantic advances, and she therefore decided that it was time for her to move out. FL's daughters testified that

around this time, respondent took FL's car and left him stranded at a hotel for multiple days. FL called them when this happened, and he did not know where he was or what to do. One daughter testified that while respondent was gone with FL's car, respondent visited an ATM and took approximately $1,000 from the joint checking account she shared with FL. Respondent testified that she was given permission by FL to take his car so that she could move out of his house.

After this incident, FL moved in with one of his daughters, and she helped him obtain a personal protection order (PPO) against respondent. This daughter also initiated protective proceedings to establish a guardianship and conservatorship over FL, and respondent was held in contempt of court for violating the PPO by attending the guardianship hearing. FL lived with his daughter until his death, and she testified that FL felt as though respondent had taken advantage of him. In 2018, FL was interviewed by the investigator about his relationship with respondent. The investigator's testimony largely corroborated the testimony of FL's daughters, and she stated that FL felt embarrassed about what had happened.

B. PROCEDURAL HISTORY

On December 28, 2018, petitioner, the Michigan Department of Licensing and Regulatory Affairs (LARA), through the Director of the Bureau of Professional Licensing, filed an administrative complaint against respondent, alleging that respondent was subject to discipline under MCL 333.16221(a) (violation of general duty), (b)(*iii*) (mental or physical inability to practice in safe and competent manner), and (b)(*vi*) (lack of good moral character). Petitioner also issued an order of summary suspension, and on March 5,

2019, respondent filed a petition for dissolution of summary suspension. After multiple adjournments, the details of which are not relevant to this appeal, a hearing on the complaint was held on August 26, 2019. On October 15, 2019, the hearings examiner issued a proposal for decision in which he found that respondent had violated MCL 333.16221(a) and (b)(*vi*) but not (b)(*iii*). On November 3, 2019, respondent filed exceptions to the proposal for decision, and on December 16, 2019, the BNDS entered a final order in which it adopted the hearings examiner's findings of fact and conclusions of law. As punishment for the statutory violations, the BNDS revoked respondent's nursing license.

II. ANALYSIS

A. STANDARDS OF REVIEW AND OVERVIEW OF DISCIPLINARY PROCEEDINGS

Rulings by disciplinary boards or subcommittees are reviewed on appeal solely under Const 1963, art 6, § 28. *Dep't of Community Health v Anderson*, 299 Mich App 591, 597; 830 NW2d 814 (2013); *Dep't of Community Health v Risch*, 274 Mich App 365, 371; 733 NW2d 403 (2007). Const 1963, art 6, § 28 provides, in relevant part:

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

This Court must review the entire record, not just the portions that support an agency's findings, when assessing whether the agency's decision was supported by competent, material, and substantial evidence on the whole record. *Risch*, 274 Mich App at 372. "Substantial evidence" means evidence that a reasonable person would find acceptably sufficient to support a conclusion. *Id*. This may be substantially less than a preponderance of evidence, but does require more than a scintilla of evidence. *Id*. The *Risch* panel further observed:

> Moreover, if the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence. A reviewing court may not set aside factual findings supported by the evidence merely because alternative findings could also have been supported by evidence on the record or because the court might have reached a different result. [*Id*. at 372-373 (citations omitted).]

"Under th[e] test, it does not matter that the contrary position is supported by more evidence, that is, which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn." *McBride v Pontiac Sch Dist (On Remand)*, 218 Mich App 113, 123; 553 NW2d 646 (1996). "[A]n appellate court must generally defer to an agency's administrative expertise." *Anderson*, 299 Mich App at 598. For purposes of Const 1963, art 6, § 28, a decision is not "authorized by law" when it is in violation of a statute or a constitutional provision, in excess of an agency's statutory authority or jurisdiction, made upon unlawful procedure that results in material prejudice, or when it is arbitrary and capri-

cious. *Northwestern Nat'l Cas Co v Comm'r of Ins*, 231 Mich App 483, 488-489; 586 NW2d 563 (1998).

Respondent also raises a due-process argument, which presents a question of constitutional law that we review de novo. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012). Unpreserved constitutional arguments are reviewed for plain error affecting substantial rights. See *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

MCL 333.16221 lists a number of violations or grounds that can result in disciplinary proceedings against a licensee. In pertinent part, MCL 333.16221 provides:

> Subject to section 16221b, the department shall investigate any allegation that 1 or more of the grounds for disciplinary subcommittee action under this section exist, and may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order the taking of relevant testimony. After its investigation, the department shall provide a copy of the administrative complaint to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under section 16226 if it finds that 1 or more of the following grounds exist:
>
> (a) Except as otherwise specifically provided in this section, a violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession.

> (b) Personal disqualifications, consisting of 1 or more of the following:
>
> * * *
>
> (*vi*) Lack of good moral character.

MCL 333.16231 authorizes the issuance of a complaint against a licensee for an alleged violation of MCL 333.16221. And MCL 333.16231a provides for a hearing on the complaint before a hearings examiner. At the hearing, the licensee "may be represented . . . by legal counsel." MCL 333.16231a(4). The hearings examiner "shall determine if there are grounds for disciplinary action under section 16221 . . . ." MCL 333.16231a(2). The hearings examiner must "prepare recommended findings of fact and conclusions of law for transmittal to the appropriate disciplinary subcommittee." *Id*. "In imposing a penalty . . . , a disciplinary subcommittee shall review the recommended findings of fact and conclusions of law of the hearings examiner." MCL 333.16237(1). Under MCL 333.16237(3), "[i]n reviewing the recommended findings of fact and conclusions of law of the hearings examiner and the record of the hearing, a disciplinary subcommittee may request the hearings examiner to take additional testimony or evidence on a specific issue or may revise the recommended findings of fact and conclusions of law as determined necessary by the disciplinary subcommittee, or both." A disciplinary subcommittee is not permitted to conduct its own investigation or to take its own additional testimony or evidence. *Id*. MCL 333.16237(4) provides:

> If a disciplinary subcommittee finds that a preponderance of the evidence supports the recommended findings of fact and conclusions of law of the hearings examiner indicating that grounds exist for disciplinary action, the

> disciplinary subcommittee shall impose an appropriate sanction . . . . If the disciplinary subcommittee finds that a preponderance of the evidence does not support the findings of fact and conclusions of law of the hearings examiner indicating that grounds exist for disciplinary action, the disciplinary subcommittee shall dismiss the complaint. A disciplinary subcommittee shall report final action taken by it in writing to the appropriate board or task force.

When a disciplinary subcommittee finds the existence of one or more of the grounds set forth in MCL 333.16221, the subcommittee is authorized under MCL 333.16226 to impose various sanctions against a licensee. And MCL 333.16226(2) provides:

> Determination of sanctions for violations under this section shall be made by a disciplinary subcommittee. If, during judicial review, the court of appeals determines that a final decision or order of a disciplinary subcommittee prejudices substantial rights of the petitioner for 1 or more of the grounds listed in section 106 of the administrative procedures act of 1969, MCL 24.306, and holds that the final decision or order is unlawful and is to be set aside, the court shall state on the record the reasons for the holding and may remand the case to the disciplinary subcommittee for further consideration.

B. DISCUSSION

Respondent first argues that the BNDS lacked jurisdiction to hear this case because there was no nexus between respondent's relationship with FL and the practice of a health profession. We disagree.

As indicated earlier, MCL 333.16221 provides, in pertinent part, that LARA "shall investigate any allegation that 1 or more of the grounds for disciplinary subcommittee action under this section exist, *and* may investigate activities related to the practice of a health

profession by a licensee, a registrant, or an applicant for licensure or registration." (Emphasis added.)[1] Pursuant to these *two* types of investigatory powers, LARA "may hold hearings, administer oaths, and order the taking of relevant testimony." MCL 333.16221. Although LARA has the authority or jurisdiction to investigate and have a subcommittee hold hearings in relation to activities connected to the practice of a health profession, it also has the authority or jurisdiction to investigate any allegations of a violation set forth in MCL 333.16221 and then hold a subcommittee hearing on the matter. Jurisdiction existed in this case because there were allegations premised on various grounds listed in MCL 333.16221. LARA and the BNDS were presented with allegations that respondent used her status as a registered nurse to exploit and defraud FL. Respondent's arguments regarding this issue pertain to the strength of the evidence supporting the allegations; however, those arguments have no bearing on whether LARA had the authority to investigate the allegations in the first place and lodge an administrative complaint or whether the BNDS had jurisdiction to conduct a hearing, assess the evidence, and render findings concerning the allegations. In other words, the jurisdiction of the BNDS depended on the nature of the allegations, not upon the truth of those allegations.

Respondent next argues that the hearings examiner committed error warranting reversal by admitting hearsay testimony. We disagree.

Petitioner contends that respondent failed to preserve this argument. An issue is preserved if it has been "raised before, addressed by, or decided by the

[1] The BNDS is an entity within LARA and its Bureau of Professional Licensing.

lower court or administrative tribunal." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010). While respondent did not raise an objection to every instance of alleged hearsay testimony, respondent did raise a hearsay objection early in the proceeding and the hearings examiner indicated that he did not intend to exclude evidence on the basis of hearsay. Therefore, we conclude that the hearsay issue was adequately preserved.

" 'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a).

Substantial portions of the evidence admitted and considered by the hearings examiner constituted hearsay. Specifically, respondent challenges the testimony of FL's daughters, the investigator, and FL's doctor. FL's daughters testified in regard to what FL told them about his relationship with respondent and how she left him stranded at a hotel. The doctor also testified with respect to what FL told him regarding FL's relationship with respondent. Finally, the investigator testified about an interview that she conducted with FL to discuss respondent's conduct. Petitioner does not dispute that this testimony was hearsay, that it did not fall within any hearsay exception, and that it would not have been admissible in an ordinary criminal or civil trial.

Nevertheless, the fact that the hearings examiner admitted hearsay does not necessarily mean that the

examiner erred. Section 75 of the Administrative Procedures Act, MCL 24.201 *et seq*., provides, in relevant part:

> In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, *but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs*. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. [MCL 24.275 (emphasis added).]

In light of the "reasonably prudent men" standard in MCL 24.275, "[i]t is now established that evidentiary rulings in administrative proceedings may stray from rigid courtroom rules on evidence." *Rentz v Gen Motors Corp, Fisher Body Div, Fleetwood Plant*, 70 Mich App 249, 253; 245 NW2d 705 (1976).

In this case, strict adherence to the Michigan Rules of Evidence was not practicable because FL died before the hearing. Therefore, the only way that the hearings examiner could consider FL's version of events was to admit hearsay evidence in the form of testimony from the people to whom FL had described his relationship with respondent. Given MCL 24.275, the dispositive issue is whether reasonably prudent men in the conduct of their affairs would have relied on the hearsay testimony.

The hearings examiner had ample reason to conclude that the evidence was sufficiently reliable to warrant admission. The evidence was not far removed from the source given that each witness was repeating information that had been relayed directly to them by FL, who had experienced the events firsthand. FL moved in with one of his daughters after he stopped living with respondent, and the daughter testified that

she spent "almost every day" with him from that point until his death. Therefore, she had the opportunity to become quite familiar with FL's perspective on his interactions with respondent. The investigator and the doctor were neutral and had no incentive to skew FL's words. We are aware of no information that substantially undermines the credibility of these witnesses and conclude that a reasonably prudent person would have relied on the hearsay testimony. Moreover, respondent merely argues in conclusory fashion that a reasonably prudent person would not have relied on the hearsay testimony but fails to proffer any reasons for that conclusion. Reversal is unwarranted.

Respondent next argues that the hearings examiner erred by ruling that she lacked good moral character for purposes of MCL 333.16221(b)(*vi*). We disagree. Petitioner argues that respondent failed to preserve this issue. But respondent's continuous position below, both at the hearing and in the exceptions to the proposal for decision, was that petitioner failed to establish the statutory grounds for revocation of her license, including lack of good moral character. Therefore, this issue is preserved. See *Gen Motors Corp*, 290 Mich App at 386.

"The phrase 'good moral character', when used as a requirement for an occupational or professional license[,] . . . means the propensity on the part of an individual to serve the public in the licensed area in a fair, honest, and open manner." MCL 338.41(1); see also *Bureau of Health Professions v Serven*, 303 Mich App 305, 310; 842 NW2d 561 (2013) (applying MCL 338.41(1) to an allegation made under MCL 333.16221(b)(*vi*)).

The following excerpt from the hearings examiner's findings summarizes the conduct of respondent that demonstrated a lack of good moral character in the view of the examiner:

> The facts in this case are truly disturbing. Shortly after meeting at a casino, Respondent found herself living in F.L.'s home, driving his car and commandeering his finances. Although Petitioner failed to provide a record demonstrating the precise dollar amount, F.L.'s daughters credibly testified that Respondent may be responsible for spending up to $40,000 in funds from F.L.'s credit cards and accounts. The credible testimony on this record also shows F.L. felt embarrassed and victimized after he realized he had been taken for a ride when he reported to [the investigator] how Respondent caused him to lose thousands and thousands of dollars. [The investigator] was a disinterested witness who offered objective and very credible testimony.

The evidence was sufficient for a reasonable person to conclude that respondent used her status as a nurse to exploit FL for her own personal and financial benefit. FL's daughters testified that FL was terminally ill and that he had been struggling emotionally since the sudden death of his wife. FL's daughters also testified that respondent told FL shortly after meeting him that she was a nurse and that they could help each other. One daughter indicated that respondent's status as a nurse gave her credibility with FL as a caregiver. FL's doctor testified that when he met respondent at one of FL's appointments, she held herself out as his "caretaker." FL's daughters asserted that respondent allowed FL to make frequent and extravagant purchases for her and estimated that FL spent close to $40,000 on respondent. Even presuming that some of the $40,000 that disappeared from FL's funds probably went to gambling rather than to respondent, respondent ad-

mitted that she was added to FL's financial accounts and that she allowed FL to purchase coats, clothing, and other necessities for her. A daughter testified that she spent virtually every day with FL after respondent stopped living with him, that she obtained insight into the situation, and that respondent appeared to be using her nursing license to exploit FL. She emphasized that respondent always presented herself as being FL's healthcare person, indicating "that she was taking care of his health." As noted earlier, FL's daughters testified that respondent once abandoned FL without a car at a hotel for multiple days and took more than $1,000 of FL's money from an ATM. The investigator testified that FL told her that respondent held herself out as FL's caregiver, and FL also informed the investigator about the incident in which he was abandoned at a hotel.

Respondent's testimony directly contradicted substantial portions of the testimony offered by petitioner's witnesses. But the hearings examiner found that "[r]espondent's version of the events was inconsistent, illogical, and largely self-serving" and that "[t]he testimony from F.L.'s daughters, [the doctor,] and [the investigator], on the other hand, were more consistent, logical and reasonable, which made their testimony more credible than Respondent's." This Court generally does not disturb findings that are based on credibility determinations, and we do not reverse factual findings merely because there were other findings that the evidence could have supported. *Risch*, 274 Mich App at 372-373. The record supported a conclusion that respondent lacked the propensity "to serve the public in the licensed area in a fair, honest, and open manner." MCL 338.41(1). Accordingly, there was substantial, competent, and material evidence supporting the

determination of the hearings examiner that respondent lacked good moral character.

Finally, respondent argues that her due-process rights were violated because the revocation of her license was based on the state's disapproval of an unconventional but consensual relationship. We disagree. Respondent contends that her license was revoked because her "non-mainstream" relationship with FL was viewed as "inappropriate or morally unacceptable" by the state of Michigan. Respondent cites *Lawrence v Texas*, 539 US 558; 123 S Ct 2472; 156 L Ed 2d 508 (2003), for the proposition that the state was not entitled to do this because "consenting adults have an absolute right to engage in private relationships of their choosing, where, as here, there is no evidence of the violation of any law." We agree that a mutually consensual relationship that causes no harm and no violation of the law would be an impermissible basis for revoking respondent's license, but the hearings examiner found that the relationship was exploitative and harmful to FL. Respondent's argument essentially is that the hearings examiner's findings were erroneous, that respondent's interpretation of the evidence was that she and FL had a consensual and mutually beneficial, though unconventional, relationship, that this Court should accept her interpretation of the evidence rather than the examiner's, and that, in light of her interpretation of the evidence, the state had no right to revoke her license. But for all the reasons discussed above, the evidence was sufficient to support the hearings examiner's findings. Therefore, we decline respondent's

invitation to substitute her interpretation of the evidence and likewise reject her constitutional argument.

We affirm.

MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

LAKESIDE RETREATS, LLC v CAMP NO COUNSELORS LLC

Docket No. 355779. Submitted October 13, 2021, at Grand Rapids. Decided January 13, 2022, at 9:10 a.m.

Lakeside Retreats, LLC, brought an action in the Van Buren Circuit Court against Camp No Counselors LLC (CNC) and Adam Tichauer, asserting claims of fraud, breach of contract, quantum meruit, and that Tichauer operated CNC as Tichauer's alter ego. Plaintiff, as the manager of a summer-camp property, entered into an agreement with CNC to rent the camp to CNC for a retreat; Tichauer, the founder, CEO, and authorized representative of CNC, negotiated the contract on behalf of CNC. CNC used the property in September 2018 but failed to pay in full for its use of the camp. Plaintiff filed this action, and defendants, in lieu of filing an answer, moved for summary disposition, asserting that the court lacked personal jurisdiction over Tichauer, that plaintiff failed to allege a sufficient factual basis for its fraud claim, and that plaintiff's alter-ego claim failed to set forth facts sufficient to warrant piercing CNC's corporate veil; defendant did not, in general, challenge the breach-of-contract claim. On June 3, 2019, defense counsel withdrew the motion, notifying the court and plaintiff's counsel by e-mail of the action. On June 12, 2019, defense counsel contacted plaintiff's attorney regarding the possibility of a settlement and informed him that she was moving to a different law firm; plaintiff's counsel requested that an offer be made. The next day, plaintiff filed a request for defaults in the trial court, asserting that defendants had withdrawn their motion for summary disposition by e-mail and that they had failed to file and serve an answer to the complaint more than six months after the case was filed; the clerk of the court entered the defaults, and the entries of default and supporting affidavits were sent to defense counsel's original address because she had not informed the court of her change of business address. Defense counsel notified plaintiff's counsel of her new address one month later and discovered the entries of default a month after that when she checked the registry of actions online; plaintiff's counsel refused defense counsel's request to withdraw the defaults. Plaintiff thereafter moved for default judgments against defendants; the court, David J. DiStefano, J., entered the default judgments for a

sum certain. Defendants moved to set aside the defaults and the default judgments, asserting that the parties had been engaging in settlement negotiations rather than litigation and that defendants expected to renotice their motion for summary disposition after discovery was completed; plaintiff opposed the motion. The trial court refused to set aside the defaults but vacated the default judgments because defendants had not received the requisite seven days' notice before the default judgments were entered. Plaintiff again moved for entry of default judgments. Defendants opposed the motion, questioning, in part, the sum-certain amount requested in the default. During the ensuing hearing, the court refused to revisit the entry of defaults regarding liability but agreed to hold a hearing regarding the amount of damages and attorney fees. The parties thereafter stipulated to set aside the defaults for the claim of fraud, subject to defendants remaining jointly and severally liable for damages under the contract and subject to that liability being nondischargeable in bankruptcy. The parties also agreed that the court would later interpret the contract's provisions regarding legal fees. Following a hearing, the trial court held that under the lease agreement, CNC agreed to pay plaintiff's costs in any litigation against CNC and that the "default judgment" established that Tichauer was also personally liable for the costs. Following a hearing on the issue of attorney fees and costs, the court awarded plaintiff attorney fees of $41,153.77, determining that $275 an hour was a reasonable hourly rate for plaintiff's attorneys, and costs of $962.24. The court rejected defendants' objection to the block-billing format used by plaintiff's law firm and concluded that plaintiff's attorney had requested a reasonable amount of time; the court, however, reduced the amount awarded for clerical work performed by paralegals. Defendants appealed.

The Court of Appeals *held*:

1. Michigan law recognizes that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue. In contrast, a default judgment reduces the default to a judgment for money damages. A defaulted party retains the right to challenge the amount of damages, but the defaulted party may no longer challenge liability. In general, a party is not entitled to notice in advance of taking a default but is entitled to notice in advance of a default judgment for purposes of challenging the amount of damages. In this case, the trial court cited the "default judgment" as the basis for concluding that Tichauer shared CNC's liability, but the default judgment had already been set aside at that time. But it

was clear from the record that the trial court meant to refer to the defaults (not the default judgments), which had conclusively established that CNC was an alter ego of Tichauer and that, therefore, Tichauer could be held personally liable for CNC's conduct. Accordingly, the trial court correctly concluded that Tichauer was personally responsible for CNC's conduct, including the associated damages related to that conduct. To the extent the rental contract permitted an award of attorney fees, the trial court correctly held that Tichauer was jointly and severally liable, along with CNC, for paying them. Defendants failed to properly present or support its claim that any attorney fees associated with the fraud claim should not have been awarded. Regardless, the claim lacked merit because a fair reading of the fraud claim was that it arose out of or was based on defendants' breach of the contract.

2. The party requesting attorney fees must establish the reasonableness of those fees, and trial courts must consider a nonexclusive list of factors when determining a reasonable attorney fee. The starting point of the calculation is to determine the fee customarily charged in the locality for similar legal services, which includes considering the yearly State Bar of Michigan Economics of Law Practice Survey. Given the evidence presented, the trial court did not clearly err when it set the billing rate at $275 an hour for four of plaintiff's attorneys involved in the case.

3. "Block billing" refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks. The use of block billing does not per se preclude a determination of reasonable hours expended on a matter. Instead, block billing is permissible and not intrinsically vague as long as the block-billing entries are sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those tasks to the litigation, and whether the amount of time expended on those tasks was reasonable. This conclusion is supported by the unanimity of prior unpublished opinions of the Court of Appeals on this issue, as well as federal court decisions in which the focus was on whether particular block-billing entries were proper. In this case, the trial court did not abuse it discretion when it determined that it was able to assess whether services described in plaintiff's invoices were necessary and whether the amount of time spent on those was reasonable. In addition, the trial court did not clearly err in its factual assessment of the invoices.

Affirmed.

ATTORNEY FEES – REASONABLENESS – BILLING FORMATS – BLOCK BILLING.

The party requesting attorney fees must establish the reasonableness of those fees, and trial courts must consider a nonexclusive list of factors when determining a reasonable attorney fee; "block billing" refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks; the use of block billing does not per se preclude a determination of reasonable hours expended on a matter; to avoid being found impermissibly vague, block-billing entries must be sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those tasks to the litigation, and whether the amount of time expended on those tasks was reasonable.

Willis Law (by *Samuel R. Gilbertson*) for plaintiff.

McGlinchey Stafford PLLC (by *Shanna M. Boughton*) for defendants.

Before: RONAYNE KRAUSE, P.J., and CAMERON and RICK, JJ.

RONAYNE KRAUSE, P.J. Defendants, Camp No Counselors LLC (CNC) and Adam Tichauer, appeal by right from the trial court's orders holding that plaintiff, Lakeside Retreats, LLC, was entitled to reasonable attorney fees and costs from defendants and holding defendants jointly and severally liable in the amount of $42,116.01. The underlying dispute in this matter arose out of plaintiff's rental of a campground facility to CNC, which then failed to pay for that rental. Tichauer is the founder, CEO, and "group authorized representative" of CNC; he negotiated the rental agreement with plaintiff. Following defendants' representation to the trial court and plaintiff that it was withdrawing its motion for summary disposition that it had filed in lieu of an answer, and defendants' failure to file a timely answer to the complaint, defendants were defaulted. Plaintiff sought to recover attorney

fees and costs from defendants under the rental contract. The trial court concluded that, under the contract and the default, defendants were jointly and severally liable for attorney fees. It held a hearing and took evidence before concluding that the attorney-fee award was reasonable. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff manages a summer-camp property in Van Buren County, Michigan. CNC, represented by Tichauer, sought to rent the camp property for a retreat. Plaintiff and CNC entered into a "Facility Use Agreement," under which CNC made use of the camp in September 2018. However, CNC never paid in full for its use of the camp, despite demands made by plaintiff, and according to the complaint, "[a]fter the event, Defendants ceased communicating with the Plaintiff." Plaintiff commenced this action on November 29, 2018, alleging claims of fraud, "alter ego," breach of contract, and quantum meruit. Defendants never seriously disputed that CNC breached the contract with plaintiff. Rather, defendants only challenged whether Tichauer had any personal liability for the breach and whether any fraud had occurred.

In lieu of an answer, defendants moved for summary disposition. The motion never addressed breach of contract or quantum meruit as to CNC, but it nevertheless requested dismissal of the entire action. Rather, the motion contended that, notwithstanding the fact that defendants' counsel had filed an unconditional appearance on behalf of both CNC and Tichauer, the court lacked personal jurisdiction over Tichauer. It also asserted that plaintiff had failed to allege a sufficient factual basis for its fraud claim and that its alter-ego claim failed to set forth facts sufficient to

warrant piercing CNC's corporate veil. Several administrative and professional errors ensued. Initially, plaintiff was not provided with notice of a scheduled hearing regarding the motion, following which defendants did not receive a copy of plaintiff's response to the motion. The parties stipulated to adjourn the hearing to June 3, 2019. In the meantime, the parties discussed a possible settlement, but according to plaintiff and not seriously challenged by defendants, defendants never provided any concrete offer until more than a year later. Rather, defendants apparently only inquired into the possibility of settlement and reacted poorly to plaintiff's insistence that plaintiff was "seeking the amount listed in the Complaint." Nevertheless, on May 30, 2019, defendants' counsel sent an e-mail to the trial judge's clerk, copying plaintiff's attorney, stating: "We will not be moving forward on our Motion for Summary Disposition on Monday, June 3, 2019 and will be withdrawing the same." Plaintiff's counsel immediately e-mailed defendants' counsel, requesting that defendants file a formal withdrawal of their motion, but defendants neither responded nor filed a formal withdrawal. Defendants' counsel subsequently maintained that she believed settlement negotiations were ongoing and that further discovery was necessary to address plaintiff's response to the motion.

On June 12, 2019, defendants' counsel e-mailed plaintiff's counsel to inquire into plaintiff's position regarding settlement, noting that she was moving to a new law firm and hoped to resolve the matter before her departure. Plaintiff's counsel responded that defendants had provided neither an offer that could be passed on nor any refutation of the allegations in the complaint. Plaintiff's counsel informed defendants' counsel that, "[t]o the extent your client is interested in resolution, please relay their offer and I will certainly

discuss with our client." The next day, plaintiff filed affidavits in support of requests for defaults against defendants, averring that defendants had withdrawn their motion for summary disposition by e-mail and that they had failed to file and serve an answer to the complaint more than six months after the case was commenced. The circuit court clerk entered defaults against CNC and Tichauer on the same date. Defendants' counsel had not yet informed plaintiff or the court of her new contact information, so she was served with the entries of defaults and supporting affidavits at the address she had used since filing her appearance. Apparently, defense counsel's original firm failed to forward the documents. Almost a month later, defendants' counsel e-mailed plaintiff's counsel her new address. A month after that, defendants' counsel learned about the defaults by accident when she "checked the online docket . . . to ensure that it reflected [her] new firm and address." Defendants' counsel's change of address was actually filed with the trial court on August 19, 2019.

The parties' attorneys exchanged e-mails regarding the defaults, in which defendants' counsel asked plaintiff's counsel to withdraw the defaults and indicated her belief that plaintiff's counsel had acted improperly; plaintiff's counsel refused and indicated his belief that defendants' counsel failed to act with diligence or competence. Plaintiff moved for default judgments against defendants, and those judgments were entered. Defendants' counsel asked plaintiff to set aside the default judgments, but plaintiff's counsel refused to "go back to our client and suggest that after all these thousands of dollars have been spent . . . to put the litigation back at the beginning due to the other side's poor litigation strategy and general failure to abide by the court rules." Defendants moved to set aside the

defaults and default judgments, generally reiterating the substance of their motion for summary disposition, arguing that the "good cause" factors for setting aside a default judgment set forth in *Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008), weighed in defendants' favor, and asserting that the parties had been engaging in settlement discussions rather than litigation and defendants expected to renotice their motion for summary disposition after the completion of discovery. Defendants again presented no apparent challenge to the breach-of-contract claim as to CNC. Plaintiff responded that defendants had still not even attempted to offer a proposed answer, and the claim that the parties were engaging in serious settlement negotiations was belied by the parties' actual communications.

The trial court held a hearing and opined that defendants had represented to the court and to plaintiff that they were withdrawing their motion, and defendants never indicated any contrary intent until after the default requests had been filed. The trial court also concluded that, even if defendants did believe settlement negotiations were ongoing, they were not excused from responding to the complaint. Furthermore, the court rules provided no grace period for filing an answer after withdrawing a motion for summary disposition that had been filed in lieu of an answer. The trial court recognized that defendants had not totally failed to appear and defend, but nevertheless they had not merely missed a deadline but had, in fact, failed to respond. The trial court therefore refused to set aside the defaults. However, the trial court concluded that because defendants had actually appeared in this matter, they were entitled to seven days' notice before entry of a default judgment under MCR 2.603(B)(1)(b). Because defendants had received fewer

than seven days' notice, the trial court vacated the default judgments. Plaintiff promptly filed a renewed motion for default judgment, and after the parties twice stipulated to give defendants additional time to respond, defendants filed a response that largely reiterated their prior substantive arguments. However, defendants also challenged whether plaintiff's damages were actually a "sum certain," especially because plaintiff's claimed damages included a substantial amount of attorney fees.[1] The trial court held a hearing at which it refused to revisit its prior decision regarding liability, which necessarily resulted in Tichauer having personal liability, but it agreed to hold an evidentiary hearing regarding the amount of damages and attorney fees.

The parties subsequently stipulated to set aside the default for fraud, subject to both defendants remaining jointly and severally liable for damages under the contract and subject to that liability being nondischargeable in bankruptcy. The trial court entered a stipulated order accordingly. The parties agreed that the trial court "would issue a ruling as to the legal interpretation of the contractual provision regarding legal fees at a future hearing." The trial court entered an opinion and order holding that ¶ 11 of the Facility Use Agreement obligated CNC to pay plaintiff's costs for plaintiff's involvement in litigation against CNC, and the default judgment established that Tichauer was also personally liable for those costs. The parties apparently spent a considerable amount of effort attempting to negotiate a settlement regarding the amount of attorney fees, but they were unable to do so.

[1] Plaintiff's entitlement to reasonable attorney fees was based on provisions of the Facility Use Agreement, which will be discussed in greater detail later.

According to plaintiff, defendants finally proposed a "settlement amount with a dollar amount attached" for the first time just prior to a hearing held on August 18, 2020. The parties eventually agreed to dismiss the remaining counts in the complaint and the defaults regarding those counts, with prejudice, but left plaintiff's claim for attorney fees outstanding. No settlement ensued regarding the attorney fees, and the trial court held a hearing regarding the amount of attorney fees.

Following the hearing, the trial court set forth a thorough analysis, during which it concluded that a reasonable hourly rate was $275 an hour, well below the $435 an hour actually charged by plaintiff's attorney, but above the median hourly rate for attorneys in Van Buren County of $250 an hour. The trial court rejected defendants' objection to the use of "block billing" in plaintiff's attorney's invoices and concluded that plaintiff's attorney had requested a reasonable amount of time, but it ordered the deduction of certain seemingly clerical work performed by paralegals. The trial court ultimately awarded plaintiff "reasonable attorney fees in the amount of $41,153.77 and costs in the amount of $962.24." This appeal followed.

II. STANDARDS OF REVIEW

A trial court's award of attorney fees is reviewed for an abuse of discretion, which "occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008) (opinion by TAYLOR, C.J.). Any underlying factual findings are reviewed for clear error, which occurs if this Court is definitely and firmly convinced that the trial court made a mistake. *Speicher v Columbia Twp Bd of Election Comm'rs*, 299

Mich App 86, 94; 832 NW2d 392 (2012). The reasonableness of the fees awarded is also reviewed for an abuse of discretion, and any underlying questions of law are reviewed de novo. *Teran v Rittley*, 313 Mich App 197, 208; 882 NW2d 181 (2015). "[Q]uestions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). "In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*.

III. TICHAUER'S PERSONAL LIABILITY

Defendants first argue that the trial court erred by awarding attorney fees against Tichauer personally. We disagree.

As an initial matter, we observe that the record reflects some loose use of terminology regarding the distinction between a "default" and a "default judgment." "It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). In contrast, a default judgment "reduces the default to a judgment for money damages." *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743; 432 NW2d 423 (1988); citing *Wood*, 413 Mich at 583-585. A defaulted party retains the right to challenge the amount of damages, but the defaulted party may no longer challenge liability. *Wood*, 413 Mich at 578; see also *Grinnell v Bebb*, 126 Mich 157, 159-161; 85 NW 467 (1901). Traditionally, therefore, a party is not entitled to notice in advance of taking a default but is entitled to notice in

advance of a default judgment for purposes of challenging the amount of damages. *White v Sadler*, 350 Mich 511, 517-519; 87 NW2d 192 (1957).

As discussed, the trial court entered a default against each defendant and subsequently refused to set aside those defaults. Although the parties did eventually stipulate to set aside the defaults, the default as to fraud was set aside conditioned upon defendants remaining jointly and severally liable for attorney fees under the parties' contract. The default as to the remaining claims was set aside only after the trial court had determined that both defendants were liable for the attorney fees, and their agreement expressly left alone the attorney-fee-award issue. Defendants argue that the trial court erred by relying on the default judgment to hold Tichauer personally responsible for the attorney fees. Technically, this is true: the trial court cited the "default judgment" as the basis for concluding that Tichauer shared CNC's liability, but the default judgment had actually been set aside. Substantively, however, it is clear that the trial court meant to refer to the defaults, which at all relevant times had conclusively established that CNC was an alter ego of Tichauer and Tichauer could be held personally liable for CNC's conduct. The trial court correctly relied on the defaults for the conclusion that Tichauer was personally responsible for CNC's conduct, including damages.

Attorney fees are typically not recoverable unless they are provided by, in relevant part, a contractual provision. *Wyandotte Electric Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 150; 881 NW2d 95 (2016). Such contractual provisions are enforceable, but they are limited to only reasonable attorney fees. *Zeeland Farm Servs, Inc v JBL Enterprises, Inc*, 219

Mich App 190, 195-196; 555 NW2d 733 (1996). When attorney fees are provided for by a contractual provision, recovery of those fees is considered an element of damages. *Fleet Business Credit, LLC v Kraphol Ford Lincoln Mercury Co*, 274 Mich App 584, 589; 735 NW2d 644 (2007). Under the default, Tichauer could be held personally liable for damages, and defendants were no longer able to challenge that liability. Therefore, to the extent the contract permitted an award of attorney fees, the trial court properly held that Tichauer was jointly and severally responsible, along with CNC, for paying them.

Defendants also argue that any attorney fees associated with the fraud claim should not have been awarded. This argument is neither properly presented nor supported. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000); *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). In any event, it does not appear to be correct. The trial court's award of attorney fees was based on ¶ 11 of the Facility Use Agreement. That provision entitles plaintiff to "all costs, losses, damages, liabilities and expenses (including reasonable attorneys' fees), *arising out of or based upon* . . . the breach or default by [CNC] . . . under any provision of this Facility Use Agreement . . . ." (Emphasis added.) Plaintiff's fraud claim generally asserted, in part, that defendants, including Tichauer personally, never intended to pay for their use of plaintiff's facility. Although perhaps not itself a direct breach of the contract, a fair reading of the fraud claim is that it *arises out of or is based upon* defendants' breach of the contract. In the absence of any meaningful argument to the contrary, we are unable to conclude that it was improper for defendants to be jointly and severally responsible for all attorney fees incurred in this litigation.

IV. REASONABLENESS OF ATTORNEY FEES

Defendants next argue that the hourly rate of $275 set by the trial court was unreasonably high in light of the lack of complexity of the case. Defendants do not actually suggest what they believe would be a more appropriate hourly rate. In any event, we disagree that the rate set by the trial court was unreasonable.

The party requesting attorney fees must establish the reasonableness of those fees, and trial courts must consider a nonexclusive list of factors when determining a reasonable attorney fee. *Smith*, 481 Mich at 528-530 (opinion by TAYLOR, C.J.). Traditionally, the factors come from two sources and overlap somewhat:

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Id*. at 529, quoting *Wood*, 413 Mich at 588.]

and

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;

> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent. [*Smith*, 481 Mich at 530 (opinion by TAYLOR, C.J.), quoting MRPC 1.5(a).]

However, the starting point is to determine "the fee customarily charged in the locality for similar legal services[.]" *Smith*, 481 Mich at 531 (opinion by TAYLOR, C.J.). To make that determination, the trial court properly considered the 2020 State Bar of Michigan Economics of Law Practice Survey. See *Vittiglio v Vittiglio*, 297 Mich App 391, 409-410; 824 NW2d 591 (2012).

The 2020 Economics of Law Practice Survey showed that in Van Buren County, the median hourly billing rate was $250 and the mean hourly billing rate was $246; statewide, the median hourly billing rate was $275 and the mean hourly billing rate was $305. A "median" is simply the number that falls in the center of a set of numbers, whereas a "mean" is essentially the average of all of the numbers in a set.[2] The mean billing rate in the field of civil litigation was $324, and the mean billing rate in the field of contracts was $302. The mean billing rate for associates was $250, whereas the mean billing rates for equity and nonequity partners was respectively, $349 and $358. The mean billing rate for attorneys with 11 to 15 years of experience was $297, and for attorneys with 6 to 10 years of experience was $285. The 75th percentile billing rate in Van Buren County was $282. Notwithstanding defendants' contention that this case should have been simple and straightforward, the fraud claim would have generated some additional complexity, as would the matter of

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[2] See Britannica, *Mean, Median, and Mode* <https://www.britannica.com/science/mean-median-and-mode> [https://perma.cc/MZB2-AYVX].

holding Tichauer, a California resident, personally liable. Defendants argue that the fraud claim was improper, but this argument is nothing more than an improper effort to relitigate a matter decided by default following defendants' mishandling of the case. That mishandling also generated additional complexity, and it is noteworthy that the evidence of the parties' communications shows that plaintiff was open to a settlement offer if defendants could provide a concrete amount and at least pay the outstanding balance on their undisputed breach of contract. The protracted nature of this litigation was mostly due to defendants' conduct, not plaintiff's conduct.

As plaintiff points out, the billing records submitted by plaintiff's counsel show that five attorneys worked on the matter, one of whom was an associate who billed at a rate of $245 an hour, and that rate was not adjusted upward in light of the trial court's reasonableness determination. Two of the other attorneys were also associates, but they had, respectively, twelve and nine years of experience by 2019, the first year in which they billed anything in this matter. Thus, some upward departure for their billing rates would be appropriate. Another lawyer was the founding partner of the firm, which would also warrant some upward departure. The fifth attorney is a slightly closer question, because he became a partner in early 2020 and had only been licensed in Michigan in 2016. His rate for 2020 would clearly warrant some upward departure. We conclude that the evidence in the record, including a number of awards given to the final attorney and the fact that he made partner after only three years, suggests an above-average level of skill. Ultimately, given the statewide mean billing rate for civil litigation, the fault of defendants in dragging this matter out and adding to its complexity, and the

above-average qualifications of the four attorneys whose billing rate was set at $275, we conclude that a rate of $275 an hour is, if anything, on the low side. It is undisputed that an hourly rate of $275 is comfortably below the 75th percentile in Van Buren County of $282. We find no error in a billing rate of $275 an hour for four of the attorneys.

V. BLOCK BILLING AND REASONABLE HOURS

Defendants finally contend that plaintiff's invoices failed to permit a proper calculation of the amount of hours expended in this matter, largely premised on plaintiff's use of "block billing" formatted invoices. We disagree.

" 'Block billing' refers to the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Harolds Stores, Inc v Dillard Dep't Stores, Inc*, 82 F 3d 1533, 1554 n 15 (CA 10, 1996).[3] Some federal courts have held that block billing—in which "vague and general entries such as, 'telephone conference,' 'office conference,' 'research,' and 'review article' make it impossible for the Court to evaluate the reasonableness of the hours expended on the litigation"—warrant a general reduction of billed hours by 10% to 20%. See *Gratz v Bollinger*, 353 F Supp 2d 929, 939 (ED Mich, 2005). Nevertheless, it appears that the federal courts did not reduce the attorneys' submitted billable hours simply because of their use of block billing but, rather, because the specific block bills presented contained vague entries. *HJ Inc v Flygt Corp*, 925 F2d 257, 260 (CA 8,

[3] Although decisions of lower federal courts are not binding on this Court, they may be considered persuasive or informative. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

1991); *In re Pierce*, 338 US App DC 97, 104-105; 190 F 3d 586 (1999). By necessary implication, the fact that a block bill contains some entries that are vague is not considered fatal to the block bill itself. Rather than rejecting a block bill entirely, the federal courts will impose a percentage reduction for the use of "sloppy and imprecise time records . . . ." See *Jane L v Bangerter*, 61 F 3d 1505, 1510 (CA 10, 1995).

Defendants rely on *Augustine v Allstate Ins Co*, 292 Mich App 408; 807 NW2d 77 (2011). This Court in *Augustine* did not directly address block billing. In *Augustine*, this Court had previously remanded an appeal from an attorney-fee award in favor of the plaintiff for the trial court to follow the procedure set forth by our Supreme Court in *Smith*, which at the time had just been decided. *Id*. at 413-415. On remand, the defendant sought to discover the plaintiff's litigation file for the purpose of assessing the accuracy of the plaintiff's attorneys' bills, and the trial court refused the request. *Id*. at 415-416. This Court concluded that the trial court abused its discretion under the circumstances. *Id*. at 423. Critical to this Court's analysis was the fact that the "plaintiff's attorneys' law firm did not maintain a time-billing procedure," "lawyers of the firm did not make contemporaneous time entries," and "the summary billing statement presented in support of an attorney-fee award was a retrospective exercise based on memory and possibly some office notes or Excel spreadsheets." *Id*. at 421-422. The trial court also abused its discretion by failing to follow this Court's instructions on remand and by admitting some inadmissible evidence. *Id*. at 425-432. Finally, the trial court erred "by assessing the number of hours allowed for the attorney-fee calculation" because the plaintiff's attorneys' billing summary was simply not backed by any documentation or testimony whatsoever. *Id*. at

432-434. In other words, nowhere in *Augustine* did this Court condemn block billing but, rather, condemned a total failure to document time spent on tasks related to litigation.

In contrast, this Court has, albeit entirely in unpublished opinions,[4] consistently rejected the proposition that the use of block billing is per se improper or vague so long as the entries within the blocks are themselves adequately detailed. See *Bristol West Ins Co v Smith*, unpublished per curiam opinion of the Court of Appeals, issued February 6, 2007 (Docket No. 264693), p 6; *TBCI, PC v State Farm Mut Auto Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 23, 2008 (Docket Nos. 279965 and 279996), pp 2-3, 5; *Bonacci v Ferris State Univ*, unpublished per curiam opinion of the Court of Appeals, issued January 13, 2015 (Docket Nos. 318136 and 319101), p 12; *Dubuc v Copeland Paving Inc*, unpublished per curiam opinion of the Court of Appeals, issued March 29, 2016 (Docket No. 325228), p 9; *Schwartz v Oltarz-Schwartz*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2016 (Docket Nos. 324555, 330031, and 330213), p 16; *Rudnicki v Ateek*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2016 (Docket No 328130), p 4; *Vogel v Desaegher*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2019 (Docket No. 339763), pp 5-7.

In the absence of any published authority in Michigan on point, the unanimity of this Court's unpublished opinions, and the federal courts' focus on

[4] Unpublished opinions are not binding, and reliance on those opinions is disfavored, but under exceptional circumstances, they may be considered persuasive. See *Glasker-Davis v Auvenshine*, 333 Mich App 222, 232 n 4; 964 NW2d 809 (2020).

whether particular entries are proper rather than rejecting block billing altogether, we regard our unpublished opinions as persuasive. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 232 n 4; 964 NW2d 809 (2020). Furthermore, we agree with them: we are unable to find anything intrinsically vague about block billing—so long as the block-billing entries are sufficiently detailed to permit an analysis of what tasks were performed, the relevance of those tasks to the litigation, and whether the amount of time expended on those tasks was reasonable. We therefore reject defendants' challenge to the use of block billing as per se precluding a determination of reasonable hours expended on a matter.

Defendants further argue that, even if block billing is permissible, the invoices submitted by plaintiff's attorneys were as deficient—and therefore as improper—as the invoices at issue in *Augustine*. This is clearly untrue. Plaintiff's attorneys' invoices were broken down by month and by the attorney or staff member who worked on the file. Each month's entry per person contains an enumeration of specific tasks undertaken on specific days. Defendants do not seriously allege that any particular such tasks are, themselves, so vague that it cannot be determined what really occurred or how the task was relevant to the litigation. Rather, defendants argue that the block billing is improper generally because it cannot be discerned how much time was spent on each discrete task. However, such "aggregation" is inherent with block billing, so this is essentially an argument that block billing is improper per se. We find no abuse of discretion in the trial court's determination that it was able to make "a very detailed assessment as to whether" the services described in plaintiff's invoices

"were necessary and whether the amount of time spent on those were reasonable."

Defendants also argue that plaintiff's attorneys' billing records make it impossible to determine how much time was spent on "clerical" tasks. Defendants provide an enumeration of specific tasks that they contend "appear to be 'clerical.' " This list is identical to the list defendants submitted to the trial court, but it is not clear from the record how the trial court addressed that list.[5] In any event, to the extent defendants challenge the entries as vague, we do not believe that entries such as "assist with finalizing Complaint," "follow up with client re: status of filing and service," "review draft Response re: Motion and assist re: edits," "review correspondence from Atty Boughton," "draft Proof of Service," and so on are vague or would be any more comprehensible if they were itemized. It is also not immediately clear that those entries are indeed purely clerical. Under the circumstances, we are not persuaded that the trial court clearly erred in its factual assessment of the invoices.

Affirmed. Plaintiff, being the prevailing party, may tax costs. MCR 7.219(A).

CAMERON and RICK, JJ., concurred with RONAYNE KRAUSE, P.J.

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[5] We note that three separate orders refer to a hearing allegedly held on November 25, 2020; however, the lower court register of actions does not reflect that any such hearing occurred. We have not been provided with any transcript for any such hearing, which would be in violation of MCR 7.210(A)(1) and MCR 7.210(B)(1)(a) if the hearing did, actually, occur. We would have presumed defendants' list would be considered at such a hearing. Nevertheless, defendants' counsel has advised this Court that no hearing did in fact occur on that date.

PEOPLE v LOEW

Docket No. 352056. Submitted November 2, 2021, at Grand Rapids. Decided January 13, 2022, at 9:15 a.m. Leave to appeal granted 510 Mich 952 (2022).

Daniel A. Loew was convicted following a jury trial in the Allegan Circuit Court of two counts of criminal sexual conduct, first-degree (CSC-I), MCL 750.520b(1)(f); one count of criminal sexual conduct, second degree (CSC-II), MCL 750.520c(1)(f); and two counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) and (b). Following his convictions, defendant appealed in the Court of Appeals. Before his appeal was considered, defendant learned that Judge Margaret Zuzich Bakker, who presided over the trial, had corresponded via e-mail, during the trial, with Allegan County's elected prosecutor. In the e-mails, the judge asked questions about the investigation that led to the charges. Defendant moved for a new trial, alleging judicial misconduct, ineffective assistance of counsel, and prosecutorial misconduct. The court, William A. Baillargeon, J., granted defendant's motion on the basis that the trial judge's e-mails created the appearance of impropriety. The prosecution filed a cross-appeal in the Court of Appeals contesting the decision to grant defendant's motion for new trial.

The Court of Appeals *held*:

1. The trial prosecutor noted in her opening statement that the investigation of the offenses had been flawed. The trial prosecutor questioned a Michigan State Police (MSP) trooper during trial about his mishandling of the evidence and what he would have done differently had the investigation been conducted properly. During the trial prosecutor's direct examination of the trooper, the trial judge e-mailed the elected prosecutor, who was not participating in the trial. The judge told the elected prosecutor that the trooper "didn't do a very good investigation" and asked whether the MSP still employed detectives. The elected prosecutor responded the following day, stating that the MSP did employ detectives but did not typically assign them to CSC cases. The elected prosecutor further noted that the trooper who had conducted the investigation had undergone additional training

following the investigation of the offenses at issue in this case. The trial judge then sent another e-mail asking the elected prosecutor why the victim had not been "referred for a medical." The prosecutor responded that no one had initially noticed that the victim had not been examined, and as a result of the oversight, her office would use a checklist for CSC cases in the future. In a criminal trial, a defendant's right to due process includes the right to have an unbiased and impartial decision-maker hear and decide the case. Under Canon 3(4)(a) of the Code of Judicial Conduct, a judge is not permitted to initiate ex parte communications concerning a pending proceeding except regarding matters related to scheduling, administrative purposes, or emergencies that do not concern substantive issues. In addition, the judge must reasonably believe that no party will gain an advantage as a result of the ex parte communications, and the judge must promptly notify the other parties and their counsel of the ex parte communications and allow them an opportunity to respond. Although the e-mails from the judge to the elected prosecutor were ex parte, they were not prohibited under Canon 3(A)(4)(a) of the judicial code, which provides that ex parte communications that relate to administrative matters are not prohibited. The e-mails here involved matters of administrative process that did not concern defendant's trial and did not concern substantive issues. The judge's first e-mail sought clarification of the MSP's process for investigating sexual assault allegations, and her second question concerned the process of referring victims for medical examinations. Although the court's concerns were tangential to defendant's trial, the nature of the questions was not specific to the trial and focused more globally on investigative processes. However, even though the ex parte communications did not relate to the merits of defendant's case, the judge was still required to comply with the disclosure requirements of Canon 3(A)(4) of the judicial code, which the judge failed to do.

2. Because the communications from the judge to the elected prosecutor were ex parte and the judge failed to comply with the judicial code's disclosure requirements, the next question was whether the trial judge's communications created the appearance of impropriety, contrary to Canon 2 of the judicial code. As an initial matter, the Michigan Supreme Court has held that the "appearance of impropriety" standard is not relevant when specific court rules or canons pertain to a subject and delineate permitted and prohibited judicial conduct. In this case, the specific prohibition in Canon 3(A)(4) was controlling, so the "appearance of impropriety" standard did not govern. Nevertheless, the decision to grant a new trial was based entirely on this

standard. Even accepting that the trial judge's communications created the appearance of impropriety, defendant still was not entitled to a new trial because the trial judge's conduct could not have influenced the jury in any way, given that the jury was not aware of the communications and that the communications did not relate to or bear on any substantive matter at trial. Additionally, the record did not support an inference that the e-mails provided any advantage to or altered any tactics by the prosecutor. Consequently, there was no evidence that the judge's e-mail exchange with the elected prosecutor violated defendant's due-process rights. Contrary to the assertions of the dissenting opinion, the e-mails did not show that the trial judge intended to assist the prosecution in its case. Moreover, such an interpretation of the e-mails did not give weight to the presumption of judicial impartiality.

3. In his motion for new trial, defendant argued that he was denied the effective assistance of counsel because his trial counsel failed to investigate the victim's assertions of fact regarding the color scheme of the bathroom where the assaults occurred and because counsel failed to investigate and present evidence of the victim's prior allegation of sexual assault against a different person. Defense counsel highlighted the discrepancies between the victim's testimony regarding the bathroom décor and that of the other witnesses. Defendant's argument that counsel should have also introduced photographic evidence asked the court to impermissibly second-guess trial counsel's strategy. Defense counsel also was not ineffective regarding his treatment of the victim's prior allegation of sexual assault against another individual. Defendant argued that evidence of the allegation was critical because it showed that the victim was not a virgin before she was assaulted by defendant and that the victim suffered from anxiety and depression before the assaults in this case as a result of the previous sexual assault by another individual. Under Michigan's rape-shield statute, MCL 750.520j, evidence of specific instances of a victim's sexual conduct is inadmissible, with certain exceptions, neither of which were applicable in this case. Therefore, defense counsel was not ineffective for failing to offer evidence of the victim's prior allegations of sexual assault at trial.

4. Defendant claimed that the trial prosecutor committed misconduct by eliciting false testimony from witnesses. Specifically, defendant argued that the prosecutor was aware of the victim's prior allegation of sexual assault but elicited false testimony that the victim was a virgin when she was first sexually assaulted by defendant. Additionally, according to defendant, the

trial prosecutor sought false testimony that the victim suffered from mental health conditions as a result of defendant's sexual assault, rather than as a result of the prior sexual assault by another individual. Although the prosecutor stated that the victim was a virgin during opening and closing arguments, the trial judge instructed the jury that the lawyers' statements were not evidence, and juries are presumed to follow their instructions. Additionally, the victim's virginity was not an element of the charged offenses, so whether the jury believed that the victim was a virgin at the time of the assaults did not matter. Defendant also failed to show that the prosecutor elicited false testimony from witnesses regarding the victim's mental health. In order to prove prosecutorial misconduct on the basis of perjury, defendant was required to show that a witness knowingly made a false statement and that the prosecutor knowingly elicited the false statement. Defendant did not assert that the witnesses knowingly made false statements to the trial court or that the prosecutor knowingly sought false testimony, and nothing in the record supported such conclusions. Therefore, defendant was not entitled to a new trial on the basis of prosecutorial misconduct.

Order granting new trial reversed.

RIORDAN, J., dissenting, agreed with Judge Baillargeon that the trial judge had created an appearance of impropriety by communicating via e-mail with the elected county prosecutor and that defendant was entitled to a new trial on this basis. The judge's e-mails were critical of weaknesses in the investigation of the offenses that could have led to an acquittal. A reasonable mind could have concluded, based on the e-mails, that the trial judge was partial in favor of the prosecution and that the judge either could not or would not set aside any partiality until the conclusion of the proceedings. Under MCR 2.003(C)(1), the trial judge should have disqualified herself on this basis. Additionally, under *Liljeberg v Health Servs Acquisition Corp*, 486 US 847 (1988), three factors had to be considered in order to determine whether the trial judge's communications were harmless: (1) the risk of injustice to the parties, (2) the risk that the denial of relief would produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. Judge RIORDAN concluded that the second and third factors weighed in favor of granting defendant a new trial. Further, he disagreed with the majority that the communications were permissible under Canon 3 of the Code of Judicial Conduct as administrative rather than substantive in nature. Communications that are administrative in nature concern simple procedural matters

regarding the judicial process. By contrast, the trial judge's e-mails concerned the internal investigatory procedures of the MSP and addressed the substance of the trial itself given that the weaknesses of the investigation could have weighed against a guilty verdict. Regardless, the majority's discussion of Canon 3 was largely irrelevant because, while a violation of the Code of Judicial Conduct might tend to show a violation of due process, a defendant cannot be entitled to relief solely on the basis of such a violation. In this case, defendant's entitlement to relief arose under MCR 2.003(C)(1)(b), not under the Code of Judicial Conduct.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Myrene K. Koch*, Prosecuting Attorney, and *Molly S. Schikora*, Assistant Prosecuting Attorney, for the people.

Springstead Bartish Borgula & Lynch, PLLC (by *Heath M. Lynch*, *Laura J. Helderop*, and *Kathryn M. Springstead*) for defendant.

Before: MURRAY, P.J., and MARKEY and RIORDAN, JJ.

MURRAY, P.J. Following a jury trial, defendant was found guilty of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (defendant engages in sexual penetration, causes personal injury to the victim, and uses force or coercion); one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(f) (defendant causes personal injury to the victim and uses force or coercion to accomplish sexual contact); one count of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (sexual penetration involving victim at least 13 years of age and under 16 years of age); and one count of CSC-III, MCL 750.520d(1)(b) (penetration by force or coercion). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 240 to 480 months' imprisonment for the CSC-I convictions and to 240 to 360

months' imprisonment for the CSC-II and CSC-III convictions. Defendant appealed his convictions and sentences to this Court. He also moved for a new trial in the trial court on the basis of judicial misconduct, ineffective assistance of counsel, and prosecutorial misconduct. The prosecution filed a cross-appeal after the trial court granted defendant a new trial on the basis of judicial misconduct. For the reasons set forth in this opinion, we reverse the trial court's order granting defendant a new trial.

I. BASIC FACTS

The relevant events began in December 2015, when the victim was 13 years old. At the time, defendant and the victim's cousin, Brouke Loew, were dating. Defendant, Brouke, and their infant son lived with Brouke's parents, Jane and Scott Heppe, at the Heppes' rural Allegan County home. Near the end of December 2015, Brouke's parents hosted a wedding reception for the victim's father and his new wife. The reception was held in a detached garage, and wedding guests did not have access to the Heppes' house.

Sometime during the evening, Brouke asked the victim to go to the house to help defendant unload groceries. The victim was in the kitchen when defendant called the victim to the bathroom so he could "show [her] something." The victim went to the bathroom where defendant closed and locked the door. According to the victim, defendant undressed her and forced her to engage in penile-vaginal sex on the bathroom floor. Defendant ejaculated on the floor before exiting the bathroom. The victim remained in the bathroom where she felt cramping in her stomach and had vaginal bleeding.

After the victim's father was incarcerated in early 2016, Jane volunteered to take the victim and her sisters to see their father on the weekends. The victim and her sisters would usually stay Friday evenings at the Heppes' house and would get up early Saturday mornings to travel to the prison for the visits. On those weekends, the victim and her younger sister would sleep on the living room couches. After everyone was asleep, the victim would wake up to defendant "touching me, my thighs, my boobs, my butt, everywhere, all over my body." Defendant would walk the victim to the bathroom where he would make her engage in penile-vaginal sex. The victim described that defendant would ejaculate on the floor or on the bathroom rugs. During one encounter, the victim stated defendant grabbed her by the hair and "pushed [her] head to the ground with his hand," causing the victim's eyes to become swollen and irritated.

The assaults mostly occurred in the bathroom at the Heppes' house; however, the victim also recounted one episode of penile-vaginal sex at the home she once shared with her father and another incident when defendant forced the victim to perform fellatio in his pickup truck. After completing the fellatio, the victim asked defendant when he would stop forcing himself on her, to which defendant replied: "If you tell anyone, you don't want to know what happens." Nevertheless, the victim disclosed the abuse to her father during a prison visit in January 2018. The victim's older sister learned of the disclosure and reported it to the Michigan State Police (MSP).

After the MSP investigated the circumstances of the crimes, defendant was charged, convicted, and sentenced as noted. This appeal followed. Before this Court could consider defendant's appeal, however, de-

fendant learned of e-mails between the trial judge and the Allegan County elected prosecutor, who was not the trial prosecutor. The dates and times of the e-mail exchanges indicated the e-mails were sent and received while defendant's trial was ongoing. Consequently, defendant moved the trial court for a new trial, alleging judicial misconduct arising from the e-mail exchanges. Defendant alternatively argued a new trial was warranted because defense counsel was ineffective and because the prosecutor committed misconduct by eliciting perjured testimony. The trial court[1] granted defendant a new trial on the basis that the e-mail communications created the appearance of impropriety but denied the motion on the bases of ineffective assistance of counsel and prosecutorial misconduct.[2] The prosecution filed a cross-appeal in this Court contesting the trial court's grant of a new trial. We now turn to a review of that challenge.

II. ANALYSIS

A. JUDICIAL MISCONDUCT

The prosecution contends that the trial court abused its discretion in granting defendant a new trial because the e-mails between the trial judge and the elected prosecutor did not violate the Code of Judicial Conduct, Canons 2 and 3(A)(4); did not cause defendant any prejudice; and therefore did not violate his right to due process of law.

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[1] On defendant's motion, the case was reassigned to a different trial court judge. For purposes of this opinion, we will refer to the judge who presided over the trial as the "trial judge" and the judge who decided the motion for new trial as the "trial court."

[2] This was defendant's second motion for a new trial. Defendant's first motion was denied by the trial judge.

Under MCR 6.431(B), a trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). Our review "examine[s] the reasons given by the trial court for granting a new trial. This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief." *Id*. (citations omitted). "The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015).

Before addressing the legal merits of this argument, we set out below the factual underpinnings for the argument. As noted, this issue arises from e-mail exchanges between the trial judge and the elected prosecutor (who, again, was not handling the trial), which took place during two of the three days of defendant's trial. Before the first e-mail exchange took place, the assistant prosecutor made her opening statement and put the jury on notice that the investigation, by an MSP trooper, was somewhat flawed:

> And we will hear, unfortunately, that there is no D.N.A. evidence. [The victim] will testify that . . . she made her aunt aware, she made law enforcement aware of blue bath mats that she last remembered the Defendant ejaculating on. And you will hear from [MSP] Trooper [Eric] Desch that aunt met him in the middle of the night at a gas station with a garbage bag full of bath mats that were green, white, and blue. Those bath mats were never taken and shown to the victim. Those bath mats were not seized

> personally by law enforcement. But Aunt Janie turned those over and those obviously didn't have any D.N.A on them.

Then, during the direct exam of the MSP trooper, which commenced at 3:11 p.m., the trial prosecutor questioned the trooper about the investigation and how he did not ideally handle the collection of the mats, and what he would have done differently had the investigation been conducted correctly. The trooper's trial testimony, after cross-examination, concluded just prior to 3:47 p.m.

The first e-mail from the trial judge to the elected prosecutor occurred at 3:41 p.m. and stated:

> This [MSP] trooper didn't do a very good investigation. Don't they have detectives with MSP anymore?

The elected prosecutor did not immediately respond, as her responding e-mail was sent at 8:47 a.m. the next day, and stated:

> They do but not typically for CSC's [sic]. This trooper has been given additional personal training since this investigation.[3]

At 8:50 a.m. that same day, the trial judge responded with another question on a different subject:

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[3] The judge's questions apparently arose from a concern regarding the investigation by MSP Trooper Desch. Trooper Desch reported that he collected the bathroom rugs where the sexual assaults occurred during a 1:00 a.m. meeting with Jane at a gas station. The trooper admitted during questioning that he never confirmed with the victim that these were the rugs from the subject bathroom. Trooper Desch also stated that he never took pictures of the subject bathroom until several months after the victim first disclosed the abuse, nor did he attempt to interview defendant or Brouke.

> One more question....this victim was not referred for a medical, do you know why?[4]

Twelve minutes later the elected prosecutor responded, and the following exchange occurred:

> [*Elected Prosecutor*]: Yes, because the prior [assistant prosecuting attorney] assigned to the case did not catch that it was missed nor did anyone else who touched the file. As a result, there will now be a checklist for CSC's [sic] in files.
>
> [*Trial Judge*]: I thought Safe Harbor would catch it.
>
> [*Elected Prosecutor*]: Unfortunately, no. The forensic interviewer is supposed to check that before case review but the list often is given to interns. I noticed it after the fact at case review but by then not clear on if the victim had much support.

According to defendant and the trial court, defendant's due-process right to a fair trial was violated because the questions the trial judge e-mailed to the elected prosecutor were ex parte communications that exhibited at least the appearance of impropriety, contrary to the Code of Judicial Conduct, and caused him prejudice.

The Fourteenth Amendment to the United States Constitution provides that states may not "deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV; see also Const 1963, art 1, § 17 ("No person shall . . . be deprived of life, liberty or property, without due process of law."). A person is entitled to due process of law prior to being deprived of their liberty, which "in a criminal trial [includes] . . . a neutral and detached magistrate." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). " 'Due process requires that an unbiased and impartial

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[4] The unspaced ellipsis was in the original e-mail.

decision-maker hear and decide a case.' " *TT v KL*, 334 Mich App 413, 431; 965 NW2d 101 (2020) (citation omitted). Consequently, a judge should act neither as an advocate nor an adversary in any criminal proceeding, as the hallmark of the judiciary is impartiality. See e.g., *Stevens*, 498 Mich at 179 ("The right to an impartial judge is so fundamental that without this basic protection, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.") (quotation marks, citations, and alteration omitted). A judge is presumed unbiased, and "[a] defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011) (quotation marks and citation omitted).

We first turn to the two canons raised by the parties, Code of Judicial Conduct Canons 2 and 3(A)(4), and consider whether the communications violated either canon. Because a violation of the judicial canons alone cannot constitute a constitutional violation, if we conclude a violation of either canon occurred, we will then turn to whether defendant was prejudiced by those communications. See *People v Aceval*, 282 Mich App 379, 390; 764 NW2d 285 (2009), and *Estate of Trentadue ex rel Aguilar v United States*, 397 F3d 840, 865 (CA 10, 2005) ("[N]ot all ex parte proceedings violate due process or even raise a serious constitutional issue."), citing *Simer v Rios*, 661 F2d 655, 679 (CA 7, 1981), and *Alexander Shokai, Inc v Comm'r of Internal Revenue Serv*, 34 F3d 1480, 1484-1485 (CA 9, 1994) (holding that there was no due- process violation where ex parte communications did not unfairly prejudice party).

1. EX PARTE COMMUNICATIONS

Ex parte communications by judges are specifically addressed by the Code of Judicial Conduct, which states:

> (4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> (a) A judge may allow ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits, provided:
>
> (*i*) the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (*ii*) the judge makes provision promptly to notify all other parties and counsel for parties of the substance of the ex parte communication and allows an opportunity to respond.[5] [Code of Judicial Conduct, Canon 3(A)(4).]

Here, it is undisputed that the trial judge initiated ex parte communications with the elected prosecutor during defendant's trial. We conclude that the e-mail questions from the judge to the elected prosecutor were clearly ex parte because the e-mails did not include defense counsel (nor, for that matter, the trial prosecutor). However, under Canon 3(A)(4)(a), ex parte communications that relate to administrative matters are not prohibited. Here, we hold that the e-mails relate to administrative matters because neither related to nor bore on substantive matters in defendant's trial.

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[5] Likewise, the Michigan Rules of Professional Conduct restrict a lawyer's ability to communicate with others, stating: "A lawyer shall not . . . communicate ex parte with such a person concerning a pending matter, unless authorized to do so by law or court order[.]" MRPC 3.5(b).

Rather, they involved matters of administrative process that did not concern defendant's trial. This is clear from the context of the e-mails, as the judge sought clarification of the MSP's *process* for investigating allegations of sexual assault—specifically, whether the MSP continued to utilize detectives for this type of investigation. The prosecutor's response the following day reveals that she, too, considered the inquiry to be process-oriented, as she explained that the MSP did not use detectives on these types of cases, and the trooper had received follow-up training. The same holds true for the second inquiry, regarding the *process* of referring victims of sexual assault for medical examinations. Again, the prosecutor's response explained both why no referral occurred for this victim and the process put in place to ensure no missed referrals occur in the future. These communications did not relate to or bear on any substantive issue in defendant's proceeding, but instead related to larger issues of process. Admittedly, the concerns were tangential to defendant's trial because the general concerns arose during the MSP trooper's testimony, yet the nature of the questions focused more globally on investigatory processes and not on issues specific to the trial itself. Therefore, the communications were not prohibited ex parte communications violative of Canon 3(A)(4).

This conclusion is consistent with decisions from our sister states that have concluded ex parte communications between a sitting judge and a prosecutor do not warrant a new trial so long as the communications focus on administrative or procedural (i.e., nonsubstantive) matters. For example, the North Carolina Supreme Court rejected a defendant's argument that he was entitled to a new trial, in part, because the trial court judge had impermissibly communicated with the prosecutor regarding the oath taken by jurors. *State v*

McNeill, 349 NC 634, 642, 652-653; 509 SE2d 415 (1998). The court determined the defendant was not entitled to a new trial on this basis because the communication "relate[d] only to the administrative functioning of the judicial system . . . ." *Id*. at 653. See also *Rodriguez v State*, 919 So 2d 1252, 1274-1275 (Fla, 2005) (holding that ex parte communications regarding the subject of the defendant's upcoming hearing did not violate the defendant's due-process rights because the communications were purely administrative in nature).

We recognize the danger that ex parte communications can have on a pending case, and/or on the integrity of the judiciary:

> *Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge. *Ex parte* conversations or correspondence can be misleading; the information given to the judge 'may be incomplete or inaccurate, the problem can be incorrectly stated.' At the very least, participation in *ex parte* communications will expose the judge to one-sided argumentation, which carries the attendant risk of an erroneous ruling on the law or facts. At worst, *ex parte* communication is an invitation to improper influence if not outright corruption. [*Grievance Administrator v Lopatin*, 462 Mich 235, 262-263; 612 NW2d 120 (2000), quoting Shaman, Lubet & Alfini, Judicial Conduct and Ethics (3d ed), § 5.01, pp 159-160.]

None of these concerns is present here. The communications did not relate to a substantive matter that was to be resolved in defendant's trial; rather, the communications related exclusively to how investigations are conducted and when and how victims are referred for medical treatment. We likewise reject the notion that the communications can be read as an attempt by the trial judge to "tip-off" the prosecutor about deficiencies

in the case. The e-mails reflect three direct questions about processes, with the answers revealing that the prosecutor perceived the questions as solely relating to processes.[6] That these e-mails do not squarely address scheduling or other such administrative matters does not take these e-mails out of that category, as they did not relate to substantive matters in defendant's trial.

Even though the ex parte communications were not related to the merits of defendant's case, the trial judge was still required to comply with Subsections (a)(i) and (ii) of Canon 3(A)(4). The record supports the inference that the trial judge did not consider the e-mails to be advantageous to either party, but the record also supports the conclusion that the trial judge did not disclose the e-mails to the parties, as required by Subsection (a)(ii). Thus, the trial judge did not comply with the disclosure requirements of Canon 3(A)(4)(a)(ii).

2. THE APPEARANCE OF IMPROPRIETY

This leaves us with the question of whether, as the trial court found, the trial judge's communications created the appearance of impropriety. The Code of Judicial Conduct, Canon 2(A), provides that "[a] judge must avoid all impropriety and appearance of impropriety." There can be no doubt that "there may be situations in which the appearance of impropriety on the part of a judge . . . is so strong as to rise to the level of a due process violation," *Cain v Dep't of Corrections*,

[6] Had the trial judge asked these questions to the prosecutor in the hallway at the end of the first day of trial, rather than asking them in an e-mail from the bench, there would be little to discuss. After all, there is no prohibition on a judge asking the elected prosecutor about processes used in criminal investigations, and questions like this predictably arise during trials.

451 Mich 470, 513 n 48; 548 NW2d 210 (1996), and that a showing of actual bias is not necessary "where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,' " *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). We hold that even if there was an appearance of impropriety in the e-mail exchange initiated from the bench, defendant has not established prejudice.

We first question whether Canon 2 can even be considered, as the Supreme Court has repeatedly held that the "appearance of impropriety" standard does not govern when specific court rules or canons pertain to a subject. *In re Haley*, 476 Mich 180, 194-195; 720 NW2d 246 (2006) ("We decline to allow general allegations of impropriety that might overlap specifically authorized or prohibited behavior and conduct to supersede canons that specifically apply to the conduct in question."). See also *Adair v Michigan*, 474 Mich 1027, 1039 (2006) ("The 'appearance of impropriety' standard is relevant not where there are specific court rules or canons that pertain to a subject, such as judicial disqualification, but where there are *no* specific court rules or canons that pertain to a subject and that delineate what is permitted and prohibited judicial conduct."). Under *In re Haley* and *Adair*, the "appearance of impropriety" standard does not govern because the specific prohibition in Canon 3(A)(4) controls. The challenged actions relate exclusively to the ex parte communications between the trial judge and elected prosecutor, and Canon 3(A)(4) specifically covers that topic. Nevertheless, we will resolve the issue because it was the sole basis for the trial court's decision and is a large part of the dissent's focus.

We accept for purposes of discussion that the trial judge's e-mail communications created an appearance of impropriety, contrary to Canon 2, because the e-mail communications occurred during the trial and did not include defense counsel. As the trial court noted, members of the public may perceive some gamesmanship when a trial judge communicates with the head prosecutor while a criminal trial is underway and the communications spawned from testimony in the trial. That perception is legally questionable but one that we accept for purposes of resolving this matter.

Even accepting that the trial judge's communications created the appearance of impropriety, defendant was still not entitled to a new trial because the trial judge's conduct did not "influence[] the jury" in any way. *Stevens*, 498 Mich at 171. A defendant must overcome a significant hurdle to show judicial bias when the alleged misconduct occurred outside the presence of a jury. *United States v Morrow*, 977 F2d 222, 225 (CA 6, 1992) (finding that the threat of prejudice is diminished when an otherwise inappropriate judicial act or remark is made outside of the jury's presence); *United States v Smith*, 706 F Appx 241, 253-254 (CA 6, 2017).

Because the judge's questions to the elected prosecutor did not relate to or bear on any substantive matter at trial, nor was the jury ever aware of the e-mails, we conclude the judge's e-mail questions to the elected prosecutor did not influence the jury in any way. Moreover, defendant's arguments in the motion for new trial, which were premised on conjecture that the trial prosecutor received an unfair tactical advantage from these e-mails, provided no specific instance or actual evidence showing defendant was prejudiced by the judge's conduct. While defendant argues that the

prosecution received an unfair tactical advantage because the communications could have altered the prosecution's theory of the case, that argument is difficult to accept because the trial prosecutor raised the problems with the MSP investigation during opening statements, which occurred before the first e-mail was sent. So, too, did the trooper's testimony concerning some of the problems with the investigation. The prosecution's opening statement was consistent with its closing arguments, in which the trial prosecutor again acknowledged the inadequacies of the investigation. The record does not support even an inference that the e-mails provided any advantage or altered any tactics by the prosecution. It cannot be said that the communications evidenced anything more than inquiries regarding the investigation process, and there is nothing beyond rank speculation that the communications caused defendant any prejudice. Consequently, the trial judge's e-mail exchange with the elected prosecutor did not violate defendant's due-process rights, and the trial court abused its discretion in granting the motion for new trial.

Our divergence with the dissent comes down to several disagreements. First, we simply do not read into these short e-mails an intent by the judge to assist the prosecution in presenting its case, and nor did the trial court. To read these e-mails in such a way is unreasonable given the actual language of the e-mails and the responses from the elected prosecutor, which reveal an understanding that the questions related to administrative processes in general, not to how the case itself was proceeding. Additionally, to read these e-mails in the way the dissent does gives no credence to the presumption of impartiality, as the dissent places the worst possible gloss onto the meaning of the e-mails. Second, the dissent overlooks the fact that the

trial prosecutor had already raised the issue of the trooper's partially deficient investigation, as well as the trooper's testimony, before the first e-mail was sent. Indeed, the dissent concedes that it is merely speculating about whether the trial prosecutor altered her strategy in light of the e-mails, yet the record unequivocally shows that this was not the case. Third, we see no possibility of prejudice to defendant when neither the trial prosecutor nor the jury knew of the e-mails.

We cannot accept the legal conclusion that questions sent from a trial judge to an elected prosecutor about how certain aspects of a criminal investigation are handled—questions that neither the trial prosecutor, defense attorney, nor jury were aware of—necessitate a new trial because the e-mails were sent during trial. We agree that the timing was poor, but other than the timing, nothing within the e-mails or that actually occurred at trial warrants the conclusion that a new trial was merited.

Because judicial misconduct was not a proper basis on which to grant defendant a new trial, we must address defendant's remaining arguments that he was entitled to a new trial on the basis of ineffective assistance of counsel and prosecutorial misconduct.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues he was denied the effective assistance of counsel because his trial attorney failed to adequately investigate and challenge the case against him.

The question of whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of fact are

reviewed for clear error and questions of constitutional law are reviewed de novo. *Id*. To the extent we must engage in statutory interpretation, our review is de novo. *People v Cannon*, 206 Mich App 653, 654-655; 522 NW2d 716 (1994).

> A fundamental rule of statutory interpretation is to determine the purpose and intent of the Legislature in enacting a provision. The Legislature is presumed to have intended the meaning it plainly expressed. Where the language of a statute is clear, there is no need for interpretation and the statute must be applied as written. [*Id*. at 655 (citations omitted).]

Trial counsel is presumed effective, and defendant must overcome a strong presumption that a trial counsel's performance was sound trial strategy. *Leblanc*, 465 Mich at 578. To succeed on an ineffective assistance of counsel argument, a defendant must show (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that he was prejudiced by counsel's performance . . . ." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015) (quotation marks and citations omitted). This second prong requires defendant to show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. (quotation marks and citation omitted). This Court will not "substitute [its] judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

"Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*,

463 Mich 590, 600; 623 NW2d 884 (2001). A trial counsel's failure to conduct a reasonable investigation may constitute ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 52-55; 826 NW2d 136 (2012). "Counsel always retains the duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 52 (quotation marks and citation omitted). "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Defendant's motion for new trial argued there were two reasons he was denied effective assistance of counsel—first, because defense counsel failed to investigate the victim's assertions of fact regarding the color scheme of the bathroom where the sexual assaults occurred, and second, because counsel failed to investigate and present evidence of the victim's prior allegation of sexual assault by another individual. According to defendant, information about the victim's prior sexual assault allegation was essential to impeach the victim's credibility. We address each argument in turn.

1. COLOR SCHEME OF THE BATHROOM

Defendant's first argument arises from the victim's testimony regarding the color scheme of the bathroom where the sexual assaults took place. During trial, the victim testified defendant first sexually assaulted her on the evening of her father's wedding in December 2015. In describing the bathroom on that day, the victim said, "the walls were orange. And there was an orange shower curtain. And there was flowers, it was a flower[-]themed bathroom . . . . There was . . . an orange rug in front of . . . the toilet." As discussed, the

sexual assaults resumed when the victim began her Friday night ritual of sleeping over at the Heppes' home, some months after the first sexual assault. By this time, the victim reported the bathroom décor had changed to "a peacock theme, it was . . . blue." The victim described the new bathroom rugs as "[l]ight blue . . . with . . . yarn on top."

Defense counsel made several challenges to the victim's description of the bathroom. For instance, on cross-examination, defense counsel asked the victim to confirm the bathroom rugs given to Trooper Desch by Jane "were absolutely never in [the] bathroom." Defense counsel also called witnesses whose descriptions of the bathroom differed from the victim's. For example, Jane testified the décor was changed from orange- to blue-themed in "like 2012, 2013, somewhere in there," before the December 2015 sexual assault. Brouke also testified the color scheme changed from orange to "teal-y blue" in about 2013.

According to defendant, his counsel should have more vigorously investigated the victim's report that the bathroom was orange-themed in December 2015 when the first sexual assault took place. Specifically, defendant pointed out that Brouke had pictures on her laptop "complete with electronic date and time stamp" showing the bathroom was blue-themed in December 2015, and his counsel dismissed the importance of the photographs and refused to offer them into evidence. Counsel proceeded in this manner even though, defendant argues, the photographs were essential to his case because counsel could have used them to impeach the victim's testimony, resulting in a "domino effect" to the victim's credibility. The trial court disagreed with defendant's position, noting there were a

number of issues with the photographs, including regarding their admissibility and foundation.

We conclude that defense counsel's actions neither fell below an objective standard of reasonableness nor prejudiced defendant. As noted, defense counsel recognized the discrepancies in the victim's testimony regarding the color scheme of the bathroom and not only challenged the victim regarding her description of the bathroom, but also called two witnesses who testified the bathroom redecoration predated the December 2015 sexual assault. Because defense counsel attempted to counter the victim's description of the bathroom, defendant's argument that defense counsel should have *also* sought to introduce photographic evidence of the bathroom décor impermissibly asks us to apply the "benefit of hindsight" and second-guess counsel's trial strategy—something this Court will not do. *Unger*, 278 Mich App at 242-243.

In furtherance of this conclusion, we note that while defendant's arguments focus heavily on the discrepancies in witness testimony, they do not account for the consistencies amongst the witnesses. While the victim testified that the *first* sexual assault took place when the bathroom was orange, she also testified many other assaults took place when the bathroom was blue. The victim's description that the bathroom was eventually changed to "a peacock theme, it was . . . blue" is largely consistent with the testimony from Jane and Brouke, each of whom testified the bathroom had a blue, peacock theme. Though there were discrepancies in the testimony, counsel was not ineffective because he in fact highlighted the discrepancies. "[I]t is the role of the jury, not this Court, to determine the weight of the evidence or the credibility of witnesses." *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012)

(quotation marks and citation omitted). On this record, it appears the jury either concluded that the discrepancies concerning the bathroom décor did not exist or did not detract from the other evidence indicating defendant's guilt. Therefore, the trial court correctly rejected this argument.

2. PRIOR SEXUAL ASSAULT ALLEGATIONS

We next address defendant's argument that he was denied effective assistance of counsel because of defense counsel's failure to investigate and enter into evidence a prior allegation by the victim of a sexual assault by another individual. According to defendant, evidence of this prior allegation was critical because it showed the victim was not a virgin before the alleged sexual assaults and because it was evidence the victim suffered from anxiety and depression before the alleged assaults by defendant. By failing to admit this evidence, defendant argues, his counsel was unable to effectively impeach several prosecution witnesses. The trial court disagreed, concluding that the evidence was inadmissible because "[defense counsel] might have thought that it might have been detrimental to the . . . interests of the defendant."

Defendant's argument on this point holds no merit. Michigan's rape-shield law states:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j.]

The evidence at issue—the victim's allegation of sexual assault by another individual—does not fall under either of the statutory exceptions to the statute. By the statute's plain language, evidence of the victim's prior allegations of sexual assault was inadmissible at trial. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Consequently, defense counsel was not ineffective for failing to offer into evidence the victim's prior allegation of sexual assault.

C. PROSECUTORIAL MISCONDUCT

Defendant also argues the prosecutor committed misconduct[7] when the prosecutor elicited "false and misleading" testimony from witnesses. "We review de novo claims of prosecutorial misconduct to determine whether [a] defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

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[7] While "we recognize that the phrase 'prosecutorial misconduct' has become a term of art in criminal appeals, we agree that the term 'misconduct' is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct." *Cooper*, 309 Mich App at 87-88. The arguments here, which allege that the prosecutor garnered false testimony, would under *Cooper* be an argument for a finding of prosecutorial misconduct (as opposed to error), for if true, the prosecutor would be acting contrary to ethical rules. See MRPC 3.3(a)(3).

> When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Further, the propriety of a prosecutor's remarks depends on the particular facts of each case. Prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence, and need not confine argument to the blandest of all possible terms[.] [*Id*. at 451 (quotation marks and citations omitted).]

"It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Aceval*, 282 Mich App at 389. The focus of this inquiry looks to whether the testimony affected the outcome of the trial and not to the "blameworthiness of the prosecutor." *Id*. at 390.

Defendant's arguments are premised on the same set of facts as his second argument alleging ineffective assistance of counsel. That is, defendant contends (1) the prosecutor knew about the prior allegations of sexual assault by the victim and proceeded to garner false testimony that the victim was a virgin at the time of the first sexual assault, and (2) the prosecutor sought false testimony that the victim suffered mental health conditions resulting from the sexual assaults by defendant. According to defendant, the victim's mental health conditions arose after the other sexual assault and not from any sexual assault by defendant. We reject these arguments.

First, defendant erroneously alleges prosecutorial misconduct because the prosecutor told the jury the victim lost her virginity on the night of the first sexual assault. This is a meritless argument because the victim's virginity is not a critical element of the

charged offenses.[8] Accordingly, it does not matter whether jury members believed whether the victim was a virgin because that question was not outcome-determinative. See *Aceval*, 282 Mich App at 389. Further, there was no testimony or evidence presented that the victim was a virgin before the alleged assault. Indeed, the only time the jury heard a report that the victim was a virgin was during the prosecution's opening and closing arguments, but, as stated, the trial

[8] Again, defendant was convicted of one count of CSC-I, MCL 750.520b(1)(f), under which "an actor may be found guilty . . . if the actor (1) causes personal injury to the victim, (2) engages in sexual penetration with the victim, and (3) uses force or coercion to accomplish the sexual penetration." *People v Nickens*, 470 Mich 622, 629; 685 NW2d 657 (2004). Defendant was also convicted of one count of CSC-II under MCL 750.520c(1)(f), which provides:

> "(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> * * *
>
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v)." [*People v Alter*, 255 Mich App 194, 202; 659 NW2d 667 (2003), quoting MCL 750.520c(1)(f).]

Defendant also received two convictions of CSC-III under MCL 750.520d(1)(a) and (b). Under MCL 750.520d(1)(a), " '[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age.' " *In re Tiemann*, 297 Mich App 250, 262; 823 NW2d 440 (2012), quoting MCL 750.520d(1)(a) (emphasis omitted). "The required elements [of MCL 750.520d(1)(b)] are: (1) defendant engaged in sexual penetration with the victim, and (2) 'force or coercion is used to accomplish the sexual penetration.' " *Eisen*, 296 Mich App at 333, quoting MCL 750.520d(1)(b) (brackets omitted).

court instructed the jury that the lawyers' statements and arguments are not evidence. Juries are presumed to follow instructions, and we discern no error on this basis. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We also reject defendant's argument that the prosecutor committed misconduct by eliciting perjured testimony about the victim's mental health. Specifically, defendant alleges the prosecutor sought false testimony from several witnesses who testified the victim suffered from mental health conditions for a period of time after the sexual assaults by defendant ended. Perjury has been defined as "a willfully false statement regarding any matter or thing, if an oath is authorized or required." *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004) (emphasis omitted). As noted, a prosecutor's "knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Aceval*, 282 Mich App at 389. Thus, to prove prosecutorial misconduct on the basis of perjury, a defendant must show two things—first, that a witness knowingly made a false statement, and second, that the prosecutor knowingly elicited the false statement. Defendant's argument fails on each of these requirements. Indeed, defendant makes no assertion that the witnesses themselves made "willfully false statement[s]" to the trial court. *Lively*, 470 Mich at 253. Moreover, defendant does not present any evidence that the prosecutor knowingly sought false testimony. *Aceval*, 282 Mich App at 389. While defendant surmises that "the prosecutor's office possessed information . . . that directly contradicted the testimony of its most important witness," defendant presents no evidence to this effect. There is simply nothing on this record from which we could conclude the prosecutor suborned perjury

amounting to prosecutorial misconduct. Thus, we reject defendant's argument on this basis.

III. CONCLUSION

The trial court's order granting defendant a new trial is reversed.

MARKEY, J., concurred with MURRAY, P.J.

RIORDAN, J. (*dissenting*). I respectfully dissent.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 US 133, 136; 75 S Ct 623; 99 L Ed 942 (1955). Thus, "the Due Process Clause clearly requires . . . a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v Gramley*, 520 US 899, 904-905; 117 S Ct 1793; 138 L Ed 2d 97 (1997). The Due Process Clause is therefore violated when the judge is actually biased against the defendant. See *id*. The Due Process Clause is also violated when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 872; 129 S Ct 2252; 173 L Ed 2d 1208 (2009) (quotation marks and citation omitted).

Relatedly, MCR 2.003(C)(1) provides, in relevant part, as follows:

> Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, 556 US 868; 129 S Ct 2252;

173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.

Additionally, Canon 2(A) of the Michigan Code of Judicial Conduct provides, in relevant part, that "[a] judge must avoid all impropriety and appearance of impropriety."

An appearance of impropriety by a presiding trial judge, i.e., a violation of Canon 2, does not necessarily result in a violation of due process. See *Cain v Dep't of Corrections*, 451 Mich 470, 513 n 48; 548 NW2d 210 (1996) ("We acknowledge there may be situations in which the appearance of impropriety on the part of a judge or decisionmaker is so strong as to rise to the level of a due process violation. However, this case does not present such a situation.").[1] Consequently, while a defendant is automatically entitled to relief regardless of prejudice when the judge was actually biased, see *Arizona v Fulminante*, 499 US 279, 290, 294; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (White, J., dissenting), or when the circumstances suggested "the probability of actual bias ris[ing] to an unconstitutional level," see *Caperton*, 556 US at 887, a defendant is not automatically entitled to relief for the mere appearance of impropriety, see *Cain*, 451 Mich at 513 n 48. See also *In re Bergeron*, 636 F3d 882, 883 (CA 7, 2011) ("Actual bias would entitle the losing party to a new trial, but the mere appearance of bias would not[.]").[2]

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[1] Of course, those trial judges who have created an appearance of impropriety are required to disqualify themselves before or during trial. See MCR 2.003(C)(1)(b). But that is a separate question from whether a defendant is entitled to relief following a conviction before a trial judge with an appearance of impropriety, which is the issue before us now.

[2] In *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), our Supreme Court created an intermediate principle under which the

In this case, the trial court apparently granted defendant a new trial on the basis that the original trial judge violated the Canon 2 admonition to avoid an appearance of impropriety.[3] I agree with the trial court that the original trial judge's e-mail communications created an appearance of impropriety. "An appearance of impropriety may arise when the conduct of a judge would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." *TT v KL*, 334 Mich App 413, 433; 965 NW2d 101 (2020) (quotation marks and citation omitted). The e-mail communications occurred between the trial judge and the county prosecutor (the official in charge of the prosecutor's office) after the second witness in the trial testified and were critical of certain weaknesses in the investigation that could conceivably lead to an acquittal.[4] While the prosecutor may argue that this was not

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appearance of bias *before the jury* is tantamount to an "actual bias" structural error under cases such as *Fulminante*. See *id*. at 190-191. *Stevens* does not govern here because the e-mail communications were not presented to the jury.

[3] In its opinion from the bench, the trial court did not make a finding regarding bias—and in fact implied that the original trial judge was not consciously biased—but stated that it would grant a new trial "pursuant to this appearance—the breech [sic] of the appearance . . . ." Given that the trial court had moments before referenced "the judicial canon of ethics" prohibiting "even the appearance of impropriety," the most reasonable conclusion is that the trial court ordered a new trial because the original trial judge violated the Canon 2 admonition to avoid an appearance of impropriety.

[4] I acknowledge that the recipient of the e-mails was the county prosecutor, not the assistant prosecutor who was actually trying the case. However, I find this distinction to be largely irrelevant because "assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him [or her.]" *People v Doyle*, 159 Mich App 632, 644; 406 NW2d 893 (1987). See also MCL 49.42 ("Any such assistant prosecuting attorney shall hold his office during the pleasure of the prosecuting attorney appointing him, [and] perform any and all duties

the trial judge's intent, a reasonable mind, upon reviewing the e-mails, may conclude that the trial judge was partial in favor of the prosecution, did not want to see weaknesses in its case exploited, and was actively attempting to assist the prosecution's case. Moreover, because the e-mail communications occurred during the trial, a reasonable mind could conclude that the trial judge would not, and could not, otherwise set aside her partiality until the proceedings were concluded. Thus, these facts show that the e-mail communications created an appearance of impropriety by the trial judge, contrary to Canon 2.

Having concluded that the trial judge violated Canon 2 by creating an appearance of impropriety and, by logical extension, violated MCR 2.003(C)(1)(b) because she failed to disqualify herself for that reason, the next question is whether defendant is entitled to a new trial on this basis. In this regard, I am guided by the decision of the United States Supreme Court in *Liljeberg v Health Servs Acquisition Corp*, 486 US 847; 108 S Ct 2194; 100 L Ed 2d 855 (1988). In that case, a trial judge presided over a matter in which it was subsequently discovered that he possessed an indirect property interest. *Id*. at 850. The issue before the Court was whether the trial judge violated 28 USC 455(a), which provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," and if so, whether the original judg-

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pertaining to the office of prosecuting attorney at such time or times as he may be required so to do by the prosecuting attorney . . . ."). Indeed, the county prosecutor signed her name to the felony information against defendant. Further, the elected county prosecutor is listed as the prosecuting attorney of record on the Register of Actions in this matter.

ment must be vacated.[5] *Liljeberg*, 486 US at 850. The Court first concluded that the trial judge did violate the statute, *id*. at 861, and then explained that the decision whether to vacate the original judgment should be determined by application of the following test:

> We conclude that in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. [*Id*. at 864.][6]

Particularly relevant to the case at hand, in *United States v Orr*, 969 F3d 732, 738 (CA 7, 2020), the defendant argued that he was "entitled to a new trial because the trial judge's ex parte communications with the prosecuting U.S. Attorney's Office violated 28 U.S.C. § 455(a), the judicial recusal statute." In response, the prosecution conceded that the trial judge violated 28 USC 455(a) but argued that any error was harmless. *Orr*, 969 F3d at 738. The United States Court of Appeals for the Seventh Circuit set forth the following principles governing the case:

> Not every violation of § 455(a) warrants a drastic remedy, like a new trial. Mere appearance of impropriety is not enough for reversal and remand—a party must show a

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[5] Although 28 USC 455(a) does not expressly use the language "appearance of impropriety," the Court implied that the statute is essentially an "appearance of impropriety" statute. See *Liljeberg*, 486 US at 858 ("We must first determine whether § 455(a) can be violated based on an appearance of partiality, even though the judge was not conscious of the circumstances creating *the appearance of impropriety* . . . .") (emphasis added).

[6] The Court ultimately concluded that the original judgment should be vacated and a new trial conducted. *Id*. at 862, 868-869.

> risk of harm. To determine whether Judge Bruce's violation is harmless, we consider the three factors announced in *Liljeberg* . . . : (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the risk of undermining the public's confidence in the judicial process. [*Id*. (quotation marks and citations omitted).][7]

This Court may use federal caselaw interpreting federal statutes as persuasive authority when interpreting state-law analogues. See *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 283; 696 NW2d 646 (2005). Because 28 USC 455(a) is a federal analogue to MCR 2.003(C)(1)(b), and because Michigan apparently does not have any state caselaw bearing on the issue at hand, I believe that the *Liljeberg* framework is appropriate to apply here.

With regard to the first *Liljeberg* factor, there is some risk of injustice to defendant if a new trial is not ordered. The trial judge's improper communications with the county prosecutor concerned the procedures used by law enforcement, in particular the Michigan State Police, for investigating allegations of sexual assault. The communications also were relevant to the credibility of the officer who investigated the allegations at issue. In particular, after the second prosecution witness testified, the trial judge questioned why the victim was not medically examined and expressed her displeasure at certain stages of the State Police

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[7] The court ultimately concluded that the first and third *Liljeberg* factors weighed in favor of a new trial and therefore vacated the defendant's conviction. *Orr*, 969 F3d at 742. See also *United States v Williams*, 949 F3d 1056, 1058 (CA 7, 2020) (conducting a similar *Liljeberg* analysis when the defendant argued that he was entitled to a new trial because the trial judge "had engaged in ex parte communications with members of the United States Attorney's Office for the Central District of Illinois").

investigation. Conceivably, this may have led to the trial prosecutor addressing these weaknesses later in trial or during closing argument when she would not otherwise have done so. These facts tend to show injustice to defendant if a new trial is not ordered. On the other hand, I acknowledge that there is some prejudice to the prosecution if a new trial is ordered, namely, the fact that the victim and other witnesses would be required to testify again and the fact that the prosecution would have to undergo the expenses of a presumably multiday trial. On balance, I believe that the first *Liljeberg* factor is neutral.

With regard to the second *Liljeberg* factor, a denial of relief to defendant would tend to produce injustice in future cases. If defendant does not obtain a new trial in this case, other trial judges in future cases would not be deterred from engaging in ex parte communications with the prosecution during trial concerning the strengths and weaknesses of the prosecution's case. The general prohibition against ex parte communications is intended to discourage such favoritism. See *Grievance Administrator v Lopatin*, 462 Mich 235, 262; 612 NW2d 120 (2000) ("*Ex parte* communications deprive the absent party of the right to respond and be heard. They suggest bias or partiality on the part of the judge.") (quotation marks and citation omitted). In other words, awarding defendant relief may prevent injustice in future cases. See *United States v Atwood*, 941 F3d 883, 885 (CA 7, 2019) ("As in *Liljeberg*, we think that enforcing § 455(a) in this case may prevent a substantive injustice in some future case—here, by encouraging judges to exercise caution in their communications.") (quotation marks and citation omitted).

With regard to the third *Liljeberg* factor, there is a risk that the public's confidence in the judicial process

will be undermined if defendant does not obtain relief. Although there is no question that judges may have personal relationships with some of the attorneys who appear before them, and may have judicial or legal interpretative philosophies which make certain outcomes seem more or less likely to those appearing before them, a trial judge unilaterally identifying the strengths and weaknesses of a case to one party, but not the other, creates a perception that the judge is not neutral and impartial. By awarding defendant relief in this case, the judiciary communicates to the public that such conduct by a judge is not acceptable. As the trial court explained when awarding defendant a new trial in the matter before us:

> [I]t's a matter of the public perception of the ethical obligations entailed with the judicial office and I worry that as unintentional as this may be, it could do damage to that. And I think it's incumbent on us to really err on the side of making sure that all people understand themselves to be given that opportunity to a full and fair hearing before an impartial judiciary.

Accordingly, because the second and third *Liljeberg* factors weigh in favor of awarding defendant relief, I would affirm the trial court's grant of a new trial on the basis that the trial judge had an appearance of impropriety, in violation of Canon 2 and MCR 2.003(C)(1)(b), and that the error was not harmless.[8]

The parties and the majority place significant emphasis upon Canon 3 of the Code of Judicial Conduct,

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[8] I acknowledge that defendant did not argue in the trial court, and does not argue on appeal, that he is entitled to relief under MCR 2.003(C)(1)(b). However, given that the trial court awarded him a new trial because the trial judge violated Canon 2 by creating an appearance of impropriety, I believe that consideration of the court-rule analogue is appropriate and necessary for resolution of this appeal.

which generally prohibits ex parte communications that concern "substantive matters" but does not prohibit ex parte communications with "administrative purposes." I question whether the majority is correct to conclude that the e-mail communications were "administrative" in nature because they addressed the internal investigatory procedures of the Michigan State Police. In my view, an ordinary understanding of the word "administrative" in this context contemplates simple procedural matters concerning the judicial process itself, such as the orderly handling of motions. See, e.g., *Adesanya v Novartis Pharm Corp*, 755 F Appx 154, 158 (CA 3, 2018) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because "[t]he Magistrate Judge and Appellee's counsel were simply seeking a way to manage the numerous pro se discovery requests Appellants had filed"); *Gerber v Veltri*, 702 F Appx 423, 432-433 (CA 6, 2017) (explaining that ex parte communications did not violate Code of Conduct for US Judges Canon 3 because "[t]heir discussion concerned when, and how, the court should reschedule the appearance of witnesses slated to testify that day, particularly defendant's expert [witness]"). The trial judge's commentary to the county prosecutor regarding the internal investigatory procedures of the Michigan State Police, a law enforcement agency independent of the judicial branch of government, addressed the substance of the trial itself given that the comments directly implicated the plausibility of the victim's allegations. In other words, the weaknesses of the investigation might tend to weigh against a guilty verdict. This, I believe, means that the e-mail communications involved "substantive matters" and therefore violated Canon 3.

In any event, I find the discussion of Canon 3 to be largely irrelevant to the case at hand. Contrary to the

majority, I do not read *People v Aceval*, 282 Mich App 379; 764 NW2d 285 (2009), as standing for the proposition that a defendant may be entitled to relief if he or she shows any violation of the Code of Judicial Conduct and prejudice therefrom. Rather, *Aceval* stated that "[a]ssuming that the acts of the trial judge and the prosecutor in this case violated Michigan's Rules of Professional Conduct, MRPC 3.4, and Code of Judicial Conduct, Canon 3, and were clearly opprobrious, the remedy for their wrongs is accomplished in other forums, such as the Attorney Discipline Board and the Judicial Tenure Commission." *Id*. at 392. "These codes . . . do not confer upon a defendant any type of constitutional right or remedy." *Id*. In other words, while a violation of the Code of Judicial Conduct might tend to show a violation of due process, a defendant cannot be entitled to relief solely for a violation of the Code of Judicial Conduct. Compare *Treadaway v State*, 308 Ga 882, 888-889; 843 SE2d 784 (2020) (explaining that even if the trial judge violated the Georgia Code of Judicial Conduct by an ex parte contact, the defendant was still not entitled to relief because he did not show that the process was "fundamentally unfair"). That is, a defendant cannot maintain a freestanding claim that the trial judge violated the Code of Judicial Conduct but instead must show that a substantive law was violated as well.[9] Here, defendant's entitlement to

[9] The majority reasons that defendant cannot show prejudice for the alleged violation of Canon 3 because the trial prosecutor's opening statement acknowledged deficiencies in the police investigation, thus showing that the trial judge did not signal anything new to the prosecutor's office through the e-mails. I agree with the majority that the trial prosecutor noted the lack of DNA evidence and the questionable handling of the bathroom rugs by the detective in her opening statement. However, the majority's focus on this type of "prejudice" misses the mark. As explained herein, the proper "prejudice" analysis includes the prejudice not only to defendant but to other parties in future cases

relief does not specifically arise under the Code of Judicial Conduct, but under MCR 2.003(C)(1)(b).[10]

Accordingly, I respectfully dissent and would affirm the trial court's grant of a new trial.[11]

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and the judiciary as a whole. See *Orr*, 969 F3d at 738 ("To determine whether Judge Bruce's violation is harmless, we consider the three factors announced in *Liljeberg* . . . .").

[10] The majority questions whether the general Canon 2 "appearance of impropriety" standard is even relevant here because Canon 3, concerning certain ex parte communications, is more specific to the case at hand. I respectfully disagree. While it is certainly true that, for example, a judge who violates Canon 3 may only be sanctioned for a violation of Canon 3 and not Canon 2 as well, see *In re Haley*, 476 Mich 180, 194-195; 720 NW2d 246 (2006), that is not the question before us. Rather, the question before us is whether the trial judge violated MCR 2.003(C)(1)(b), and if so, whether defendant is entitled to relief. Indeed, Canon 3(C) provides that "[a] judge should raise the issue of disqualification whenever the judge has cause to believe that grounds for disqualification may exist under MCR 2.003(C)."

In other words, if the general Canon 2 "appearance of impropriety" standard is not relevant here, then even a judge who violates Canon 3 by engaging in certain ex parte communications would not be required to recuse himself or herself unless that violation rises to the level of a due-process violation as otherwise outlined in MCR 2.003(C)(1)(a) and (b).

[11] Having concluded that defendant is entitled to a new trial because of the appearance of impropriety by the trial judge, I need not address his alternate arguments in favor of a new trial.

CORBIN v MEEMIC INSURANCE COMPANY

Docket No. 354672. Submitted January 11, 2022, at Detroit. Decided January 13, 2022, at 9:20 a.m. Leave to appeal denied 509 Mich 1072 (2022).

Plaintiff, Aniya Corbin, a minor, brought an action by her next friend, Anthony Corbin, in the Washtenaw Circuit Court against Meemic Insurance Company and Farm Bureau General Insurance Company following an automobile accident that left plaintiff permanently and severely injured. Plaintiff's parents shared joint legal and physical custody of plaintiff on the basis of a consent order of filiation entered in 2010. At the time of the accident, plaintiff was with her mother, who lacked automobile insurance. Plaintiff's mother filed an application for no-fault benefits on plaintiff's behalf with the Michigan Assigned Claims Plan (the MACP). The MACP then assigned Farm Bureau to the case. Later, however, plaintiff, with her father as next friend, filed the instant case against Farm Bureau and Meemic. Plaintiff contended that she was the resident relative of someone insured by Meemic, plaintiff sought no-fault benefits from Meemic on that basis, and plaintiff alternatively argued that Farm Bureau was liable for her benefits after having been assigned by the MACP. Farm Bureau moved for summary disposition, arguing that the resident relative insured by Meemic was plaintiff's paternal great-grandmother, with whom both plaintiff and her father resided at the time of the accident. Meemic filed a countermotion, contending that under *Grange Ins Co of Mich v Lawrence*, 494 Mich 475 (2013), because a custody order was in place that granted joint physical and legal custody of plaintiff to her parents, her domicile for no-fault purposes was with whichever parent had actual custody at the time of the accident. The trial court, Patrick J. Conlin, J., agreed with Meemic and dismissed Meemic from the case. Farm Bureau appealed.

The Court of Appeals *held*:

1. MCL 500.3114(1) of the no-fault act, MCL 500.3101 *et seq*., provides, in relevant part, that a personal protection insurance policy described in MCL 500.3101 applies to accidental bodily injury to the person named in the policy, the person's spouse, and

a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. In this case, the parties did not dispute that to the extent plaintiff was domiciled with her father at the time of the accident, Meemic's policy applies. MCL 500.3172(1)(a) provides that a person entitled to a claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may claim personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury. In this case, the parties also did not dispute that if plaintiff had not been domiciled with her father and great-grandmother at the time of the accident, then Meemic's policy was not applicable to plaintiff's injuries and the MACP properly assigned an insurer—Farm Bureau—to the case.

2. In this case, the order of filiation did not establish a primary custodial parent or otherwise fix a parenting time schedule; plaintiff's schedule was left to her parents as long as they continued to cooperate. The trial court nonetheless concluded that the order of filiation was dispositive and that pursuant to a footnote in *Grange*—which held that in the event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom the child is living at the time—plaintiff's domicile was with whichever parent had actual custody at the time of the automobile accident. However, the footnote in *Grange* did not apply to plaintiff's arrangement in this case because the order of filiation left parenting time to the discretion of the parents. Accordingly, the trial court needed to look beyond the order of filiation to determine plaintiff's actual domicile. The trial court should have reverted to the traditional multifactored analyses from *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675 (1983), to determine plaintiff's domicile. In light of the fact that the order of filiation did not conclusively determine plaintiff's domicile, the trial court erred by not weighing the additional relevant evidence when it made its initial domicile determination.

Reversed and remanded for the trial court to reassess its determination of plaintiff's domicile.

INSURANCE – NO-FAULT ACT – MINOR CHILD WITH DIVORCED PARENTS – ESTABLISHING DOMICILE.

When an order of filiation does not establish a primary custodial parent or otherwise fix a parenting time schedule but instead leaves parenting time to the discretion of parents, the trial court must look beyond the order of filiation to determine plaintiff's actual domicile and use the multifactored analyses from *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675 (1983).

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

Kopka Pinkus Dolin PC (by *Mark L. Dolin* and *Raed L. Abboo*) for Farm Bureau General Insurance Company.

Before: GADOLA, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM. In this first-party no-fault action, defendant-appellant, Farm Bureau General Insurance Company, appeals by leave granted[1] the trial court's order denying Farm Bureau's motion for summary disposition and granting summary disposition to defendant-appellee, Meemic Insurance Company. Farm Bureau contends on appeal that the trial court erred when it held that plaintiff, a minor, was domiciled with her mother at the time of her automobile accident and that the court erred in dismissing Meemic on that basis. We reverse and remand for the trial court to reassess its domicile determination.

I. FACTUAL BACKGROUND

This case arises out of an automobile accident that left plaintiff permanently and severely injured. Plain-

[1] *Corbin v Meemic Ins Co*, unpublished order of the Court of Appeals, entered December 23, 2020 (Docket No. 354672).

tiff's parents share joint legal and physical custody of plaintiff on the basis of a consent order of filiation entered in 2010. At the time of the accident, plaintiff was with her mother, who lacked automobile insurance. On that basis, plaintiff's mother filed an application for no-fault benefits on plaintiff's behalf with the Michigan Assigned Claims Plan (the MACP). The MACP then assigned Farm Bureau to the case.

Later, however, plaintiff, with her father as next friend, filed the present suit against Farm Bureau and Meemic. Plaintiff contended that she was the resident relative of someone insured by Meemic, plaintiff sought no-fault benefits from Meemic on that basis, and plaintiff alternatively argued that Farm Bureau was liable for her benefits after having been assigned by the MACP. Farm Bureau moved for summary disposition, arguing that the resident relative insured by Meemic was plaintiff's paternal great-grandmother, with whom both plaintiff and her father resided at the time of the accident. Meemic filed a countermotion, contending that under *Grange Ins Co of Mich v Lawrence*, 494 Mich 475; 835 NW2d 363 (2013), because a custody order was in place that granted joint physical and legal custody of plaintiff to her parents, her domicile for no-fault purposes was with whichever parent had actual custody at the time of the accident. The trial court agreed and dismissed Meemic from the case. This appeal followed.

II. STANDARD OF REVIEW

The trial court indicated that it granted summary disposition to Meemic pursuant to MCR 2.116(C)(8); however, we note that the trial court looked beyond the pleadings in reaching its conclusion. MCR 2.116(C)(8) considers the pleadings and not documentary evidence,

Patterson v Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994), whereas MCR 2.116(C)(10) considers both, *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013). See also *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019). Thus, even where a decision on a motion for summary disposition is premised on MCR 2.116(C)(8), when a court looks beyond the pleadings in granting the motion, we treat the motion as though it were granted under MCR 2.116(C)(10). *Capitol Props Group, LLC v 1247 Ctr Street, LLC*, 283 Mich App 422, 425; 770 NW2d 105 (2009). Here, central to the trial court's decision was the consent order of filiation that was first made part of the record when Farm Bureau filed its motion for summary disposition, and the details of which were not incorporated into plaintiff's complaint. Accordingly, because the trial court looked beyond the pleadings in rendering its decision, we treat the motion as though it were granted under MCR 2.116(C)(10).

This Court reviews decisions to grant or deny summary disposition de novo. *El-Khalil*, 504 Mich at 159. Summary disposition pursuant to MCR 2.116(C)(10) is appropriate where, "[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." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *El-Khalil*, 504 Mich at 160 (quotation marks and citation omitted). In reviewing the motion, "this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, in a light most

favorable to the party opposing the motion." *Sanders*, 303 Mich App at 4 (quotation marks and citation omitted).

Generally, a domicile determination is a question of fact, "and this Court will not reverse the trial court's determination unless the evidence clearly preponderates in the opposite direction." *Goldstein v Progressive Cas Ins Co*, 218 Mich App 105, 111; 553 NW2d 353 (1996). Where the underlying facts are not in dispute, however, the determination of domicile is a question of law that this Court reviews de novo. *Grange*, 494 Mich at 490. Issues of statutory interpretation are likewise questions of law that this Court reviews de novo. *Id*.

III. ANALYSIS

Farm Bureau contends that the trial court's application of *Grange* was inapt and that it was not appropriate under the circumstances for the trial court to treat the consent order of filiation as conclusive evidence of plaintiff's domicile.

A. *GRANGE*

Resolution of this issue centers on the interaction between MCL 500.3114(1) and MCL 500.3172(1)(a) and, of course, on application of *Grange*. MCL 500.3114(1) provides, in relevant part:

> [A] personal protection insurance policy described in [MCL 500.3101] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

The parties do not dispute that the insurance policy provided by Meemic to plaintiff's great-grandmother was one such insurance policy and that to the extent

plaintiff was domiciled with her father at the time of the accident, Meemic's policy applies. MCL 500.3172(1)(a) provides:

> (1) A person entitled to [a] claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may claim personal protection insurance benefits through the assigned claims plan if any of the following apply:
>
> (a) No personal protection insurance is applicable to the injury.

The parties likewise do not dispute that if plaintiff was not domiciled with her father and great-grandmother at the time of the accident, then Meemic's policy is not applicable to plaintiff's injuries and the MACP properly assigned an insurer—Farm Bureau—to the case. The trial court determined that the issue of plaintiff's domicile was resolved by application of *Grange*.

Grange was a consolidated case involving two similar factual scenarios. *Grange*, 494 Mich at 482-489. In the first, the custody of a minor child was governed by a judgment of divorce that granted joint legal custody to both parents but primary physical custody to the mother. *Id*. at 482. After the child was killed in an automobile accident, both of her parents submitted claims for PIP benefits with their respective insurers —Farm Bureau and Grange. *Id*. at 483. Farm Bureau, the mother's insurer, appeared before the trial court and argued that the two insurers were equal in the order of priority for the payment of PIP benefits because the minor child was domiciled in both of her parents' homes, and thus Farm Bureau sought a partial reimbursement from Grange, the father's insurer, for benefits paid. *Id*.[2] Grange argued that it was not liable for any PIP benefits because the child was solely

[2] At the time, MCL 500.3115(2) allowed insurers to recoup benefits from other insurers of equal priority. *Grange*, 494 Mich at 491. That provision is now codified as MCL 500.3114(8).

domiciled with her mother and not her father. *Id*. The trial court determined that the child was domiciled with both parents and thus both insurers were equally liable for her PIP benefits. *Id*. at 484. This Court affirmed. *Id*.

In the second case, two parents were awarded joint legal custody of their minor child, but the father was awarded physical custody. *Id*. at 486. The most recent custody order in that case permitted the father to change the child's domicile to the state of Tennessee and awarded the mother six weeks of summer visitation in Michigan. *Id*. When the child was 16 years old, she determined that she wanted to get to know her mother better, and both the mother and father agreed that the child could remain in Michigan after summer visitation and attend high school while living with her mother and uncle. *Id*. at 487. That fall, the child was killed in an automobile accident. *Id*. Thereafter, the uncle's automobile insurer, Automobile Club Insurance Association (ACIA), began to pay no-fault benefits on the basis that the child was a resident relative. *Id*. Ultimately, however, ACIA instituted an action wherein it argued that it was not liable for no-fault benefits because the child was not actually domiciled in Michigan. *Id*. at 487-488. On that basis, ACIA argued that the insurer of highest priority was the insurer that insured the vehicle in which the child had been a passenger. *Id*. at 488. The trial court disagreed and concluded that the child " 'had residency in Michigan with her mother and her uncle at the time of the motor vehicle accident.' " *Id*. This Court reversed, concluding that the child's actual domicile was a question of fact for the jury. *Id*. at 488-489.

The Court reasoned that both cases turned "on the interpretation of the term 'domiciled' as it is used in

MCL 500.3114(1)." *Id*. at 492. The Court noted more specifically that the first case turned on "whether a child of divorced parents injured in a motor vehicle accident can be 'domiciled' in more than one household for purposes of the no-fault act" and that the second case turned on "whether a family court order pertaining to a child's custody conclusively establishes a child's domicile under the no-fault act." *Id*.

As to the first issue, the Court noted that with respect to MCL 500.3114(1), "[h]ad the Legislature intended to make insurers liable for PIP benefits for dual coexisting 'domiciles,' then it would have used the term 'resided,' not 'domiciled,' " in the statute. *Id*. at 495-496. This is because although a person may have more than one residence at a time, a person may only have one domicile. *Id*.

> For over 165 years, Michigan courts have defined "domicile" to mean the place where a person has his true, fixed permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. Similarly, a person's domicile has been defined to be that place where a person has voluntarily fixed his abode not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time. In this regard, the Court has recognized that it may be laid down as a settled maxim that every man must have such a national domicile somewhere. It is equally well settled *that no person can have more than one such domicile, at one and the same time*. [*Id*. at 493-494 (quotation marks and citations omitted).]

The Court continued: "[C]onsistent with the traditional common-law principle that a person may have only one domicile at a given point in time, we hold that a child, whose parents are divorced and who has more than one legal residence, may have only a single

domicile at any one point in time that continues until the child acquires a different one." *Id*. at 496.

With respect to the next issue, how courts may determine the domicile of a minor, the Court noted that "common law recognizes three means of acquiring a domicile, which are generally applicable to all persons depending on the factual circumstances, including: (1) domicile of origin or of nativity; (2) domicile of choice; and (3) domicile by operation of law." *Id*. at 501. "[A] child's domicile, upon the divorce or separation of the child's parents, is the same as that of the parent to whose custody *he has been legally given* pursuant to a custody order." *Id*. at 504. That is, "a child's domicile upon . . . entry of a custody order is established by operation of law consistent with the terms of the custody order." *Id*. at 505. Although parents might ordinarily be permitted to alter a child's domicile to be consistent with their own, "parents are legally bound by the terms of the custody order . . . ." *Id*. at 508. "[T]he order therefore negates the parents' legal capacity, which is necessary to establish a domicile of choice for the minor child that is different from that established in the custody order." *Id*. at 508-509. "Therefore, courts presiding over an insurance coverage dispute involving the minor child of divorced parents must treat a custody order as *conclusive* evidence of a child's domicile." *Id*. at 511 (emphasis added). In such cases, "the factual circumstances or the parents' or child's intention are irrelevant to the domicile determination." *Id*.

With all of the above in mind, the *Grange* Court concluded that the child in the first factual scenario was domiciled with her mother because the relevant custody order granted the mother primary physical custody and that the child in the second factual sce-

nario was domiciled with her father for the same reason and because the custody order in that case expressly established domicile in the state of Tennessee. *Id*. at 513-515. In reaching this conclusion, the Court noted that, in some rare instances, custody orders may grant joint physical custody *and* equal parenting time; therefore, the Court instructed lower courts on how to deal with those cases:

> Although not presently before this Court, we recognize that determining domicile by reference to a custody order may appear to lead to a perplexing result where the order grants each parent joint physical custody under MCL 722.26a(7) *and* creates an equal 50/50 division of physical custody. To begin with, we emphasize that an award of joint physical custody alone does not automatically create this potentially perplexing situation because although an order may award joint physical custody, it may also establish that one parent has *primary* physical custody. Alternatively, the details of the physical custody division may reveal that one parent has physical custody of the child more often than the other parent despite the joint physical custody arrangement. Thus, it is only in the very rare event that a custody order awards joint physical custody *and* grants both parents an equal amount of time to exercise physical custody that this issue arises. Indeed, MCL 722.26(a)(7) does not require that parents share *equal* physical custodial time for a court to award joint physical custody; rather, [MCL 722.26a(7)(a)] merely defines joint physical custody as an order "[t]hat the child shall reside *alternatively for specific periods* with each of the parents." Emphasis added. The statute does not, however, require that the child reside with each parent for an *equal* amount of time to constitute joint physical custody.
>
> In the unusual event that a custody order *does* grant an equal division of physical custody, and only in this instance, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time. Restatement [Conflict of

> Laws, 2d], § 22 (1971). Thus, the child's domicile is with the parent who has physical custody as established by the custody order at the specific time of the incident at issue. This approach is consistent with the terms of the custody order and avoids a finding that the child has dual coexisting domiciles. [*Id*. at 512 n 78 (first and second alterations in original).]

B. APPLICATION OF *GRANGE*

Returning to the facts of the case at bar, the consent order of filiation governing plaintiff's custody provided as follows:

> CUSTODY
>
> The parties shall have joint legal and physical custody of said minor child(ren) until further order of the Court.
>
> The parents shall cooperate with respect to the child(ren) so as, in a maximum degree, to advance the child(ren)'s health, emotional and physical well-being, and to give and afford the child(ren) the affection of both parents and a sense of security. Neither parent will directly or indirectly influence the child(ren) so as to prejudice the child(ren) against the affectionate relationship between the child(ren) and the father and the child(ren) and the mother. Neither party will do anything which may estrange the other from the child(ren) or injure the opinion of the child(ren) to the other party, or which will hamper the free and natural development of the child(ren) for the other party.
>
> DOMICILE
>
> The domicile or residence of the child(ren) may not be moved from Michigan without the approval of this Court and the custodian shall promptly notify the Court when the child is moved to another address.
>
> A party whose custody or parenting time of a child is governed by this Order shall not change the legal resi-

dence of the child, except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

A parent of a child whose custody is governed by Court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued, except in compliance with section 11 of the Child Custody Act of 1970, 1970 PA 91, MCL 722.31.

PARENTING TIME

The non-custodial parent shall have reasonable parenting time until further order of the Court.

As the trial court recognized, the order of filiation did not establish a primary custodial parent or otherwise fix a parenting time schedule. That is, plaintiff's schedule was left to her parents so long as they continued to cooperate and work together. The trial court nonetheless concluded that the order of filiation was dispositive and that, pursuant to the instructions contained in footnote 78 of *Grange*, plaintiff's domicile was with whichever parent had actual custody at the time of the automobile accident.

The conclusions set forth in footnote 78 do not apply to the above arrangement.[3] The dispositive fact in *Grange* was that both of the custody orders awarded

[3] Farm Bureau suggests that the relevant portion of *Grange* is dictum. It is not. "[D]ictum 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)." *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (quotation marks and citation omitted). However, "when 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 dictum but is a judicial act of the court which it will thereafter recognize as a binding decision." *Id*. at 384 (quotation marks, citation, and brackets omitted).

primary physical custody to one parent. *Grange*, 494 Mich at 513-515. And footnote 78 does not apply by its own terms. The *Grange* Court referred in that footnote to the unusual situation in which a custody order awards *both* joint physical custody and equal parenting time. *Id*. at 512 n 78. "In the unusual event that a custody order *does* grant an equal division of physical custody, *and only in this instance*, then the child's domicile would alternate between the parents so as to be the same as that of the parent with whom he is living at the time." *Id*. at 513 n 78 (second emphasis added). This is not such a case, as the order of filiation left parenting time to the discretion of the parents.

Meemic contends that the above application of *Grange* is inapt because *Grange* specifically held that where custody of a minor is governed by a court order, parents are bound by the order and lose the legal capacity to establish a domicile of choice for that minor. Again, this rule does not cleanly apply here because the order of filiation did exactly what the custody orders in *Grange* did not: it reserved to the parents their right to determine both residence and domicile, with some limitations. The order did not set forth a parenting time schedule, let alone one that required equal parenting time. This alone takes this order outside what was addressed in footnote 78.

With that in mind, we hold that the trial court needed to look beyond the order of filiation to determine plaintiff's actual domicile, as the order of filiation was not dispositive. To do so, the trial court should have reverted to the traditional multifactored analyses from *Workman v Detroit Auto Inter-Ins Exch*, 404 Mich 477; 274 NW2d 373 (1979), and *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675; 333 NW2d 322 (1983), to determine plaintiff's domicile. See *Grange*,

494 Mich at 498 n 41 ("The *Workman-Dairyland* multifactored framework comprises the one now commonly employed by Michigan courts when a question of fact exists as to where a person is domiciled.").

Here, there was a substantial amount of testimony to suggest that plaintiff's father had always operated as plaintiff's primary custodian and that both parents intended to continue that arrangement before and after the automobile accident. Rather than stand in the position of the finder of fact, we think it more appropriate that the trial court be afforded an opportunity to weigh the above evidence. See *Grange*, 494 Mich at 490 (noting that the issue of domicile is ordinarily a question of fact). Suffice it to say, however, in light of the fact that the order of filiation did not conclusively determine plaintiff's domicile, the trial court erred in not weighing the additional relevant evidence when it made its initial domicile determination.

Reversed and remanded for the trial court to reassess its determination regarding plaintiff's domicile. We do not retain jurisdiction.

GADOLA, P.J., and MARKEY and MURRAY, JJ., concurred.

PEOPLE v HAWKINS

Docket No. 357068. Submitted January 4, 2022, at Lansing. Decided January 20, 2022, at 9:00 a.m. Leave to appeal denied 510 Mich 864 (2022).

Sherikia L. Hawkins was charged in the 45th District Court with falsifying election records, MCL 168.932(c); falsely making, altering, forging, or counterfeiting a public record (forgery), MCL 750.248; common-law misconduct in office, MCL 750.505; and three counts of use of a computer to commit a crime (use of a computer), MCL 752.796, each premised, respectively, on one of the first three listed offenses. The charges arose from events that occurred following the November 6, 2018 general election, during which defendant served as the elected city clerk for Southfield. Michigan's Secretary of State maintains the qualified voter file (QVF), which is a statewide computer database of registered voters that is available to election officials throughout the state, enabling the officials to track the process by which people vote via absent-voter (AV) ballots. For the 2018 election, Southfield had two AV counting boards tabulating the AV ballots—both the AV ballots received before election day and those received by the close of the polls on election day—for the 36 precincts in Southfield. During its canvass of the election to certify the results, the Oakland County Board of Canvassers discovered numerous discrepancies that in turn led to the discovery that defendant had changed voter records affecting 193 people who voted by AV ballot. More specifically, it was determined that defendant had altered the original QVF, which listed those 193 ballots as received and accepted before or on election day, to being listed in a revised QVF submitted by defendant as not received or rejected for some reason other than arriving after election day. Following a preliminary-examination hearing, the district court, Michelle Friedman Appel, J., bound defendant over on the charged offenses, finding that there was probable cause to believe that defendant had committed those crimes. Defendant thereafter filed a motion in the Oakland Circuit Court to quash the charges. The circuit court, Leo Bowman, J., granted the motion in part and quashed the bindover with respect to all charges except for the misconduct-in-office charge and its related use-of-a-computer

charge. Subsequently, defendant moved to dismiss those remaining charges; the circuit court denied that motion. The prosecution appealed by leave granted the circuit court order quashing the charges of falsifying election records and forgery and the two related charges of use of a computer; defendant cross-appealed the circuit court order denying her motion to dismiss the two remaining charges.

The Court of Appeals *held*:

1. To bind a defendant over on a charge, the district court must find that evidence existed regarding each element of the crime charged or evidence from which the elements may be inferred. If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the fact-finder at trial resolve those questions of fact and bind the defendant over for trial. MCL 168.932(c) (falsifying election records) provides that an inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or any paper, documents, or vote of any description, which pursuant to the Election Law is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so; the statute does not require proof that a defendant intended to, or successfully did, alter the results of the election. MCL 168.932 proscribes more than a person forging an election record, it proscribes a person from making a document something it was not, i.e., an accurate memorialization of what took place during an election as it relates to absentee ballots. The record in this case indicated that (1) defendant served as the Southfield clerk, (2) defendant had custody of election records, which were required to be made, filed, or preserved under the Election Law, and (3) defendant willfully falsified or fraudulently altered the QVF after the election to falsely report regarding AV ballots that were, in fact, received and valid. Defendant's actions purported to make the QVF something it was not, an accurate memorialization of Southfield's AV ballots during the 2018 general election. Thus, the prosecution presented evidence from which the district court could have reasonably inferred that defendant willfully acted to change the QVF. Although the district court incorrectly remarked—when discussing a double-jeopardy argument raised by defendant—that MCL 168.932(c) does not require the prosecution to prove intent, the prosecution presented

sufficient evidence of each element of the charged offenses to show that the crime of falsifying election records had been committed and that probable cause existed that defendant had committed the offense. Accordingly, the district court correctly bound defendant over on the charge of falsifying election records, and the circuit court therefore erred by granting defendant's motion to quash the charge of falsifying election records. The prosecution's failure to initially turn over to defendant a spreadsheet relied on by a prosecution witness was not grounds for dismissal as a sanction for prosecutorial misconduct because the district court exercised its discretion by stopping the preliminary examination when the spreadsheet was discussed during testimony, making copies of the spreadsheet for the parties, and granting a 2½-month continuance before the hearing resumed, allowing defense counsel significant time to review the document before cross-examining the witness about the spreadsheet's preparation and contents; therefore, the prosecution's alleged misconduct was not grounds for affirming the circuit court's erroneous ruling.

2. Under MCL 750.248(1), a person who falsely makes, alters, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation may be received as legal proof, with intent to injure or defraud another person, is guilty of a felony punishable by imprisonment for not more than 14 years. The key to the offense is that the writing itself is a lie. Although MCL 750.248(1) is often referred to as the offense of forgery, the statute applies not only to document forgers but also to persons who falsely make, alter, or counterfeit a public record; thus, the statute prohibits both alterations of public records and forgeries of public records. Stated differently, the statute plainly proscribes a variety of acts, including falsification or alteration of a document, and the statute does not require a complete falsification of the document for the falsification or alteration to fall within the ambit of the statute. In this case, the evidence indicated that defendant created, and submitted to the board, a second QVF that purported to be a complete and accurate list of people who voted via AV ballot. The second, revised QVF, however, presented a false alteration of the correct QVF information. Under these facts, the district court correctly held that there was probable cause to believe that defendant had committed the offense of forgery with the intent to defraud, i.e., deceive, the

board. Given the evidence presented during the preliminary examination, the circuit court erred by quashing the charge of forgery.

3. MCL 752.796(1) provides that a person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime. Thus, the use-of-a-computer crime has two elements: (1) the commission, attempted commission, conspiracy to commit, or solicitation of a crime, and (2) through the use of a computer. The circuit court quashed the two counts of use of a computer on the basis of its erroneous conclusion that the district court had abused its discretion by binding over defendant on the predicate offenses of forgery and falsifying election records. Because the circuit court erred by quashing the bindover on those two underlying offenses, it necessarily erred by quashing the two related use-of-a-computer counts. Further, evidence supported the district court's ruling that crimes had been committed and that probable cause existed to believe that defendant committed those offenses by using a computer to alter and falsify the QVF.

4. Misconduct in office was an indictable offense at common law. An indictable common-law offense can be charged by the prosecution pursuant to MCL 750.505 unless punishment for that offense is otherwise expressly provided for by statute. In turn, MCL 750.505 provides that any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony. Thus, it is proper to dismiss a charge brought under MCL 750.505 if the charge sets forth all the elements of a statutory offense. At common law, misconduct in office was defined as corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office. An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance. However, committing nonfeasance or acts of malfeasance or misfeasance are not enough to constitute misconduct in office. In the case of malfeasance and misfeasance, the offender also must act with a corrupt intent, i.e., with a sense of depravity, perversion, or taint. In contrast, MCL 168.931(1)(h) provides that a person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election

officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election. MCL 168.931(1)(h) does not foreclose prosecution for misconduct in office because the elements of the offenses are different. Specifically, misconduct in office requires proof that the defendant acted while a public officer, while MCL 168.931(h) may be violated by any person with duty imposed upon that person by the Michigan Election Law. Relatedly, MCL 168.931(1)(h) prohibits the breach of a duty owed under the Michigan Election Law, while misconduct in office may be premised on a breach of any duty owed as a result of one's status as a public officer. Because the elements of misconduct in office differ from the elements needed to prove a violation of MCL 168.931(1)(h), the misconduct-in-office charge under MCL 750.505 is not foreclosed by an Election Law charge under MCL 168.931(1)(h). Accordingly, the circuit court correctly denied defendant's motion to dismiss the misconduct-in-office charge on that basis. In addition, defendant was not entitled to dismissal of the use-of-a-computer charge related to the misconduct-in-office offense. The circuit court's resolution of defendant's motion to quash the bindover of common-law misconduct in office did not establish law of the case because the law-of-the-case doctrine only applies when an appellate court has ruled on the merits of the issue presented. In this case, defendant raised a new issue in her motion to dismiss the common-law misconduct-in-office charge; therefore, even if the circuit court could be deemed to have functioned as an appellate court, the law-of-the-case doctrine did not apply.

Circuit court order granting in part defendant's motion to quash reversed, circuit court order denying defendant's motion to dismiss affirmed, and case remanded for further proceedings.

1. ELECTIONS – OFFENSES AND PENALTIES – FORGERY – PROSCRIBED CONDUCT.

Under MCL 750.248(1), a person who falsely makes, alters, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation may be received as legal proof, with intent to injure or defraud another person, is guilty of a felony punishable by imprisonment for not more than 14 years; the statute does not apply to only election-record forgers but also to persons who falsely make, alter, or counterfeit a public record; the statute does not require a complete falsification of a document for the falsification or alteration to fall within the ambit of the statute.

2. CRIMINAL LAW – COMMON-LAW OFFENSES – MISCONDUCT IN OFFICE – ELECTION-LAW OFFENSES.

MCL 750.505 provides that any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any Michigan statute, shall be guilty of a felony; misconduct in office, which is an indictable offense at the common law, does not contain the same elements of an offense brought under MCL 168.931(1)(h) of the Michigan Election Law, so MCL 750.505 does not prohibit a person from being charged with both the common-law offense of misconduct in office and for an Election Law violation under MCL 168.931(1)(h) (MCL 168.1 *et seq*.).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Linus Banghart-Linn*, Assistant Attorney General, for the people.

Gurewitz & Raben, PLC (by *Harold Gurewitz* and *Margaret Sind Raben*) for defendant.

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

REDFORD, J. In this interlocutory criminal appeal, the prosecution appeals by delayed leave granted the circuit court's order granting in part and denying in part defendant's motion to quash the bindover. The district court bound defendant over for trial for violation of the Michigan Election Law, MCL 168.1 *et seq*., by falsifying election records (falsifying election records), MCL 168.932(c); falsely making, altering, forging or counterfeiting a public record (forgery), MCL 750.248; common-law misconduct in office, MCL 750.505; and three counts of use of a computer to commit a crime (use of a computer), MCL 752.796, each count premised, respectively, on one of the first three listed offenses. The circuit court quashed the bindover respecting all charges but misconduct in office and the related use-of-a-computer charge. The circuit court

also denied defendant's later motion to dismiss the charges of misconduct in office and the related use of a computer charge, which decision defendant cross-appeals.

For the reasons set forth in this opinion, we reverse the circuit court's order granting in part defendant's motion to quash the bindover, affirm the circuit court's order denying defendant's motion for dismissal, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. FACTS

This case arises from the November 6, 2018 general election in Southfield, Michigan. Defendant, Sherikia Hawkins, served as the elected City Clerk for Southfield. Among other things, she bore the responsibility for conducting elections. During the certification process conducted by the Oakland County Board of Canvassers (the Board) after the election, numerous discrepancies arose that led to the discovery that defendant had changed voter records affecting 193 people who voted via absent-voter (AV) ballots. At issue in this appeal is whether the district court abused its discretion in its decision to bind defendant over when it concluded that defendant's conduct constituted falsifying election records, forgery, or misconduct in office.

At the preliminary examination, Sally Williams, the Director of Elections for the Michigan Bureau of Elections, and Nichole Humphries, the Deputy City Clerk for the city of Southfield, testified regarding how AV ballots are processed and how election officials track voting to ensure election integrity. The Michigan Secretary of State (the Secretary) maintains the qualified

voter file (QVF), a statewide computer database of registered voters that is available to election officials throughout the state, which enables them to track the process by which people vote via AV ballots. Specifically, a local election official indicates in the QVF the date an AV-ballot application is received by the official, the date an AV ballot is sent to the voter, and the date an AV ballot is received back by the official. If an AV ballot received by an official is invalid for some reason —for example, the AV-ballot envelope is unsigned, or the signature does not match the voter's signature on file—that reason is noted in the QVF along with the date of receipt of the AV ballot and a code that indicates the reason for invalidation of the AV ballot. By law, AV ballots may not be removed from the envelope in which they are returned until Election Day. Local officials store the AV ballots until Election Day, when they are sent to the appropriate location for tabulation.

Localities have two options for processing AV ballots on Election Day. They may either sort the AV ballots by precinct and tabulate them at the corresponding poll site, or they may have one or more AV counting boards (AVCBs) that tabulate AV ballots. Southfield used the latter method for the 2018 general election, and it had two AVCBs for the 36 Southfield precincts.[1] At the AVCB, the AV ballots, both those received before Election Day and those received by the close of the polls on Election Day, are processed by a tabulator. Occasionally, a tabulator cannot process an AV ballot because of a defect. For example, an AV ballot may be damaged in the mail or the barcode may be torn. When such a problem occurs, two election workers, one Democrat and one Republican, transfer the voter's votes to a new

[1] Humphries bore responsibility for overseeing the AVCBs on Election Day.

ballot that is then tabulated. Once all AV ballots have been processed, the tabulator is closed out, its count is transferred to a computer via flash drive, and unofficial results are transmitted to the county. Election workers are responsible for printing a report from the QVF that indicates the number of AV ballots received by the close of the polls. Election workers also complete a ballot summary for each precinct.[2] The ballot summary indicates the number of AV ballots received, which information is gathered from the QVF report, and the number of ballots processed, which information is gathered from the tabulator. Ideally, the numbers balance. The QVF report and ballot summaries are included in AV-ballot poll books. Each precinct has one poll book solely for AV ballots. The poll books are then given to the county board of canvassers to certify the election results.

Joseph Rozell, the Director of Elections for Oakland County, testified at the preliminary examination that he participated in the canvass of the 2018 general election conducted by the Board, which began on November 9, 2018. Rozell discovered that the carbon copies of the ballot summaries for the 36 precincts that had been sent to the Board and the county clerk had not been completed. While the copies were sent to the appropriate entity, they were all blank. That prompted Rozell to contact defendant, who indicated they were completed, so Rozell asked that she bring them to the Board. The Board also discovered that the tabulator data transmitted to the county at the end of Election Day for eight precincts indicated that no ballots were counted. Accordingly, defendant had to bring all ballots

[2] Ballot summaries are done with carbon triplicates. The local clerk keeps the original copy, and the two duplicate copies are sent to the county clerk and county board of canvassers, respectively.

for those eight precincts to the county and tabulate them, which she did on November 13, 2018, and November 14, 2018. Defendant delivered the ballot summaries on November 15, 2018, along with a revised QVF report, which Rozell and the Board had not requested.

The ballot-summary form features a column of three boxes, which identify the number of ballots delivered to the AVCB: Box A enables entry of the number of AV-ballot envelopes delivered at the opening of the AVCB; Box B enables entry of additional AV-ballot envelopes delivered by the close of the AVCB; and Box C must specify the total number of AV-ballot envelopes delivered. The ballot summary also features a column of four boxes that identify the number of ballots at the close of the AVCB: Box D features the number of AV ballots tabulated; Box E indicates the number of AV-ballot envelopes delivered to the Board that did not contain a ballot; Box F shows the number of AV-ballot envelopes delivered to the Board without a signature or otherwise invalid; and Box G requires entry of the total number of AV ballots processed. The total numbers reported in Boxes C and G must agree. When done properly, "Ballots Returned" on the QVF report should be in Box C of the ballot summary, and Box C should equal Box G, the number of ballots processed by a tabulator. The canvas that is performed postelection must be completed within 14 days.

Rozell testified that the revised QVF reports defendant brought to him on November 15, 2018, matched Box C, and Box C matched Box G for each precinct. However, Ella Mills, one of Rozell's staff members, informed him that Precincts 35 and 36 had problems. It appeared that the number of ballots returned for Precinct 35 from the revised QVF report matched the

number of ballots counted for Precinct 36, and vice versa. Accordingly, Rozell instructed Mills to locate the original QVF report that had been submitted on Election Day. Mills eventually found the original QVF report in a trash can in the Board's canvassing room. Mills testified that this was highly unusual because the Board does not throw away any documentation. Rozell testified that defendant had been in the canvassing room on November 15, 2018, when she brought in the ballot summaries and revised QVF report. Rozell and Mills compared the revised QVF report with the original and noticed that the number of ballots received identified on the revised QVF report was less than that on the original QVF report. Rozell, therefore, contacted the state Bureau of Elections (the BOE) for assistance to determine what happened.

Cynthia Wilkinson, a database architect for the BOE, ran a query to find all instances in which a Southfield AV ballot had been recorded in the QVF as received and accepted before or on Election Day but had been later recorded as not received or rejected for some reason other than arriving after Election Day. There were 193 such instances, and each modification had been made by the same user: Sherikia@74900.[3] All modifications were done on November 14, 2018, and November 15, 2018. Rozell shared this information with the Board which then instructed defendant to turn over all AV ballots and envelopes. The Board physically counted every AV ballot and envelope for each precinct and again tabulated the ballots, which Rozell put into a spreadsheet.

Rozell noticed multiple patterns in the ballot counts. First, for most precincts, the number of AV ballots

[3] The Secretary has designated the city of Southfield as 74-900.

physically counted and tabulated by the Board was consistent with the number of AV ballots the original QVF report indicated as received. Second, the number of AV ballots tabulated on Election Day did not match the number of AV ballots physically counted and tabulated by the Board. Third, the number of AV ballots in Precinct 2 that had to be duplicated because of issues with the original ballot equaled the number of AV voters removed from the QVF by defendant and the number of ballots that were not tabulated on Election Day. Rozell testified:

> What had happened was the ballots had been duplicated but the duplicated ballots had not been processed so not all of the votes had been counted in Southfield on election night. Not all of the absentee votes had been counted.

Rozell later testified that he did not know how many total duplicate AV ballots there were, but that he knew the number of duplicates in Precinct 2 matched the number of ballots not tabulated and the number of AV voters removed from the QVF in that precinct. Rozell concluded that, while damaged AV ballots had been duplicated, they had not been tabulated on Election Day. Rozell also randomly selected three of the AV ballots that had been changed from received and accepted to rejected for lack of a signature. In each case, the AV-ballot envelopes included a signature revealing that defendant modified the QVF after Election Day to contain false information. Rozell testified that the number of voters removed in each precinct from the QVF list after the election equaled the number of ballots necessary to balance the number of ballots tabulated on election night.

B. PROCEDURAL HISTORY

1. DISTRICT COURT BINDOVER DECISION

In deciding whether to bind defendant over on the charges, the district court first noted that, to be entitled to a bindover for falsifying election records, the prosecution had to demonstrate probable cause to believe defendant was a city clerk, that she had lawful custody of an election record (in this case, the QVF), that she had falsified information in the QVF, and that she had acted with fraudulent intent. The district court found that probable cause existed to believe that defendant was the City Clerk for Southfield and that she had modified the QVF after the election to falsely indicate that certain absentee ballots were returned without a signature. The district court also found that the prosecution demonstrated probable cause to believe that defendant committed forgery because the revised QVF report "was a forged document that was published to the board of canvassers," the QVF was a required list of voters, and the QVF was meant to be legal proof of the identities of individuals that voted via an AV ballot in the election. Addressing an argument that the charge of forgery should be dismissed because it was the same offense as falsifying election records for double-jeopardy purposes, the district court explained that the two offenses required proof of different elements. The district court, however, stated further:

> The prosecution need not show any intent pursuant to MCL 168.932(c). On the other hand MCL 750.248 [forgery] is applicable to any person who makes, alters or counterfeits a public record and requires the specific intent to harm or defraud another.

The district court found that probable cause existed to believe that defendant committed misconduct in office because defendant modified the QVF with a corrupt intent to make the number of AV ballots tabulated on Election Day match the QVF report. Finally, the district court found probable cause to believe that defendant used a computer to commit each of the above predicate offenses. The district court, therefore, bound defendant over to the circuit court on all charged offenses.

2. MOTION TO QUASH BINDOVER

On August 27, 2020, defendant moved the circuit court to quash the bindover. Defendant argued that the district court erred by binding her over on falsifying election records and forgery because no evidence indicated that she altered any vote and any alleged modification of the QVF did not make the QVF a forgery. Defendant argued that the district court erred by binding her over on misconduct in office and use of a computer since each were predicated on her alleged commission of falsifying election records and forgery. Defendant contended that forgery requires the creation of an instrument that purports to be what it is not, whereas inclusion of some false information in an instrument does not turn the document into a forgery. She took the position that, even if she included some false information in the QVF, she had not created something that purported to be something else. Defendant also contended that the district court erred by not requiring the prosecution to show that she acted with an intent to defraud to establish probable cause to believe that she committed falsifying election records. She relied on the district court's statement that the "prosecution need not show any intent pursuant to

MCL 168.932(c)." Defendant argued further that the district court erred by binding her over on common-law misconduct in office because the prosecution failed to present evidence of forgery, and misconduct in office cannot be charged where, as here, a statute already prohibited the charged conduct.

The prosecution opposed defendant's motion by arguing that the district court did not err respecting the charge of falsifying election records because the statute did not require proof of a forgery. The prosecution asserted that defendant's falsification of the QVF by changing the status of AV ballots sufficed. The prosecution argued that the district court did not err respecting the forgery charge because defendant modified the QVF to falsely reflect that some AV ballots were rejected, then printed the QVF and published it to the Board as part of the poll book, which represented an attestation that it may be received as legal proof of those who voted via AV ballots. The prosecution also explained that the district court did not err respecting the misconduct-in-office charge or use-of-a-computer charge because sufficient evidence had been presented to support the court's probable-cause findings for the offenses. The prosecution also observed that defendant did not merely make false entries in the QVF because she also generated a report from the QVF that she represented to be a list of those who voted via AV ballots, which constituted the forgery of a public record. The prosecution also asserted that the district court clearly understood that falsifying election records required a showing of intent to defraud but merely misspoke when it considered defendant's argument that falsifying election records and forgery were the same offense for double-jeopardy purposes.

The circuit court held a hearing on defendant's motion to quash the bindover at which the parties argued consistently with their briefs. The court issued an opinion and order in which it concluded that the district court abused its discretion respecting the falsifying-election-records charge because it could not determine whether the district court understood that the prosecution had to establish an intent to defraud. Specifically, while the district court initially appeared to recognize the necessity of proof of an intent to defraud, the circuit court noted that the district court failed to make any findings on that element. Regarding forgery, the circuit court concluded that the district court erred because defendant's entry of false information into a public record did not change the nature of the record and therefore did not constitute a forgery.

The circuit court, however, concluded that the district court did not abuse its discretion by binding defendant over on the charge of misconduct in office because defendant corruptly altered the QVF to indicate the rejection of ballots that were, in fact, valid. The court ruled that the misconduct-in-office charge stood independently of the previous two counts because it did not rely on a forgery. The circuit court concluded that the district court abused its discretion regarding the counts of use of a computer predicated on falsifying election records and forgery but did not abuse its discretion regarding the count premised on misconduct in office. Accordingly, the circuit court quashed the bindover respecting falsifying election records, forgery, and the attendant use-of-a-computer charges but denied defendant's motion to quash the misconduct-in-office charge and the related count of use of a computer.

3. MOTION TO DISMISS REMAINING TWO COUNTS

Later, defendant moved to dismiss the remaining two counts on the ground that the common-law misconduct-in-office offense[4] could not be based on conduct that is otherwise prohibited by law because an improper alteration of the QVF is statutorily prohibited under MCL 168.931(1)(h),[5] which makes it a misdemeanor to disobey a lawful instruction or order of the Secretary. Defendant argued that the misconduct-in-office charge should be dismissed along with the attendant count of use of a computer. Defendant relied on a number of statutory provisions and the election manual used by the Secretary to guide local election officials in the conduct of elections to argue that altering the QVF qualified as disobeying a lawful instruction or order of the Secretary falling within the ambit of MCL 168.931(1)(h).

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[4] MCL 750.505 provides:

> Any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or by a fine of not more than $10,000.00, or both in the discretion of the court.

In *People v Waterstone*, 296 Mich App 121, 137; 818 NW2d 432 (2012), this Court confirmed that misconduct in office as prosecuted under MCL 750.505 requires proof of "a corrupt intent[, which] can be shown where there is intentional or purposeful misbehavior or wrongful conduct pertaining to the requirements and duties of office by an officer." (Quotation marks and citation omitted.) This Court reiterated that "it is deemed 'corrupt' for a public officer to purposely commit a violation of any duties associated with the officer's job or office." *Id*. at 137-138.

[5] MCL 168.931(1)(h) makes it a misdemeanor under the Michigan Election Law for a person to "willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election."

In response, the prosecution argued that misconduct in office and MCL 168.931(1)(h) had different elements and that, therefore, the latter did not preclude charging the former. Specifically, the prosecution argued that MCL 168.931(1)(h) applied to all persons upon whom a duty is imposed under the Michigan Election Law, not just to public officers as is the case for misconduct in office.

At the hearing on the motion, the circuit court advised that its decision regarding defendant's motion to quash the bindover as to misconduct in office and the attendant use of a computer was binding under the law-of-the-case doctrine. The court, therefore, denied defendant's motion.

This Court granted the prosecution's delayed application for leave to appeal the circuit court's order granting in part and denying in part defendant's motion to quash the bindover.[6] On appeal, the prosecution argues that the circuit court erred by partially quashing the bindover because it misinterpreted the district court's findings and failed to recognize that falsifying election records and forgery can be premised on a fraudulent alteration or a forgery. Defendant filed a claim of cross-appeal. In her appeal, defendant argues that the circuit court erred by denying her motion to dismiss because the elements of misconduct in office are identical with the elements of MCL 168.931(1)(h).

II. STANDARDS OF REVIEW

In *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000), this Court explained the applicable standard of review as follows:

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[6] *People v Hawkins*, unpublished order of the Court of Appeals, entered June 30, 2021 (Docket No. 357068).

> We review for an abuse of discretion a district court's decision to bind over a defendant. The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. A circuit court's decision with respect to a motion to quash a bindover order is not entitled to deference because this Court applies the same standard of review to this issue as the circuit court. This Court therefore essentially sits in the same position as the circuit court when determining whether the district court abused its discretion. In other words, this Court reviews the circuit court's decision regarding the motion to quash a bindover only to the extent that it is consistent with the district court's exercise of discretion. The circuit court may only affirm a proper exercise of discretion and reverse an abuse of that discretion. Thus, in simple terms, we review the district court's original exercise of discretion. [Quotation marks and citations omitted.]

We review "de novo the bindover decision to determine whether the district court abused its discretion, giving no deference to the circuit court's decision." *People v Norwood*, 303 Mich App 466, 468; 843 NW2d 775 (2013) (quotation marks and citation omitted). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Waterstone*, 296 Mich App 121, 131-132; 818 NW2d 432 (2012). Questions of statutory interpretation are reviewed de novo. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). "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. Legal questions, including questions of statutory interpretation, are reviewed de novo." *People v Hofman*, 339 Mich App 65, 69; 981 NW2d 112 (2021) (quotation marks and citation omitted).

III. ANALYSIS

A. FALSIFICATION OF ELECTION RECORDS IN VIOLATION OF MCL 168.932(c)

The prosecution argues that the circuit court erred by quashing the bindover on the charge of falsifying election records because the district court understood the elements of the offense and the record evidence clearly supported the district court's bindover decision. We agree.

The district court conducts a preliminary examination to determine whether a felony has been committed and whether probable cause exists to believe that the defendant committed the felony. *People v Plunkett*, 485 Mich 50, 57; 780 NW2d 280 (2010). "Probable cause requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt." *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003) (quotation marks and citation omitted). "Whether conduct falls within the scope of a penal statute is a question of statutory interpretation." *Flick*, 487 Mich at 8. In *Flick*, our Supreme Court recited the well-established principles that govern our interpretation of a statute:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. [*Id*. at 10-11 (quotation marks and citations omitted).]

Respecting statutory interpretation of provisions contained within the Penal Code, MCL 750.2 provides:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law.

The prosecution charged defendant in Count 1 with falsifying election records in violation of MCL 168.932(c), which provides:

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> * * *
>
> (c) An inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes, certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so.

In this case, to bind defendant over on the offense of falsifying election records in violation of MCL 168.932(c), the prosecution had to present evidence that defendant: (1) was a clerk; (2) had custody of a record, election list of voters, certificates, poll book, or of any paper, document, or vote of any description, which must be made, filed, or preserved under the Michigan Election Law; and (3) willfully falsified or fraudulently made any entry, erasure, or alteration on any or all of such items. "The intent to defraud is the

specific intent to cheat or deceive." *People v Miller*, 326 Mich App 719, 739; 929 NW2d 821 (2019).

To properly bind defendant over on this charge, the district court needed to find that evidence existed "regarding each element of the crime charged or evidence from which the elements may be inferred . . . ." *Hudson*, 241 Mich App at 278 (quotation marks and citation omitted). "If the evidence introduced at the preliminary examination conflicts or raises a reasonable doubt about the defendant's guilt, the magistrate must let the factfinder at trial resolve those questions of fact. This requires binding the defendant over for trial." *Id*.

The record reflects that the prosecution presented evidence at the preliminary examination that, while conducting the canvas of the 2018 general election in Southfield, the Board discovered several discrepancies and evidence that not all AV ballots were counted at the Southfield AVCBs on Election Day. After Election Day, someone with the username "SHERIKIA@74900" changed 193 voter records in the QVF to indicate that either no AV ballot had been received from such voters, or for the AV ballots received, such ballots lacked a signature by Election Day. Defendant's first name is Sherikia, and 74900 refers to the Secretary of State's designation for Southfield. The district court could reasonably infer from this evidence that defendant willfully acted to change the QVF. While the number of AV ballots indicated as received on the QVF report sent to the Board on Election Day at the close of polls matched the number of ballots physically counted by the Board, the number of AV ballots indicated as received on the changed QVF report that defendant submitted to the Board failed to match the number of ballots physically counted by the Board, and the total

number of AV ballots indicated as received on the revised QVF report equaled less than that indicated on the original QVF report.

The record indicates that, in its decision following the preliminary examination, the district court made extensive findings based on the admitted documentary evidence and the witnesses' testimonies. The district court correctly stated that to establish a violation of MCL 168.932(c), the prosecution must establish that

> one, the defendant was a city clerk, two, as clerk the defendant had lawful custody of a record, in this case the Q.V.F., the defendant falsified information in the record and defendant acted with a fraudulent intent when she falsified the record.

The district court then rendered its decision on Count 1:

> According to the evidence and testimony presented at the preliminary exam the defendant, city clerk for the city of Southfield, modified the Q.V.F. after the election to falsely indicate that certain absentee ballots were returned without signature. Therefore, the Court finds probable cause for Count 1 and probable cause that the defendant most likely committed the offense.

De novo review of the record in this case establishes that the district court, having fully examined the evidence, properly found that the prosecution presented evidence of each element of the charged offense of falsifying election records in violation of MCL 168.932(c). The record indicates that evidence established that: (1) defendant served as the Southfield clerk, (2) defendant had custody of election records, which must be made, filed, or preserved under the election law, (3) defendant willfully falsified or fraudulently altered the QVF after the election to falsely report regarding AV ballots that were in fact received

and valid. Accordingly, the district court properly exercised its discretion by binding defendant over for trial on Count 1. Respecting defendant's motion to quash, the circuit court had ample evidence in the record from which it could conclude that the prosecution met its burden of demonstrating that a crime had been committed and probable cause existed that defendant committed a violation of MCL 168.932(c), justifying the bindover on Count 1. Therefore, the circuit court erred by granting defendant's motion to quash Count 1.

Defendant argues that the circuit court did not err by quashing the bindover on Count 1 because, in relation to her double-jeopardy argument raised in the district court, the district court remarked that MCL 168.932(c) did not require the prosecution to prove intent, which she argues indicated that the district court's bindover ruling suffered from a fatal error of law, a conclusion with which the circuit court correctly agreed. The prosecution argues that the record evidence supported the district court's bindover decision and that the district court's statement, when taken in proper context of the district court's comparative analysis of the elements of MCL 168.932(c) and MCL 750.248 for double-jeopardy purposes, did not negate the record evidence that the prosecution presented that satisfied each element of the falsification of election records in violation of MCL 168.932(c) and supported the district court's bindover decision.[7]

[7] The prosecution offers a reasonable contextualization and interpretation of the district court's statement and the circuit court's confusion that led to quashing Count 1, but the record lacks clarity to permit accepting that speculation. We conclude that determination of the propriety of the district court's bindover decision requires de novo review of the record, and based on such record review, we conclude that

We are not persuaded by defendant's argument because the circuit court had the ability to determine, by examining the extensive record before it, that the district court had not abused its discretion by binding over defendant on Count 1 because the prosecution presented sufficient evidence of each element of the charged offense to show that a crime had been committed and that probable cause existed that defendant committed the charged offense. That the district court made an erroneous or confusing statement after the fact did not negate the record evidence that supported its earlier bindover decision.

The prosecution argues that the circuit court also erred by quashing the bindover on Count 1 because, to the extent that the circuit court needed clarification of the district court's bindover decision, it should have remanded the case to the district court to give it the opportunity to explain. Circuit courts have jurisdiction to remand to the district court even after granting a motion to quash. See *People v Miklovich*, 375 Mich 536, 539; 134 NW2d 720 (1965); *People v Kennedy*, 384 Mich 339, 345; 183 NW2d 297 (1971). No authority appears to preclude a circuit court from exercising discretion to remand for further proceedings. Therefore, in its discretion, the circuit could have ordered the remand for further explanation by the district court. However, declining the exercise of such discretion is not, in and of itself, an abuse of discretion requiring reversal.

Defendant argues that the circuit court correctly quashed Count 1 because MCL 168.932(c) must be read as prohibiting forgery and her changes made to the QVF did not constitute a forgery. More specifically, she claims that her document modification did not

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the district court did not abuse its discretion. Therefore, the circuit court erred.

make the QVF something different than it purported to be, and therefore, it did not constitute a forgery. We disagree. Taken in its entirety, the evidence before the district court provided adequate evidence to bind over the charge that the actions of defendant purported to make the document something it was not, an accurate memorialization of what took place regarding the November 6, 2018 election as relates to absentee ballots, and thus constituted a forgery.

Additionally, she argues that *People v Pinkney*, 501 Mich 259; 912 NW2d 535 (2018), stands for the proposition that MCL 168.932(c) is exclusively an election-record-forgery statute and that therefore her conduct did not fall within the forgery prohibition. We disagree. *Pinkney* addressed the issue whether MCL 168.937 constituted a substantive offense or merely a punishment provision. Our Supreme Court held that the defendant could not be convicted under MCL 168.937 because it merely provided punishment but did not set forth a substantive offense. *Pinkney*, 501 Mich at 263. In doing so, the Court rejected the argument that the Legislature meant for common law to provide the substantive elements of forgery in MCL 168.937 because "a reasonable person would believe that 'forgery under the provisions of this act' suggests that he or she could only be found guilty of a forgery crime defined elsewhere in the Election Law." *Pinkney*, 501 Mich at 276 (emphasis omitted), quoting MCL 168.937. The Court reviewed the legislative history of relevant provisions of the Michigan Election Law, including MCL 168.932, to support its conclusion. The Court observed from that historical analysis that the predecessor statute, 1948 CL 195.8, originated in 1917 PA 126, ch 2, § 8, the first statute in which the substantive forgery crime was independent of the penalty provision. *Id*. at 279 n 48.

Pinkney did not interpret the substance or breadth of the conduct prohibited under MCL 168.932(c). The Court merely discussed the provision in passing as further support for its conclusion that MCL 168.937 provided a penalty provision for forgery offenses defined elsewhere in the election law. Although the Court referred to MCL 168.932(c) as an "election-related forgery prohibition," *Pinkney*, 501 Mich at 279, it did so in the context of its interpretation of MCL 168.937. Nowhere in *Pinkney*, however, did the Court definitively state that MCL 168.932(c) only prohibits election-record forgery. The plain language of MCL 168.932(c) does not identify forgery specifically as the prohibited conduct, but it specifies that a clerk, like defendant, "shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any [election records], in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so." The statute obviously prohibits more than the forgery of election records. The statute must be construed according to the fair import of its terms. MCL 750.2. Defendant's argument fails because the statute cannot be interpreted in the narrow manner she desires and because *Pinkney* does not support her contention.

The prosecution had to demonstrate that defendant acted in a manner prohibited by the statute. In this case, the record reflects that the prosecution presented evidence that defendant, Southfield's clerk, falsified election records that the election law required be made, filed, or preserved. Witness testimony and documentary evidence supported the district court's conclusion that MCL 168.932(c) had been violated and that probable cause existed that defendant committed the charged offense. Specifically, the evidence supported the conclusion that defendant willfully and falsely

altered entries in the QVF by indicating AV ballots received and accepted were either not received or not accepted because they had no signature by Election Day. She did this after the election but while the Board attempted to canvass the votes and certify the election. Evidence presented by the prosecution indicated that defendant made and submitted a false copy of the QVF, and disposed of the original, when she knew that the Board worked to verify the results of the Southfield election to ensure the integrity of it. From this, a reasonably prudent and conscientious person could believe that defendant intended to deceive the Board. *Miller*, 326 Mich App at 739.

Defendant asserts that no evidence established that the election results would have been different if the 193 AV ballots that were not tabulated on Election Day continued to go uncounted. MCL 168.932(c), however, does not require proof that defendant intended to alter the results of an election, nor does the statute require proof that she achieved altering the results of an election. Evidence of defendant's intent to deceive the Board, such that the canvass would not reveal that some valid AV ballots went uncounted, sufficed. Moreover, the statute cannot properly be interpreted in the manner defendant argues. Such a reading would be counter to the plain language of the statute, which requires a willful falsification or fraudulent entry, alteration, or erasure of an election record. Accordingly, the circuit court erred by quashing the bindover on Count 1.

Defendant also argues that the circuit court's decision to quash the bindover on Count 1 should be affirmed on appeal because the prosecution committed misconduct by failing to disclose the Rozell spreadsheet. Defendant appears to argue that this Court

should affirm the circuit court's erroneous quashing of the bindover as a sanction for the prosecution's conduct. We disagree.

In *People v Burger*, 331 Mich App 504, 518; 953 NW2d 424 (2020), this Court recently explained:

> Generally, a criminal defendant does not have a constitutional right to discovery. However, a defendant's right to due process may be violated by the prosecution's failure to produce exculpatory evidence in its possession. [Quotation marks and citation omitted.]

MCR 6.201 provides for discovery in criminal cases. MCR 6.201(B)(1) specifies that the prosecution must provide a defendant discovery of any exculpatory information or evidence known to the prosecuting attorney, and Subrule (H) imposes a continuing duty of disclosure upon parties that discover additional discoverable information or material at any time. MCR 6.201(J) addresses a violation of the rules regarding discovery in criminal proceedings as follows:

> If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

Subrule (J) plainly indicates that the presiding lower court has discretion to address and decide discovery issues in criminal proceedings. The rule, how-

ever, does not authorize appellate courts to sanction parties after the fact.

The record in this case reflects that Rozell created a spreadsheet, gave it to the Secretary of State's office, and may have provided a copy to the prosecution, which, in turn, may have used it to prepare Rozell for testifying at the preliminary examination. The record indicates that defense counsel informed the district court that he did not have the spreadsheet, and the prosecution represented to the court that it did not believe that it had a copy or had seen it. Defense counsel argued that the prosecution had an obligation to share all exculpatory evidence and should be required to engage in further efforts to locate and turn over the spreadsheet, to which the prosecution agreed but stated that the spreadsheet was unnecessary to conduct the preliminary examination. Despite additional discussion regarding the existence of the spreadsheet between the court, the prosecution, and defense counsel, not until later in his testimony did Rozell inform defense counsel during further cross-examination that he had a copy of the spreadsheet with him. The district court took a brief recess, and both parties received a copy of the spreadsheet. Defense counsel moved for and the district court granted an adjournment to permit defendant's review of the spreadsheet to determine its contents that might prove beneficial and permit defense counsel's use for cross-examination. When the preliminary examination resumed over 2½ months later, defense counsel cross-examined Rozell extensively about the spreadsheet's preparation and contents and moved for its admission. The district court granted the document's admission without objection.

The record reflects that the district court exercised its discretion regarding the discovery issue raised by defendant and granted defendant a lengthy continuance sufficient for defense counsel to analyze Rozell's spreadsheet. The record indicates that the spreadsheet enabled defense counsel to develop cross-examination of Rozell regarding that evidence. The record, however, is unclear whether the spreadsheet contained exculpatory evidence. Additionally, the spreadsheet does not appear to have served to impeach Rozell's credibility or cast doubt on the evidence he summarized in the spreadsheet.

Defendant argued below as she does on appeal that the circuit court could draw an adverse inference from the prosecution's failure to turn over the spreadsheet, which defendant argues contained relevant and exculpatory evidence that the district court had ordered to be turned over. Defendant offers little legal citation in support of her argument. Defendant cites *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997), which expresses the general proposition that Michigan courts have inherent power to sanction civil-litigant misconduct. Defendant also cites *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014), a case in which our Supreme Court clarified the test for a claim of a *Brady*[8] violation, i.e., that: (1) the prosecution suppressed evidence, (2) that is favorable to the accused, and (3) that is material. In *Chenault*, 495 Mich at 150, the Court explained:

> The government is held responsible for evidence within its control, even evidence unknown to the prosecution, without regard to the prosecution's good or bad faith. Evidence is favorable to the defense when it is either exculpatory or impeaching. To establish materiality, a defendant must

[8] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> show that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Quotation marks and citations omitted.]

The Court concluded that the "question is whether, in the absence of the suppressed evidence, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id*. at 150-151 (quotation marks and citation omitted). The Court rejected the imposition of an additional due-diligence factor on a defendant in determining whether the defendant has successfully asserted a *Brady* violation.

Contrary to defendant's assertions, the propositions of law expressed in *Brenner* and *Chenault* do not apply in this case because the district court dealt with the prosecution's failure to disclose the Rozell spreadsheet by granting defendant an adjournment and time to analyze that evidence and use it to the extent that it provided any benefit to defendant. Having obtained the evidence and having used it, we conclude that the district court did not err because it corrected the potential of any due-process violation and prevented any unfairness in the preliminary-examination proceeding. Nor are we convinced that, under the circumstance, the circuit court could draw an adverse inference because, ultimately, defendant was not deprived of the spreadsheet, prevented from using it, or subjected to an unfair proceeding that undermined the confidence in the outcome of the preliminary-examination proceeding. "An adverse inference permits the fact-finder to conclude that the missing evidence would have been adverse to the opposing party." *Pugno v Blue Harvest Farms, LLC*, 326 Mich App 1, 24; 930 NW2d 393 (2018). Here, the evidence did not remain missing, and its contents were fully revealed

and used by defendant before the district court made its bindover decision. The district court properly dealt with the discovery issue. The prosecution's misconduct is not grounds for affirming the circuit court's erroneous ruling.

B. FALSIFICATION OF A PUBLIC RECORD IN VIOLATION OF MCL 750.248(1)

The prosecution argues that the circuit court erred by quashing the bindover on Count 2 because the record evidence supported the district court's bindover decision. We agree.

The prosecution charged defendant with violation of MCL 750.248(1), which states in relevant part:

> A person who falsely makes, alters, forges, or counterfeits a public record, or a certificate, return, or attestation of a clerk of a court, register of deeds, notary public, township clerk, or any other public officer, in relation to a matter in which the certificate, return, or attestation may be received as legal proof, . . . with intent to injure or defraud another person is guilty of a felony punishable by imprisonment for not more than 14 years.

The prosecution argues that the circuit court erred by quashing the bindover respecting this count because evidence showed that defendant violated MCL 750.248(1) by generating a false QVF that she submitted as a list of all voters who submitted an AV ballot, but which actually omitted 193 valid AV ballots. The prosecution argues that MCL 750.248(1) prohibits altering public records in addition to forging public records. The prosecution concedes that a forgery requires making an instrument that purports to be something it is not, but argues that, even if defendant did not "forge" a public record, she altered one by removing the 193 names from the QVF.

MCL 750.248(1) is often referred to as the offense of forgery, but the plain language of the statute reveals that it explicitly targets not only document forgers but also persons who falsely make, alter, or counterfeit a public record. The prosecution correctly observes that the statute prohibits alterations of public records *and* forgeries of public records. In *People v Johnson-El*, 299 Mich App 648, 651; 831 NW2d 478 (2013), this Court stated:

> MCL 750.248(1) proscribes forgery as follows: A person who falsely makes, alters, forges, or counterfeits a public record . . . with intent to injure or defraud another person is guilty of a felony[.] The elements of the crime of forgery are: (1) an act which results in the false making or alteration of an instrument (which makes an instrument appear to be what it is not); and (2) a concurrent intent to defraud or injure. The key is that the writing itself is a lie. [Quotation marks and citation omitted; alteration in original.]

In this case, the record evidence indicates that defendant created a second QVF, and submitted it to the Board, that purported to be a complete and accurate list of people who voted via AV ballot. That QVF, however, presented a false alteration of the correct QVF information. Defendant argues that she cannot be found to have violated MCL 750.248(1) because she only altered a relatively small percentage of the QVF's entries. She contends that her falsification of a portion of the QVF data cannot be construed as a forgery because it did not make the document appear to be what it is not, and therefore, the prosecution failed and could not establish a necessary element of the charged offense. In essence, she takes the position that, to be bound over on the charge, the prosecution had to establish that she falsified the entire document.

The circuit court agreed and concluded that "the entry of false information into a public record does not change the nature or genuineness of the document such that it is not a forgery." The circuit court, however, misread the statute as proscribing only acts of complete falsification of a document. The plain language of the statute makes clear that a variety of acts, including falsification or alteration, fall within the ambit of the proscribed conduct, and the statute does not require a complete falsification of a document. For example, the falsification alone of an attestation by a clerk of court, register of deeds, notary public, township clerk, or any other public officer constitutes a violation of the statute. The statute does not require the falsification of the entire public record bearing the false attestation.

Moreover, in this case, record evidence indicates that defendant's fraudulent act of falsifying the QVF made that altered election record appear to be what it certainly was not, an accurate report regarding the AV ballots. In so doing, defendant created a document that lied about the validity of 193 voters' AV ballots. Such conduct falls within the ambit of MCL 750.248(1).

In making its bindover ruling respecting Count 2, the district court explained:

> The evidence shows that the defendant changed the Q.V.F. after the election to falsely reflect that certain absentee ballots were rejected as having no signature and then ran a new list of people who voted during the election. This new list was a forged document that was published to the board of canvassers. The list of voters is a required part of the poll book and is reviewed as an attestation that it is to be received as part of the legal proof of the identities of individuals that voted by absentee ballot during the election. Therefore, the Court finds probable cause that the crime of forgery of a public record occurred and probable cause that the defendant most likely committed the offense.

The district court properly analyzed the evidence and properly bound defendant over on Count 2 because the prosecution presented evidence that defendant violated MCL 750.248(1) by falsely making and altering the QVF public record with the intent to defraud, i.e., deceive, the Board. The circuit court, therefore, erred by quashing Count 2.

C. THE COMPUTER CRIMES RELATED TO COUNTS 1 AND 2

The prosecution argues that the circuit court erred by quashing the bindover respecting the two counts of use of a computer related to Counts 1 and 2. We agree.

MCL 752.796(1) provides, "A person shall not use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit a crime." Thus, the use-of-a-computer crime has two elements: (1) the commission, attempted commission, conspiracy to commit, or solicitation of a crime, and (2) through the use of a computer. In this case, the record reflects that the prosecution presented evidence that defendant violated MCL 168.932(c) and MCL 750.248(1) through the use of a computer. The circuit court erroneously quashed the two counts of use of a computer because it erroneously concluded that the district court abused its discretion by binding over defendant to face trial for the predicate offenses, the violations of MCL 168.932(c) and MCL 750.248(1). Because the circuit court erred by quashing the bindover on those two underlying offenses, it necessarily erred by quashing the two related use-of-a-computer counts. The evidence supported the district court's ruling that crimes had been committed and that probable cause existed to believe that defendant committed

violations of MCL 168.932(c) and MCL 750.248(1) by using a computer to alter and falsify the QVF.

D. DENIAL OF DEFENDANT'S MOTION TO DISMISS

Defendant argues in her cross-appeal that the circuit court erred by failing to dismiss Count 3, which charged defendant with common-law misconduct in office in violation of MCL 750.505, on the ground that MCL 168.931(1)(h) statutorily prohibits the same conduct alleged in Count 3, which precludes her being charged and tried for a common-law offense. We disagree.

As a preliminary matter, we address defendant's argument that the circuit court erred by denying her motion to dismiss Count 3 on the ground that the law-of-the-case doctrine governed and precluded it from ruling differently than the court had previously ruled on her motion to quash. The prosecution concedes that the law-of-the-case doctrine did not preclude the circuit court from considering and deciding defendant's motion to dismiss. This Court reviews de novo whether the law-of-the-case doctrine applied. *Duncan v Michigan*, 300 Mich App 176, 188; 832 NW2d 761 (2013). The law-of-the-case doctrine is intended to promote efficiency, comity, and finality in the law. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991). Generally, the doctrine provides that an appellate court's final determination on a matter of law binds both the lower court on remand and the appellate courts in later appeals of the same case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000). Some cases like *People v Mitchell (On Remand)*, 231 Mich App 335, 340; 586 NW2d 119 (1998), have stated that the law-of-the-case doctrine bars reconsideration of an issue decided "by

an equal or subordinate court during subsequent proceedings in the same case," but analysis of such cases indicates that the doctrine applies to courts after an appellate court has rendered judgment on a legal issue, and not when a subordinate court has ruled on an issue and a party moves for different relief in the same case, as happened here. We agree with both defendant and the prosecution that the doctrine did not apply in this case. Although circuit courts occasionally act as appellate courts for district court decisions, that was not the case here respecting defendant's motion to quash the bindover. "[C]ircuit courts have original jurisdiction over all criminal cases involving felonies." *People v Scott*, 275 Mich App 521, 524 n 1; 739 NW2d 702 (2007). The circuit court's resolution of defendant's motion to quash the bindover did not establish the law of the case. The law-of-the-case doctrine only applies when an appellate court has ruled on the merits of the issue presented. Defendant raised a new issue in her motion to dismiss. Therefore, even if the circuit court could be deemed to have functioned as an appellate court, the law-of-the-case doctrine did not apply.

The prosecution argues that this Court should remand to the circuit court for it to address the merits of defendant's argument. Although we could do so, defendant preserved the issue and has properly presented it to this Court for consideration. See *People v Zitka*, 325 Mich App 38, 48; 922 NW2d 696 (2018) (explaining that "if an issue is raised before the trial court and is pursued on appeal, this Court is not foreclosed from reviewing it even if it was not decided by the trial court."). Accordingly, we may address the merits of defendant's argument.

Turning to the merits of her motion to dismiss, defendant argues that she could not be charged with

misconduct in office under MCL 750.505 because the elements of that offense are the same as the elements of MCL 168.931(1)(h). We disagree.

Misconduct in office was an indictable offense at common law. *Waterstone*, 296 Mich App at 133. In *Waterstone*, this Court explained:

> An indictable common-law offense can be charged by the prosecution pursuant to MCL 750.505 unless punishment for that offense is otherwise expressly provided for by statute. It is proper to dismiss a charge brought under MCL 750.505 if the charge sets forth all the elements of [a] statutory offense . . . . [*Id*. at 134 (quotation marks and citation omitted).]

Under MCL 750.505, "[a]ny person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony[.]" In *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003), our Supreme Court explained:

> At common law, misconduct in office was defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." An officer could be convicted of misconduct in office (1) for committing any act which is itself wrongful, malfeasance, (2) for committing a lawful act in a wrongful manner, misfeasance, or (3) for failing to perform any act that the duties of the office require of the officer, nonfeasance.
>
> However, committing nonfeasance or acts of malfeasance or misfeasance are not enough to constitute misconduct in office. In the case of malfeasance and misfeasance, the offender also must act with a corrupt intent, i.e., with a "sense of depravity, perversion or taint." In the case of nonfeasance, an offender must willfully neglect to perform the duties of his office. [Citations omitted.]

Consistently with MCL 750.505, when a statutory offense sets forth all the elements of the common-law

offense, the common-law offense is precluded. *People v Thomas*, 438 Mich 448, 453; 475 NW2d 288 (1991).

MCL 168.931(1)(h) provides:

> A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a board of county election commissioners, board of city election commissioners, or board of inspectors of election.

MCL 168.931(1)(h) does not foreclose the prosecution of a defendant for misconduct in office because the elements of the offenses are different. First, misconduct in office requires proof that the defendant acted while a public officer. *Perkins*, 468 Mich at 457. By contrast, MCL 168.931(1)(h) may be violated by any person with "a duty imposed upon that person by" the Michigan Election Law. Second, and relatedly, MCL 168.931(1)(h) prohibits the breach of a duty owed under the Michigan Election Law, while misconduct in office may be premised on a breach of any duty owed as a result of one's status as a public officer. Therefore, the elements of misconduct in office differ from the elements required to prove a violation of MCL 168.931(1)(h). For that reason, a misconduct-in-office charge under MCL 750.505 is not foreclosed by an Election Law charge under MCL 168.931(1)(h).[9] Accordingly, defendant was not entitled to dismissal of the charge of misconduct in office. Correspondingly, defendant was also not entitled to dismissal of the

[9] Defendant raised in her reply brief on appeal for the first time that MCL 168.931(2) forecloses a charge of misconduct in office if MCL 168.931(1)(h) does not. We disagree because the same substantive analysis respecting MCL 168.931(1)(h) applies to MCL 168.931(2), and a misconduct-in-office charge under MCL 750.505 is not foreclosed by an Election Law charge under MCL 168.931(1)(h) or MCL 168.931(2).

use-of-a-computer charge related to the misconduct-in-office offense. The circuit court, therefore, reached the right result, albeit for the wrong reason. This Court will not reverse when a lower court reaches the right result for the wrong reason. *People v Ramsdell*, 230 Mich App 386, 406; 585 NW2d 1 (1998).

IV. CONCLUSION

For these reasons, we reverse the circuit court's order granting in part defendant's motion to quash the bindover respecting Counts 1, 2, 3, and 4, affirm the circuit court's order denying defendant's motion for dismissal, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

UNIVERSITY OF MICHIGAN REGENTS v MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY

Docket No. 354808. Submitted January 12, 2022, at Detroit. Decided January 20, 2022, at 9:05 a.m.

The University of Michigan Regents, as assignee of Valentino Trevino, brought an action in the Washtenaw Circuit Court, seeking payment for treatment provided to Trevino after he was injured in an automobile crash involving a vehicle owned by Sterling Pierson. At the time of the accident, the vehicle was insured by defendant Falls Lake National Insurance Company. When Trevino filed a claim for no-fault benefits, Falls Lake discovered that Pierson had made two material misrepresentations in his insurance application. The company rescinded the policy and refunded the premiums to Pierson, who endorsed and cashed the refund check. Plaintiff, as Trevino's assignee, then applied for no-fault benefits through the Michigan Automobile Insurance Placement Facility (the MAIPF). The MAIPF denied plaintiff's claim, identifying Falls Lake as the applicable insurer. Plaintiff filed this action against Falls Lake and the MAIPF. Defendants filed competing motions for summary disposition, with Falls Lake arguing that its rescission rendered the policy void *ab initio*. The MAIPF argued that *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), required the court to balance the equities between Trevino and Falls Lake. The MAIPF also argued that the equities weighed in favor of requiring Falls Lake to cover Trevino's injuries. The court, Timothy Connors, J., denied the MAIPF's motion and granted summary disposition to Falls Lake, concluding that the policy's mutual rescission precluded balancing the equities between Falls Lake and Trevino. The MAIPF sought leave to appeal, and the Court of Appeals granted leave.

The Court of Appeals *held*:

The innocent-third-party rule no longer bars an insurer from rescinding an insurance policy procured through fraud when such rescission would impact an innocent third party, but because equitable principles govern both legal rescission and equitable rescission, insurers are not categorically entitled to rescission. Instead, the court must balance the equities between the de-

frauded insurer and the innocent third party before extending the mutual rescission of a no-fault insurance policy to the innocent third party. In doing so, the court should consider factors including (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. In this case, the circuit court erred when it failed to balance the equities between Falls Lake, the defrauded insurer, and Trevino, the innocent third party, and the court's summary-disposition orders therefore had to be vacated.

Summary-disposition orders vacated and case remanded to the trial court for further proceedings.

INSURANCE – NO-FAULT – MISREPRESENTATION BY APPLICANT – RESCISSION OF POLICY – INNOCENT THIRD PARTIES.

Trial courts must balance the equities between a defrauded insurer and an innocent third party before extending the mutual rescission of a no-fault insurance policy to an innocent third party.

Hewson & Van Hellemont, PC (by *Jordan A. Wiener*) for Michigan Automobile Insurance Placement Facility.

Zausmer, PC (by *Nathan S. Scherbarth*, *Amanda P. Waske*, and *Elizabeta Rumery*) for Falls Lake National Insurance Company.

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

PER CURIAM. Defendant Michigan Automobile Insurance Placement Facility (MAIPF) appeals by leave granted, *Univ of Mich Regents v Mich Auto Ins Placement Facility*, unpublished order of the Court of Appeals, entered January 27, 2021 (Docket No. 354808),

the trial court orders denying its motion for summary disposition and granting the summary-disposition motion of defendant Falls Lake National Insurance Company (Falls Lake). We vacate the orders and remand this matter for the trial court to balance the equities between Falls Lake, as a defrauded insurer, and Valentino Trevino, as an innocent third party.

On November 1, 2018, Sterling Pierson applied for a policy of automobile insurance from Falls Lake to cover his 2003 Chevy Malibu. The application required Pierson to identify, among other things, all household members who were 14 years of age or older and other vehicles he owned. Falls Lake completed the application review and issued a policy of insurance to Pierson effective November 1, 2018.

On November 10, 2018, Pierson and his live-in girlfriend, Alisha LaPorte, drove Valentino Trevino to a Saginaw area bar in Pierson's Malibu. According to both Pierson and LaPorte, after Trevino got out of the vehicle, he opened the driver's side door and attacked Pierson. Pierson reported fearing for his life. As a consequence of this fear, Pierson drove away with Trevino clinging to the driver's side door and being dragged down the street. Pierson repeatedly swerved his vehicle in an attempt to break Trevino's grip on the door. As he did so, the Malibu crossed the center line and struck a parked vehicle. Trevino sustained serious bodily injuries during these events and was treated for those injuries at a medical facility owned and operated by plaintiff, University of Michigan Regents.

Subsequently, Trevino filed a claim for no-fault benefits with Falls Lake. On June 11, 2019, Falls Lake notified Pierson that his no-fault policy was rescinded because Pierson made two material misrepresentations in his insurance application, namely (1) failing to

disclose two residents of Pierson's household over the age of 14 and (2) failing to disclose a second vehicle owned by Pierson. Falls Lake also mailed to Pierson a check in an amount sufficient to refund the paid premium on the policy. Pierson endorsed and cashed the refund check.

On September 23, 2019, plaintiff, the assignee of Trevino, applied for no-fault benefits through the assigned claims plan. Plaintiff's application identified Pierson's Falls Lake policy as providing insurance applicable to Trevino's injuries and advised that Falls Lake was contemplating rescission of that insurance policy. The MAIPF denied the claim because insurance applicable to Trevino's injuries through Falls Lake was identified.

On October 16, 2019, plaintiff, again as the assignee of Trevino, commenced the underlying action against Falls Lake and the MAIPF. Plaintiff sought to recover the "reasonable and customary charges associated with the treatment" that plaintiff provided to Trevino as a result of his injuries suffered on November 10, 2018. Falls Lake and the MAIPF filed competing motions for summary disposition, each asserting that the other was responsible for paying the medical bills generated by plaintiff as a result of its treatment of Trevino's injuries.

According to Falls Lake, it was entitled to summary disposition under MCR 2.116(C)(10) because it had rescinded its policy of insurance issued to Pierson as a consequence of his misrepresentations, and Pierson had ratified that rescission by accepting the refunded premium. Falls Lake asserted that the rescission rendered the policy void *ab initio*. Thus, Falls Lake provided no coverage for Trevino's injuries.

The MAIPF argued that *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), required that the equities be balanced before the policy between Falls Lake, as a defrauded insurer, and Trevino, as an innocent third party, could be rescinded with respect to the innocent third-party's claims. It further asserted that the equities weighed in favor of Falls Lake retaining liability under the insurance contract as to Trevino and that, because the insurance coverage supplied by Falls Lake applied to Trevino under this balancing, neither Trevino nor plaintiff was eligible for benefits through the assigned claims plan.

The trial court denied the MAIPF's motion but granted Falls Lake's motion. The trial court opined that Falls Lake rescinded the policy and Pierson ratified the rescission such that there was no policy in effect. The court concluded that it therefore did not need to balance the equities with respect to innocent third parties, that Falls Lake was not obligated to pay Trevino's medical bills, and that the MAIPF was so obligated. After the trial court denied the MAIPF's motion for reconsideration, this appeal followed.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 160. When considering a motion under MCR 2.116(C)(10), the trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id*. (citation omitted). "A genuine issue of material fact exists when the record leaves open an

issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted).

At issue in the instant matter is whether, under our Supreme Court's opinion in *Bazzi*, 502 Mich at 408-412, trial courts are required to balance the equities between a defrauded insurer and an innocent third party before extending the mutual rescission of a no-fault insurance policy to an innocent third party. We find that they are so required.

In *Bazzi*, our Supreme Court recognized that the judicially created innocent-third-party rule, which precluded an insurer from rescinding an insurance policy procured through fraud when such rescission would impact an innocent third party, was abrogated by our Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). *Bazzi*, 502 Mich at 396, 408. "[A]n insurance policy procured by fraud may be declared void *ab initio* at the option of the insurer." *Id*. at 408 (citations omitted). The Court also recognized that "[r]escission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Id*. at 409 (citation omitted). However, "[b]ecause a claim to rescind a transaction is equitable in nature, it is not strictly a matter of right but is granted only in the sound discretion of the court." *Id*. (quotation marks and citations omitted). Thus, while the innocent-third-party rule no longer bars insurers from seeking rescission for fraud, insurers are not categorically entitled to rescission. *Pioneer State Mut Ins Co v Wright*, 331 Mich App 396, 407, 409-410; 952 NW2d 586 (2020), citing *Bazzi*, 502 Mich at 407-408. Accordingly, "[w]hen a plaintiff is seeking rescission, the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks."

Bazzi, 502 Mich at 410 (quotation marks and citation omitted). Our Supreme Court explained:

> [W]hen two equally innocent parties are affected, the court is required, in the exercise of its equitable powers, to determine which blameless party should assume the loss . . . . [W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong. The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked.
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> In this instance, rescission does not function by automatic operation of the law. Just as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third parties. [*Id*. at 410-411 (quotation marks and citations omitted).]

Our Supreme Court "did not provide trial courts with a clear-cut framework for balancing the equities[.]" *Pioneer State Mut Ins Co*, 331 Mich App at 410. Instead, this Court adopted the "nonexclusive list of factors" offered as guidance by Justice MARKMAN in his concurrence in *Farm Bureau Gen Ins Co of Mich v Ace American Ins Co*, 503 Mich 903, 906-907 (2018) (MARKMAN, C.J., concurring). These factors are:

> (1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured; (2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud; (3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event; (4) the availability of an alternate avenue for recovery if the insurance policy is not enforced; and (5) a determination of whether policy enforcement only serves to relieve

> the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party. [*Pioneer State Mut Ins Co*, 331 Mich App at 411 (citation omitted).]

In the present matter, the parties do not dispute that Pierson made two material misrepresentations in his application for no-fault insurance. There is also no dispute that (1) Falls Lake and Trevino are blameless parties to Pierson's material omissions on the insurance application, (2) Falls Lake rescinded Pierson's policy of insurance, and (3) Pierson ratified the rescission. Falls Lake attempts to distinguish the present matter from *Bazzi* and *Pioneer State* by pointing out that in those cases the insurers sought rescission of no-fault insurance contracts by grant of the trial court. In the present case, in contrast, the rescission was accomplished by mutuality of action, i.e., by return and acceptance of the premium. Falls Lake characterizes rescission accomplished in such a manner as a legal remedy distinct from the equitable rescission in *Bazzi* and *Pioneer State*. According to Falls Lake, these distinctions are dispositive in nature and remove this matter from the reach of *Bazzi* and its progeny.

In *Meemic Ins Co v Fortson*, 506 Mich 287, 310 n 19; 954 NW2d 115 (2020), our Supreme Court addressed the distinction between the equitable remedy of rescission and the legal remedy of rescission as follows:

> Before they were merged, proceedings in equity and law were distinct, with different rules and procedures in each. See Mich Const 1963, art 6, § 5. Although the distinctions have been erased for most purposes, *id*., the differences sometimes crop up in discussions of the common law. Such is the case here. Although equitable rescission was at issue in *Bazzi* and there was, accordingly, no need to differentiate common-law practices in equity and law, it is worth noting here that courts at law have also

> permitted rescission as a legal remedy. This form of relief was hedged with formalities, most notably that the plaintiff had to "tender to the other party, as a precondition of suit, specific restitution of everything received under the contract." 2 Restatement Restitution, 3d, § 54, comment *b*, p 268; see also *Chaffee v Raymond*, 241 Mich 392, 394-395; 217 NW 22 (1928) ("In an action at law, based on rescission, a tender is a prerequisite . . . . In equity, however, the rule is not so rigid, for there the bill must make profert of return of what has been received, and the decree will place the parties in *status quo*, as far as possible."); *Witte v Hobolth*, 224 Mich 286, 290; 195 NW 82 (1923) ("A bill in equity praying rescission proceeds on the theory that there has been no rescission, not on the theory that rescission has already been accomplished. Were plaintiff to sue at law for the money he paid defendant, he should, before suit, restore, or tender restoration of, the property he received, that by his own act he thus may have legal right and title to the money."). According to the Restatement, the formalities gave courts at law considerable discretion, almost akin to that wielded by equity courts. Restatement Restitution & Unjust Enrichment, § 54, comment *b*, p 268.

Notwithstanding the distinctions between the equitable remedy of rescission and the legal remedy of rescission, this Court has held on multiple occasions that trial courts are required to balance the equities between a defrauded insurer and an innocent third party before extending the mutual rescission of a no-fault insurance policy to an innocent third party. *Estate of Audisho v Everest Nat'l Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued June 24, 2021 (Docket No. 352391), p 5; *Alshabi v Doe*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2020 (Docket No. 346700), p 4.[1] While in

[1] "Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless

another case, *Green v Meemic Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2020 (Docket No. 348651), this Court reached the opposite conclusion, the *Green* panel made no reference to our Supreme Court's opinion in *Bazzi*, 502 Mich 390, and did not address the injured party's status as an innocent third party. In light of these omissions and this Court's opinions in *Alshabi* and *Estate of Audisho*, we hold that trial courts are required to balance the equities between a defrauded insurer and an innocent third party before extending the mutual rescission of a no-fault insurance policy to an innocent third party. This conclusion is consistent with our Supreme Court's recognition that courts of law have "considerable discretion, almost akin to that wielded by equity courts," when granting rescission. *Meemic Ins Co*, 506 Mich at 311 n 19. Furthermore, application of the *Bazzi* rule to matters involving rescission at law is a logical outgrowth of *Bazzi*.

Our Supreme Court has recognized both that "[r]escission, whether legal or equitable, is governed by equitable principles," *Kundel v Portz*, 301 Mich 195, 210; 3 NW2d 61 (1942), and that courts at law have considerable discretion in granting rescission, *Meemic Ins Co*, 506 Mich at 311 n 19. Thus, like equitable rescission, rescission as a legal remedy is also not a matter of right, but rather is granted in the sound exercise of a trial judge's discretion. Because the legal underpinnings of equitable rescission and rescission at law are the same, logic dictates that the same rule apply in matters involving rescission at law.

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consider such opinions for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017), lv den 503 Mich 911 (2018) (citation omitted).

In sum, trial courts are required to balance the equities between a defrauded insurer and an innocent third party before extending the mutual rescission of a no-fault insurance policy to an innocent third party. Thus, the trial court erred when it held that Falls Lake had rescinded Pierson's policy of insurance without balancing the equities between Falls Lake, as a defrauded insurer, and Trevino, as an innocent third party. See *Bazzi*, 502 Mich at 412 (holding that remand was required in order for the trial court to determine whether, in its discretion, rescission of the insurance policy was available). We therefore vacate the trial court's summary-disposition orders and remand this matter for the trial court to balance the equities between Falls Lake, as a defrauded insurer, and Trevino, as an innocent third party.

Vacated and remanded for proceedings not inconsistent with this opinion. We do not retain jurisdiction.

SAWYER, P.J., and SERVITTO and RICK, JJ., concurred.

In re ESTATE OF SEYBERT

Docket No. 355647. Submitted January 11, 2022, at Grand Rapids. Decided January 20, 2022, at 9:10 a.m.

Aaron Wise moved the Kalamazoo Probate Court to compel Shannon M. Parker, personal representative of the estate of her father, Terry L. Seybert, the decedent, to submit to genetic testing so that Wise could demonstrate that Seybert was his biological father. Seybert died intestate in 2019. In 2020, Wise filed an ex parte petition for a temporary restraining order, requesting that Parker be enjoined from distributing any assets of the estate and asserting that he was an heir of Seybert. At a hearing on his petition, Wise stated that he had received information following Seybert's death that led him to believe he was Seybert's son. Wise informed the court, Curtis J. Bell, J., that DNA samples from Seybert's mother, brother, and Wise revealed a 99.8% probability of relationship between Seybert and Wise. However, the analysis of the DNA samples was inconclusive as to whether Wise was Seybert's child or whether Wise was simply a biological relative of Seybert. The court scheduled an evidentiary hearing on the issue of paternity and ordered Parker not to make any distributions from the estate until the court determined whether Wise was an heir. Wise then filed his motion to compel Parker to submit to genetic testing, and the court granted the motion. Parker applied for delayed leave to appeal in the Court of Appeals.

The Court of Appeals *held*:

1. Under MCL 722.717(1) of the Paternity Act, MCL 722.711 to MCL 722.730, a court may establish paternity by an order of filiation in four ways: (a) by a finding or verdict of the court determining that the man is the father; (b) the defendant acknowledges paternity to the court, either orally or in writing; (c) the defendant is served with a summons and a default judgment is entered against him; or (d) genetic testing under MCL 722.716 determines that the man is the father. MCL 722.716(1) requires the court, either upon application of either party or on its own motion, to order the mother, child, and alleged father to submit to blood- or tissue-typing determinations to determine whether the alleged father is the father of the child. Pursuant to MCL

700.2114(1)(b)(*v*), the probate court had to use the "standards and procedures established" under the Paternity Act to determine whether Seybert was Wise's father, and the Act only authorizes the court to order the child, mother, and alleged father to provide DNA samples. Therefore, the court erred by ordering Parker to submit to genetic testing. No language in the Paternity Act permits a court to order the putative father's other children to submit to genetic testing, and given that the Legislature expressly named three persons from whom the court must order testing, the language of the statute precluded the court from ordering testing of other individuals. The probate court's reliance on *In re Jones Estate*, 207 Mich App 544 (1994), was misplaced because although the Court of Appeals permitted the probate court in that case to consider the DNA profile of the decedent's mother in determining the paternity of the subject child, there was no indication that the decedent's mother was not willing to provide a sample of her DNA. Therefore, *Jones* did not and could not contravene the statutory language that requires the court to only order certain individuals to submit to DNA testing. Rather, *Jones* and other caselaw held only that if DNA samples from other individuals are voluntarily submitted, they may be considered by the court under the totality of the circumstances when making a determination of paternity.

2. Wise argued that the court could also compel Parker to provide a DNA sample under MCR 2.310(B)(1) or MCR 2.311. However, because court rules are not controlling when a matter is specifically addressed by a statute, the court rules cited by Wise were not controlling here given that the Paternity Act specifically identifies the only three individuals that a court must order to submit to DNA testing. Further, even if the court rules could be used to require genetic testing not contemplated by MCL 722.716(1), neither MCR 2.310 nor MCR 2.311 provided a legal basis to compel Parker to submit a sample for genetic testing. Of the two court rules, only MCR 2.311(A) was arguably applicable, but the rule was not relevant here because it allows for an examination of a party when that party's mental or physical condition is at issue. Because there was no issue concerning Parker's mental or physical condition, Wise was not entitled to a sample of her DNA under MCR 2.311(A).

Order reversed and case remanded.

JUDICIAL DETERMINATIONS OF PATERNITY – PATERNITY ACT – GENETIC TESTING.

Under MCL 722.716(1) and MCL 722.717(1) of the Paternity Act, MCL 722.711 to MCL 722.730, upon application of either party or

> on its own motion, a court shall order the mother, the child, and the alleged father to submit to blood- or tissue-typing determinations to determine whether the alleged father is the father of the child; because MCL 722.716(1) specifies the three individuals from whom the court must order testing, the language precludes the court from ordering the testing of other individuals in order to establish paternity.

Speaker Law Firm, PLLC (by *Jordan M. Ahlers* and *Liisa R. Speaker*) for appellant.

Thav, Ryke & Associates (by *Jason P. Dandy*) for appellee.

Before: CAMERON, P.J., and M. J. KELLY and SHAPIRO, JJ.

M. J. KELLY, J. Shannon Parker, the personal representative of the estate of Terry L. Seybert, appeals by delayed leave granted[1] the probate court order compelling her to submit a genetic sample for the purpose of determining the probability that appellee, Aaron Wise, is the biological son of Seybert. For the reasons stated in this opinion, we reverse and remand for further proceedings.

I. BASIC FACTS

Seybert died intestate in 2019, and his body was cremated. The first personal representative of Seybert's estate was Seybert's mother; however, Seybert's mother was removed as personal representative, and Parker, Seybert's daughter,[2] was appointed successor

[1] *In re Seybert Estate*, unpublished order of the Court of Appeals, entered January 7, 2021 (Docket No. 355647).

[2] Seybert supported Parker with child support and acknowledged his paternity. Although Wise suggested that he may eventually challenge Parker's status as an heir, no such challenge has been raised at this time.

personal representative of Seybert's estate in March 2020. In April 2020, Wise filed an ex parte petition for a temporary restraining order, asserting that he was an heir of Seybert and requesting that Parker be temporarily restrained from disbursing any assets of the estate. At a hearing on his petition, Wise stated that he received information after Seybert's death that led him to believe that he was Seybert's son. The probate court was further informed that Seybert's mother, Seybert's brother, and Wise had all provided DNA samples, which, according to Wise, revealed a "99.8 percent probability of relationship" between Seybert and Wise. The probate court scheduled an evidentiary hearing on the issue of paternity and ordered that Parker not make any distributions from Seybert's estate until the court determined whether Wise was an heir. Thereafter, Wise moved to compel Parker to submit to genetic testing so that Wise could demonstrate that Seybert was his biological father. According to the record, there was no genetic material of decedent remaining after he was cremated, and the genetic testing from Seybert's mother and brother was inconclusive with regard to whether Wise was Seybert's child or whether he was merely biologically related to Seybert. The probate court granted the motion, and this appeal by delayed leave granted follows.

II. MOTION TO COMPEL

A. STANDARD OF REVIEW

Parker argues that the trial court erred by ordering her to provide a DNA sample for genetic testing. This Court reviews for an abuse of discretion a trial court's decision on a motion to compel discovery. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). Issues of statutory interpretation are reviewed de

novo, *In re Haque*, 237 Mich App 295, 299; 602 NW2d 622 (1999), as are issues involving the interpretation of the court rules, *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004).

B. ANALYSIS

MCL 700.2114, a provision of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., provides, in pertinent part:

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:
>
> * * *
>
> (b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
>
> (*i*) The man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.
>
> (*ii*) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth.
>
> (*iii*) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.

(*iv*) The man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

(*v*) *Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act*, 1956 PA 205, MCL 722.711 to 722.730.

* * *

(c) A child who is not conceived or born during a marriage is an individual born in wedlock if the child's parents marry after the conception or birth of the child. [Emphasis added.]

The Paternity Act was created as a procedural vehicle for determining the paternity of children born out of wedlock. *In re MKK*, 286 Mich App 546, 557; 781 NW2d 132 (2009). The Paternity Act provides four ways by which a court may establish paternity by an order of filiation. *In re Koehler Estate*, 314 Mich App 667, 677; 888 NW2d 432 (2016). MCL 722.717(1) provides:

In an action under this act, the court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:

(a) The finding of the court or the verdict determines that the man is the father.

(b) The defendant acknowledges paternity either orally to the court or by filing with the court a written acknowledgment of paternity.

(c) The defendant is served with summons and a default judgment is entered against him or her.

> (d) Genetic testing under [MCL 722.716] determines that the man is the father.

In turn, MCL 722.716(1) provides, in relevant part:

> In a proceeding under this act before trial, the court, upon application made by or on behalf of either party, or on its own motion, *shall order that the mother, child, and alleged father* submit to blood or tissue typing determinations that may include, but are not limited to, determinations of red cell antigens, red cell isoenzymes, human leukocyte antigens, serum proteins, or DNA identification profiling, to determine whether the alleged father is likely to be, or is not, the father of the child. [Emphasis added.]

Parker argues that, because the probate court had to determine whether Seybert was Wise's father using "the standards and procedures established" under the Paternity Act, MCL 700.2114, and because the Paternity Act only authorizes a trial court to order the child, the mother, and the alleged father to provide a DNA sample, MCL 722.716(1), the probate court erred by ordering her, an alleged sibling of Wise, to provide a DNA sample. We agree. The relevant statutes provide that a child born out of wedlock may have a rightful claim to a decedent's estate if the child can establish that the decedent was his or her biological father through the process provided in the Paternity Act, which, by its plain language, requires the trial court to order blood- and tissue-typing determinations from the mother, the child, and the alleged father when determining paternity. No language in the Paternity Act permits a trial court to order the putative father's other children to submit to a blood- or tissue-typing determination, and we will not read such a requirement into an unambiguous statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) (stating that nothing will be read into a clear statute that is not within the manifest

intention of the Legislature as derived from the language of the statute itself). Additionally, given that the Legislature expressly named three individuals that the court must order testing from, the language used precludes the court from ordering testing from other individuals. See *Bronner v Detroit*, 507 Mich 158, 173 n 11; 968 NW2d 310 (2021) (stating that when interpreting a statute, the negative-implication canon, *expressio unius est exclusio alterius*, means that the "[e]xpress mention in a statute of one thing implies the exclusion of other similar things") (quotation marks and citation omitted; alteration in original).

The probate court relied on *In re Jones Estate*, 207 Mich App 544; 525 NW2d 493 (1994), when it granted Wise's motion to compel Parker to provide a DNA sample. In *In re Jones Estate*, the decedent, David Anthony Jones, died intestate in May 1991 at the age of 27. *Id*. at 546. The decedent left two uncontested heirs. *Id*. In July 1991, Lavena Turner, the mother of David Anthony Jones II (David II), filed a petition to determine heirs. She claimed that David II was the son of the decedent. See *id*. at 546-547. The probate court determined that David II was the son of the decedent, and in doing so, it held that MCL 700.111(4) violated equal protection. *In re Jones Estate*, 207 Mich App at 546, 548-549. MCL 700.111(4), a provision of the Revised Probate Code,[3] provided that a man was the natural father of a child born out of wedlock if any of the following occurred: (a) "The man joins with the mother of the child and acknowledges that child as his child in a writing executed and acknowledged by them . . . ."; (b) "The man joins with the mother in a written request for a correction of certificate of birth

[3] The Revised Probate Code was repealed and replaced by EPIC. *In re Leete Estate*, 290 Mich App 647, 661; 803 NW2d 889 (2010).

pertaining to the child . . . ."; or (c) "The man and the child have borne a mutually acknowledged relationship of parent and child . . . ." *In re Jones Estate*, 207 Mich App at 547-548.

The decedent's mother (who was the personal representative of the estate) and the mother of the decedent's two uncontested heirs appealed the probate court's finding. *Id*. at 546-547. This Court affirmed the probate court's finding that David II, who was only 110 days old at the time of the decedent's death, had never acknowledged a parent-child relationship with the decedent, and therefore, MCL 700.111(4)(c) was not satisfied. *In re Jones Estate*, 207 Mich App at 548. But the Court disagreed with the probate court's conclusion that because David II could not satisfy MCL 700.111(4)(c), MCL 700.111(4) was unconstitutional. *In re Jones Estate*, 207 Mich App at 551. Nonetheless, on the basis of *Easley v John Hancock Mut Life Ins Co*, 403 Mich 521; 271 NW2d 513 (1978), the Court agreed that the parties should be given an opportunity to present additional evidence regarding whether David II was the decedent's child. *In re Jones Estate*, 207 Mich App at 552. It explained:

> In *Easley*, our Supreme Court held that a judicial determination of paternity entitled a child born out of wedlock to share in the father's estate notwithstanding the child's failure to satisfy the requirements of former MCL 702.83. In *Easley*, the decedent had acknowledged the child as his own and support orders had been entered by a circuit court. The Supreme Court concluded that the order of filiation granted the right to an equal share with the other children of the decedent's estate, and that to hold otherwise would deny equal protection of the laws because it would leave children whose paternity had been judicially established in an inferior position. *Easley, supra*, pp 524-525.

> Although MCL 700.111(4) has been amended, effective October 19, 1993, to include that an order of filiation establishing paternity is sufficient for a child born out of wedlock to inherit from an intestate father, that amendment is not applicable to this case because the determination of heirs is to be governed by statutes in effect at the time of death. *In re Adolphson Estate*, 403 Mich 590, 593; 271 NW2d 511 (1978).
>
> However, this Court recently held that *Easley* established a nonstatutory, judicial method of establishing a right to inherit that continued after the enactment of MCL 700.111(4) in 1979. *In re Miller Estate*, 207 Mich App 19; 524 NW2d 246 (1994). Therefore, the parties in the instant case are to be given the opportunity to determine paternity pursuant to the Paternity Act, MCL 722.711 *et seq*. As noted by appellants, one method of proving paternity in this case is to utilize a DNA profile by using the child's tissue and the tissue of either decedent or decedent's mother. Such a judicial determination of paternity would then be sufficient for David II to inherit from the intestate decedent's estate. [*In re Jones Estate*, 207 Mich App at 552-553 (some citations omitted).][4]

In this case, the probate court indicated that it viewed *In re Jones Estate* as controlling because, in that case, the Court permitted the probate court to consider a DNA profile using the tissue of the child and the decedent's mother, an individual that was "not specifically contained within the Paternity Act."

Yet, *In re Jones Estate* is not controlling on this issue. Although the Court in *In re Jones Estate* stated that the probate court could consider a DNA profile

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[4] In *In re Miller Estate*, 207 Mich App at 25 n 6, the Court noted that the amendment of MCL 700.111(4), effective October 19, 1993, codified "*Easley*'s holding." The amendment provided a fourth way for a man to be found the natural father of a child born out of wedlock: "The man has been determined to be the father of the child and an order of filiation establishing that paternity has been entered pursuant to the paternity act . . . ." The *Easley* holding remains codified in MCL 700.2114(1)(b)(*iv*).

that used the tissue of David II and the decedent's mother, there is no indication that the decedent's mother was not willing to voluntarily provide a sample of her DNA. She, along with the mother of the decedent's two uncontested heirs, was appealing the probate court's determination that David II was an heir of the decedent and she wanted the opportunity to present additional evidence on the issue of whether David II was the decedent's heir. *In re Jones Estate*, 207 Mich App at 546-547, 552. The Court did not consider and decide whether a probate court could order an individual who is not willing to provide a DNA sample and who is not specifically mentioned in the Paternity Act to provide a DNA sample. Therefore, although the Court in *In re Jones Estate* held that additional DNA profiles could be utilized to determine paternity, it did not and could not contravene the statutory language that requires the court to only order certain individuals to submit DNA samples.

Wise also relies on *In re Koehler Estate*, 314 Mich App 667. One of the issues in *In re Koehler Estate* was whether Carl Cedrick Umble was the paternal grandfather of the decedent, who had no spouse, children, or siblings and whose parents had predeceased him. *Id*. at 670. The probate court determined that Umble was the biological father of the decedent's father, Carl Koehler. *Id*. at 673. This Court affirmed the probate court's finding, stating, "Under MCL 722.717(1)(a), the probate court had the authority to review the totality of the evidence and to determine that Carl Cedrick Umble was Carl Koehler's father." *Id*. at 677-678. Nothing in *In re Koehler Estate*, however, provides that the probate court may order an individual other than the three individuals identified in MCL 722.716(1) to submit a DNA sample for genetic testing. Instead, taken together, *In re Jones Estate* and *In re Koehler*

Estate only stand for the proposition that if DNA samples from other individuals are voluntarily submitted, they may be considered under the totality of the circumstances when making a judicial determination of paternity.

In sum, a probate court may use "the standards and procedures established" under the Paternity Act to determine whether a decedent is the father of a child. MCL 700.2114(1)(b)(*v*). Under the Paternity Act, a trial court has authority to order "the mother, child, and alleged father" to provide a DNA sample. MCL 722.716(1). There is no provision in the Paternity Act that allows a trial court to order any other person, such as an alleged sibling of the child, to provide a DNA sample. Accordingly, under "the standards and procedures established" under the Paternity Act, the probate court could not order Parker to provide a DNA sample.

Moreover, even if we were to conclude that "the standards and procedures established" under the Paternity Act did not prohibit the probate court from ordering Parker to provide a DNA sample, Wise must still have a legal basis for his request for a sample of Parker's DNA. Wise contends that such a sample may be compelled under MCR 2.310(B)(1) or MCR 2.311. However, although the court rules may control in situations in which a statutory scheme is silent, they do not control matters specifically addressed by a statute. See *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 190; 732 NW2d 88 (2007). In this case, given that the Paternity Act specifically addresses the only three individuals that a court must order to submit to DNA testing, the court rules cannot be used to subvert the plain language of the statute.

And, even if the court rules could be used to require genetic testing not contemplated under the plain language of MCL 722.716(1), we do not agree that MCR 2.310(B) or MCR 2.311 provide a legal basis to compel Parker to submit a sample of her DNA for genetic testing. MCR 2.310(B)(1), provides, in pertinent part:

> A party may serve on another party a request
>
> (a) to provide and permit the requesting party, or someone acting for that party,
>
> (i) to inspect and copy designated documents or
>
> (ii) to inspect and copy, test, or sample other tangible things that constitute or contain matters within the scope of MCR 2.302(B) and that are in the possession, custody, or control of the party on whom the request is served[.]

In turn, MCR 2.311(A) provides:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

Although Wise relies on both court rules, MCR 2.311(A) is the only one that is arguably applicable. MCR 2.311(A) specifically addresses instances in which a party—such as Parker—may be compelled to submit to a physical examination. Because requiring a person to submit a DNA sample for genetic testing,

therefore, falls squarely within the scope of MCR 2.311, not within MCR 2.310(B)(1), we must apply it over the more general provision in MCR 2.310(B). See *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008) (recognizing that more specific rules should prevail over more general rules).[5]

MCR 2.311(A) allows for an examination of a party when that party's mental or physical condition (including blood group) is at issue. In this case, however, there is no issue concerning Parker's mental or physical condition. Her status as Seybert's heir has never been challenged.[6] Consequently, Wise is not entitled to a sample of Parker's DNA under MCR 2.311(A).

Reversed and remanded for further proceedings. Parker may tax costs as the prevailing party. MCR 7.219(A). We do not retain jurisdiction.

CAMERON, P.J., and SHAPIRO, J., concurred with M. J. KELLY, J.

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[5] We also note that, unlike MCR 2.310(B)(1), MCR 2.311 provides for a number of protections for parties being required to submit to physical examination, which help protect the legitimate privacy interest an individual has in his or her physical (or mental) condition. Given the undisputed privacy interest a person has in his or her DNA, we discern no basis to conclude that by the mere happenstance that DNA can be collected from a tangible source—such as blood or saliva—the court rules allow for its compelled production under MCR 2.310(B), as opposed to MCR 2.311, which is both more specific in addressing the examination required to collect a DNA sample and more protective of the interests of the individual being compelled to submit to examination.

[6] At the August 12, 2020 hearing, Wise suggested that he could file a petition to challenge the paternity of Parker and that such a challenge would require Parker to submit for a physical examination under MCR 2.311(A). But he was not specifically alleging that Parker was not an heir of Seybert.

PEOPLE v FREDELL

Docket No. 351971. Submitted May 11, 2021, at Lansing. Decided January 20, 2022, at 9:15 a.m. Leave to appeal sought.

Frederick M. Fredell was convicted following a jury trial in the Genesee Circuit Court, Joseph J. Farah, J., of two counts of involuntary manslaughter, MCL 750.321; two counts of operating while intoxicated or visibly impaired causing death (OWI causing death), MCL 257.625(1), (3), and (4); three counts of operating while intoxicated or visibly impaired causing serious impairment of a body function (OWI-SI), MCL 257.625(1), (3), and (5); two counts of reckless driving causing death, MCL 257.626(4); and three counts of reckless driving causing serious impairment of a body function, MCL 257.626(3). Defendant was involved in a collision with another vehicle while he was driving under the influence of alcohol and other intoxicating substances. Two passengers of the other vehicle died as a result of the injuries they sustained in the collision, and the other three passengers were seriously and permanently injured. Defendant appealed.

The Court of Appeals *held*:

1. Defendant argued that his six convictions related to the deaths of two individuals and six convictions related to the injuries sustained by three individuals violated his rights under the multiple-punishments strand of double-jeopardy protections. When the Legislature's intention with regard to the permissibility of multiple punishments is not clear from the language of the statutes, Michigan courts apply the "abstract legal elements" test set forth in *Blockburger v United States*, 284 US 299 (1932), to determine whether the Legislature intended to classify two offenses as the same offense for purposes of double jeopardy. Under this test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses has an element that the other does not. In this case, defendant argued that his convictions of OWI causing death and involuntary manslaughter violated double-jeopardy protections because the offense of OWI causing death necessarily involved the grossly negligent act of driving a vehicle while intoxicated and causing the death of another, which constituted involuntary manslaugh-

ter. Whether the Legislature intended to permit multiple punishments for these offenses is not indicated by the language of the relevant statutes, so application of the abstract-legal-elements test was necessary to determine whether multiple punishments were permissible. In order to prove involuntary manslaughter, the prosecution must establish that a defendant unintentionally killed a human being with a *mens rea* of gross negligence or an intent to injure. Although multiple theories may support a charge of involuntary manslaughter, the prosecution's theory in this case was evidently that defendant acted in a grossly negligent manner when his vehicle crashed with the vehicle in which the decedents were passengers. To prove OWI causing death, the prosecution was required to establish that (1) defendant was operating his vehicle while under the influence of an intoxicating substance, (2) defendant voluntarily decided to drive knowing that he had consumed an intoxicating substance and might be intoxicated, and (3) defendant's operation of the motor vehicle caused the decedents' deaths. Thus, OWI causing death does not require the prosecution to prove gross negligence, so convicting defendant in this case of involuntary manslaughter required proof of an element that OWI causing death did not require. Conversely, convicting defendant of OWI causing death required proof of an element that a conviction of involuntary manslaughter did not require. Therefore, defendant's right to protection against double jeopardy was not violated when he was convicted of both involuntary manslaughter and OWI causing death.

2. Defendant also argued that defendant's convictions of involuntary manslaughter and reckless driving causing death violated the multiple-punishments strand of double jeopardy. The Legislature's intention with respect to cumulative punishments is not clear from the plain language of MCL 750.321 and MCL 257.626, so application of the "abstract legal elements" test was necessary. Proving involuntary manslaughter requires the prosecution to establish that a defendant unintentionally killed a human being with a *mens rea* of gross negligence, while reckless driving causing death requires proof that a person operated a vehicle in willful or wanton disregard of the safety of persons and property, and by the operation of that vehicle caused the death of another person. Thus, the crime of reckless driving causing death contains an element that involuntary manslaughter does not—that the defendant operated a vehicle in causing the death. Additionally, involuntary manslaughter requires proof of gross negligence, while reckless driving causing death requires proof of willful or wanton disregard for the safety of persons or property. While there are certain similarities between the mental states of

gross negligence and willful or wanton disregard, caselaw indicates that gross negligence involves a greater degree of culpability than recklessness on the continuum of legally significant mental states. Therefore, because involuntary manslaughter and reckless driving causing death each contained an element that the other offense did not, defendant's convictions of both offenses did not violate double-jeopardy protections.

3. Defendant also argued that his convictions of OWI causing death and reckless driving causing death violated double-jeopardy protections because it was impossible to commit OWI causing death without also committing reckless driving causing death. Again, application of the abstract-legal-elements test was required because the intention of the Legislature regarding the permissibility of multiple punishments was not clear from the statutes. Pursuant to the test, it was clear that the two offenses were not the same offense for double-jeopardy purposes. Reckless driving causing death required the prosecution to prove that defendant operated a vehicle with willful or wanton disregard for the safety of persons or property, while OWI causing death did not require this mental state or even proof of mere ordinary negligence. Further, OWI causing death required proof related to the defendant's intoxication or visual impairment, which were not elements of reckless driving causing death. Therefore, because each offense required proof of an element that the other did not, defendant's convictions of these offenses did not violate double-jeopardy protections.

4. Defendant argued that it was impossible to commit OWI-SI without also committing reckless driving causing serious impairment of a body function because both required proof that defendant acted recklessly. Neither the OWI-SI statute, MCL 257.625(5), nor the statute criminalizing reckless driving causing serious impairment, MCL 257.626(3), indicate whether the Legislature intended to permit multiple punishments when a defendant is convicted of both offenses. However, under the *Blockburger* test, defendant's convictions did not violate double-jeopardy protections. Reckless driving causing serious impairment required the prosecution to prove that a defendant operated a vehicle with willful or wanton disregard for the safety of persons or property, which was not an element of OWI-SI; OWI-SI required proof that the defendant was intoxicated or visibly impaired, which reckless driving causing serious impairment did not require. Because each offense contained an element that the other did not, convicting defendant of both offenses did not violate double-jeopardy protections.

5. Defendant contended that, although his convictions were supported by multiple "theories," he should have received only one conviction for each deceased victim and one conviction for each injured victim. Citing *People v Bigelow*, 225 Mich App 806 (1997) (*Bigelow I*), vacated 225 Mich App 806 (1997), reinstated in part 229 Mich App 218 (1998) (*Bigelow II*), defendant argued that dual convictions arising from the death of a single victim violated double-jeopardy protections. In *Bigelow I*, the Court of Appeals concluded that the defendant's convictions of first-degree premeditated murder and first-degree felony murder were unconstitutional because multiple murder convictions for one killing violated his right to protection against double jeopardy. Further, *Bigelow I* explained that premeditated murder and felony murder were alternative theories, requiring different mental states, of proving the same crime: first-degree murder. In *Bigelow II*, a conflict panel of the Court of Appeals held that the appropriate remedy to protect the defendant's rights against a double-jeopardy violation in that case was to modify the defendant's judgment of conviction to specify that it was for one count and one sentence of first-degree murder supported by two theories, premeditated murder and felony murder. In contrast to *Bigelow I*, defendant in this case was not convicted of a single crime with respect to each victim; rather, he was convicted of multiple offenses with distinct elements defined by separate statutes. The inquiry was thus whether, despite the seemingly separate nature of the offenses, the offenses nevertheless constituted the "same offense" for double-jeopardy purposes under the *Blockburger* test. *Bigelow I* was specific to the offense of first-degree murder and did not stand for the broader proposition that it constitutes a double-jeopardy violation to convict a defendant of more than one crime per death or injury caused by the defendant.

Defendant's convictions and sentences affirmed; case remanded to correct the judgment of sentence and to permit defendant to raise unpreserved sentencing issues before the trial court.

1. CONSTITUTIONAL LAW – DOUBLE JEOPARDY – MULTIPLE PUNISHMENTS – INVOLUNTARY MANSLAUGHTER – OPERATING A VEHICLE WHILE INTOXICATED OR VISIBLY IMPAIRED CAUSING DEATH.

A defendant's right to protection against double jeopardy prohibits multiple punishments for the same offense; to convict a defendant of operating a vehicle while intoxicated or visibly impaired causing death (OWI causing death), the prosecution must prove that the defendant was operating a motor vehicle, the defendant voluntarily decided to drive knowing that the defendant had

consumed an intoxicating substance and might be intoxicated, and the defendant's operation of the motor vehicle caused the victim's death; the elements of involuntary manslaughter include the unintentional killing of a human being with a *mens rea* of gross negligence; OWI causing death and involuntary manslaughter are not the same offense for double-jeopardy purposes because each offense contains an element that the other does not, so a defendant's conviction of and punishment for both offenses arising from the death of a single victim does not violate the defendant's right to protection against double jeopardy.

2. CONSTITUTIONAL LAW – DOUBLE JEOPARDY – MULTIPLE PUNISHMENTS – INVOLUNTARY MANSLAUGHTER – RECKLESS DRIVING CAUSING DEATH.

A defendant's right to protection against double jeopardy prohibits multiple punishments for the same offense; the elements of involuntary manslaughter include the unintentional killing of a human being with a *mens rea* of gross negligence; to prove that a defendant committed reckless driving causing death, the prosecution must show that the defendant operated a motor vehicle in willful or wanton disregard of the safety of persons or property and that by the operation of that vehicle caused the death of another person; therefore, because each of these offenses contain an element that the other offense does not, a defendant's conviction and punishment for both of these offenses arising from the death of a single victim does not violate double-jeopardy protections.

3. CONSTITUTIONAL LAW – DOUBLE JEOPARDY – MULTIPLE PUNISHMENTS – OPERATING A VEHICLE WHILE INTOXICATED OR VISIBLY IMPAIRED CAUSING DEATH – RECKLESS DRIVING CAUSING DEATH.

A defendant's right to protection against double jeopardy prohibits multiple punishments for the same offense; to convict a defendant of operating a vehicle while intoxicated or visibly impaired causing death (OWI causing death), the prosecution must prove that the defendant was operating a motor vehicle, the defendant voluntarily decided to drive knowing that the defendant had consumed an intoxicating substance and might be intoxicated, and the defendant's operation of the motor vehicle caused the victim's death; to prove that a defendant committed reckless driving causing death, the prosecution must show that the defendant operated a motor vehicle in willful or wanton disregard of the safety of persons or property and that by the operation of that vehicle caused the death of another person; because each offense contains an element that the other offense does not, a

defendant's conviction and punishment for both offenses arising from the death of a single victim does not violate double-jeopardy protections.

4. CONSTITUTIONAL LAW – DOUBLE JEOPARDY – MULTIPLE PUNISHMENTS – OPERATING A VEHICLE WHILE INTOXICATED OR VISIBLY IMPAIRED CAUSING SERIOUS IMPAIRMENT OF A BODY FUNCTION – RECKLESS DRIVING CAUSING SERIOUS IMPAIRMENT OF A BODY FUNCTION.

A defendant's right to protection against double jeopardy prohibits multiple punishments for the same offense; in order to convict a defendant of operating a vehicle while intoxicated or visibly impaired causing serious impairment of a body function, the prosecution must establish that the defendant was intoxicated or visibly impaired and operated a motor vehicle and by that operation caused serious impairment of a body function; to establish reckless driving causing serious impairment of a body function, the prosecution must prove that a defendant operated a vehicle in willful or wanton disregard of the safety of persons or property; because each offense contains an element that the other offense does not, a defendant's conviction and punishment for both offenses arising from an injury caused to a single victim does not violate double-jeopardy protections.

Dana Nessel, Attorney General, *Ann M. Sherman*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, *Michael Tesner*, Managing Assistant Prosecuting Attorney, Appeals, Research, & Training Division, and *Katie R. Jory*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*) for defendant.

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

BORRELLO, J. Defendant appeals as of right his convictions, following a jury trial, of two counts of involuntary manslaughter, MCL 750.321;[1] two counts

[1] Defendant was charged with two counts of second-degree murder, MCL 750.317, but the jury found him guilty of the lesser offense of involuntary manslaughter.

of operating a vehicle while intoxicated or visibly impaired causing death (OWI causing death), MCL 257.625(1), (3), and (4); three counts of operating a vehicle while intoxicated or visibly impaired causing serious impairment of a body function (OWI-SI), MCL 257.625(1), (3), and (5)(a); two counts of reckless driving causing death, MCL 257.626(4); and three counts of reckless driving causing serious impairment of a body function, MCL 257.626(3). The trial court sentenced defendant to prison terms of 86 months to 15 years for each involuntary-manslaughter and OWI-causing-death conviction, 28 to 60 months for each OWI-SI and reckless-driving-causing-serious-impairment conviction, and 6 to 15 years for each reckless-driving-causing-death conviction. The court ordered the sentences for OWI causing death to be served consecutively and all other sentences to be served concurrently.

For the reasons set forth in this opinion, we affirm defendant's convictions and sentences, but we remand to permit defendant to pursue corrections to his sentencing information report that will not affect his guidelines range or sentence, and we remand to permit the trial court to perform the ministerial task of correcting a clerical error in the judgment of sentence.

I. BACKGROUND

Defendant's convictions arise from a September 4, 2015 motor vehicle collision on I-69 in Genesee County. The Corvette that defendant was driving collided with a Dodge Ram pickup truck driven by Danyelle Barker. Danyelle's husband, Ronald Weiss, Jr., two of their children, and Erin Stone, who was a friend of one of the children, were passengers in the truck. Ronald and Erin died from injuries each sustained in the collision.

Danyelle and her two children survived, but they each sustained serious, permanent injuries.

Earlier that day, defendant's wife had contacted the police after defendant brought a gun into the bedroom, placed it on the bed, and asked his wife to shoot him. When the police arrived, defendant remarked that he was having a bad day, and he seemed depressed. He stated that his wife no longer loved him and that they were going through a divorce. Defendant agreed to go to the hospital for an evaluation. By the time defendant returned home from the hospital, his wife had left to stay with a family friend. At approximately 9:00 p.m., defendant told his son that he was going for a drive in his Corvette. Defendant's son tried to persuade defendant not to go, but he was unsuccessful. After defendant left, his son went back into the house and saw "a pint of Jim Beam whiskey" on the counter and approximately "a dozen pills scattered about the kitchen." Defendant's son testified that defendant had long been prescribed medication for pain and that these particular pills were Oxycontin. Defendant's son also testified that it was unusual for defendant to drink alcohol.

Later that night, Clayton Township police officers Rod Wurtz and Adam Chesnutt were performing stationary radar duty. Wurtz observed defendant's Corvette traveling west on I-69 at 137 miles an hour. Wurtz testified that he and Chesnutt began to follow the Corvette and that he saw "quite an impact." Chesnutt testified that he approached the site of the crash and saw a Dodge Ram pickup truck about 25 yards from the road. Chesnutt and Wurtz found Danyelle in the driver's seat of the truck. The other occupants of the truck had all been ejected during the accident and were found by responders in the area

around the truck. Defendant's Corvette was found approximately 50 yards from the road in the weeds, and defendant was in the driver's seat.

According to an accident investigator, evidence indicated that the front of defendant's Corvette struck the pickup truck from behind, "kind of like a wedge lifting it up and putting it on to the hood of the Corvette." The pickup truck then hit a guardrail, which caused it to tumble off its axis before eventually landing on its wheels. Data from a data recorder in defendant's Corvette showed that it was traveling 121 miles per hour five seconds before the collision and had slowed to 79 miles per hour one second before the collision.

Toxicology testing of blood samples taken from defendant at 12:10 a.m. on September 5, 2015, indicated that he had a blood alcohol level of .034 grams of alcohol per 100 milliliters of blood, 10 nanograms of THC per milliliter, and 176 nanograms of oxycodone per milliliter.

II. DOUBLE JEOPARDY

Defendant argues that his multiple convictions of involuntary manslaughter, OWI causing death, reckless driving causing death, OWI-SI, and reckless driving causing serious impairment of a body function contravene double-jeopardy protections. Defendant specifically contends that his six convictions based on the deaths of two individuals and six convictions based on the injuries to three other individuals violated the multiple-punishment strand of double-jeopardy protection.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Because defendant did not argue in the trial court that his multiple convictions violated double-jeopardy protections, this issue is unpreserved on appeal.[2] *People v Ackah-Essien*, 311 Mich App 13, 30; 874 NW2d 172 (2015) ("To preserve appellate review of a double jeopardy violation, a defendant must object at the trial court level."). Although "a double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court," this Court nevertheless reviews "an unpreserved claim that a defendant's double jeopardy rights have been violated for plain error that affected the defendant's substantial rights . . . ." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008). To have affected the defendant's substantial rights, the plain error must have affected the outcome of the proceedings in the trial court. *Id*. If these requirements are met, reversal is warranted only if the error "resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*.

Any questions of statutory interpretation or constitutional law are reviewed de novo. *People v Miller*, 498 Mich 13, 16-17; 869 NW2d 204 (2015).

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[2] During the discussions regarding jury instructions, the trial court sua sponte stated that "[t]here's no double jeopardy problem on these crimes." This statement was made within a longer monologue by the trial court, did not prompt any objection by defendant, and was not responsive to any contemporaneous objection or argument by defendant. Therefore, we do not consider this statement to constitute satisfaction of defendant's obligation to properly preserve issues for appeal. *People v Ackah-Essien*, 311 Mich App 13, 30; 874 NW2d 172 (2015). Nevertheless, we would reach the same conclusions on defendant's appellate double-jeopardy arguments even if they had been preserved.

B. ANALYSIS

Both the United States Constitution and the Michigan Constitution prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Dickinson*, 321 Mich App 1, 10; 909 NW2d 24 (2017). In *Miller*, 498 Mich at 17, our Supreme Court explained that

> [t]he prohibition against double jeopardy protects individuals in three ways: "(1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." The first two protections comprise the "successive prosecutions" strand of double jeopardy, while the third protection is known as the "multiple punishments" strand. [Citations omitted.]

At issue in this case is whether defendant's multiple convictions violate the multiple-punishments strand of double jeopardy.

"The multiple punishments strand of double jeopardy is designed to ensure that courts confine their sentences to the limits established by the Legislature and therefore acts as a restraint on the prosecutor and the Courts." *Id*. at 17-18 (quotation marks and citations omitted). If the Legislature specifically authorizes cumulative punishments under two statutes, the multiple-punishment strand of double jeopardy is not implicated. *Id*. at 18. On the other hand, "where the Legislature expresses a clear intention in the plain language of a statute to prohibit multiple punishments, it will be a violation of the multiple punishments strand for a trial court to cumulatively punish a defendant for both offenses in a single trial." *Id*.

As observed in *Miller*, the Legislature "does not always clearly indicate its intent with regard to the

permissibility of multiple punishments." *Id*. at 19. "When legislative intent is not clear, Michigan courts apply the 'abstract legal elements' test articulated in [*People v Ream*, 481 Mich 223; 750 NW2d 536 (2008),] to ascertain whether the Legislature intended to classify two offenses as the 'same offense' for double jeopardy purposes." *Miller*, 498 Mich at 19. This test is the same test set forth by the United States Supreme Court in *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). *Ream*, 481 Mich at 227-228, 235, 241-242. "Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if 'each of the offenses for which defendant was convicted has an element that the other does not . . . .' " *Miller*, 498 Mich at 19 (ellipsis in original), quoting *Ream*, 481 Mich at 225-226. "[B]ecause the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements[.]" *Miller*, 498 Mich at 19 n 16, quoting *Ream*, 481 Mich at 238. The *Miller* Court summarized the applicable legal framework as follows:

> In sum, when considering whether two offenses are the "same offense" in the context of the multiple punishments strand of double jeopardy, we must first determine whether the statutory language evinces a legislative intent with regard to the permissibility of multiple punishments. If the legislative intent is clear, courts are required to abide by this intent. If, however, the legislative intent is not clear, courts must then apply the abstract legal elements test articulated in *Ream* to discern legislative intent. [*Miller*, 498 Mich at 19 (citation omitted).]

1. INVOLUNTARY MANSLAUGHTER AND OWI CAUSING DEATH

We first consider whether defendant's right to be protected against double jeopardy was violated when he was convicted of both involuntary manslaughter and OWI causing death.

With respect to involuntary manslaughter, MCL 750.321 provides:

> Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court.

The offense of OWI causing death is defined in MCL 257.625. At the time defendant committed these offenses, MCL 257.625, as amended by 2014 PA 219,[3] stated, in pertinent part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. . . .
>
> * * *
>
> (3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic

[3] MCL 257.625 has been amended several times since the commission of the offenses, but these amendments do not contain any changes relevant to the issues raised in this appeal. See 2017 PA 153, effective February 6, 2018; 2020 PA 383, effective March 24, 2021; 2021 PA 80, effective November 21, 2021; and 2021 PA 85, effective September 24, 2021.

> liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.
>
> (4) A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [or] (3) . . . and by the operation of that motor vehicle causes the death of another person is guilty of a crime . . . .

A review of the language of MCL 750.321 and MCL 257.625 does not reflect any expression by the Legislature of its intention with respect to the permissibility of multiple punishments for these offenses. Therefore, we must apply the abstract-legal-elements test to determine the Legislature's intention with respect to the permissibility of multiple punishments. *Miller*, 498 Mich at 19.

In *People v Holtschlag*, 471 Mich 1, 21-22; 684 NW2d 730 (2004), our Supreme Court explained the crime of involuntary manslaughter[4] as follows:

> [I]t must be kept in mind that the sole element distinguishing manslaughter and murder is malice and that [i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse. If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter. If the homicide was committed with malice, it is murder. If it was

[4] As this Court explained in *People v Kulpinski*, 243 Mich App 8, 13 n 3; 620 NW2d 537 (2000), "[t]he crime of involuntary manslaughter is codified only insofar as the punishment is concerned; its definition remains rooted in common law."

> committed with a lesser mens rea of gross negligence or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter. [Quotation marks and citations omitted; second alteration in original.]

In this case, defendant was charged with second-degree murder, and the jury was also instructed on involuntary manslaughter as a lesser offense. The jury was specifically instructed that it could find defendant guilty of involuntary manslaughter if defendant caused the deaths of the two decedents when defendant's vehicle crashed with the vehicle in which the decedents were passengers and if defendant had acted *in a grossly negligent manner* in doing so. We note that this was the apparent theory of prosecution in this case with respect to involuntary manslaughter, being cognizant of the fact that multiple potential theories may support a charge for this "catch-all" offense. See *id*. at 16-17, 21; see also *People v Head*, 323 Mich App 526, 532; 917 NW2d 752 (2018) ("The requisite mental state for the type of involuntary manslaughter charged in this case is gross negligence."). "Gross negligence is only necessary if an intent to injure cannot be established." *Holtschlag*, 471 Mich at 19 (quotation marks and citation omitted).[5]

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[5] We remain aware, however, that the particular facts of the case are not the focus when applying the *Blockburger* test. *Miller*, 498 Mich at 19 n 16. Nevertheless, it is relevant that defendant was convicted of involuntary manslaughter under a gross-negligence theory because gross negligence was therefore indisputably an element of this particular offense of which defendant was convicted. *Id*. at 19 ("Under the abstract legal elements test, it is not a violation of double jeopardy to convict a defendant of multiple offenses if each of the offenses for which defendant was convicted has an element that the other does not . . . .") (quotation marks and citation omitted; ellipsis in original).

To convict defendant of OWI causing death under MCL 257.625(4), the prosecution was required to prove the following:

> (1) the defendant was operating his or her motor vehicle in violation of MCL 257.625(1) [or] (3) . . . ; (2) the defendant voluntarily decided to drive, knowing that he or she had consumed an intoxicating agent and might be intoxicated; and (3) the defendant's operation of the motor vehicle caused the victim's death. [*People v Schaefer*, 473 Mich 418, 433-434; 703 NW2d 774 (2005), modified in part on other grounds by *People v Derror*, 475 Mich 316, 334, 341-342 (2006), which in turn was overruled in part on other grounds by *People v Feezel*, 486 Mich 184, 205 (2010).]

In this case, defendant argues that it is not possible to commit the offense of OWI causing death without also committing involuntary manslaughter because the offense of OWI causing death necessarily involves the grossly negligent act of driving a vehicle while intoxicated and causing the death of another as a result. Defendant incorrectly focuses on the particular facts of the case rather than the legal elements of the crimes. See *Miller*, 498 Mich at 19 & n 16.

OWI causing death does not require the prosecution to prove gross negligence. *Schaefer*, 473 Mich at 434; see also *id*. at 422 n 4 (stating that under MCL 257.625(4), "the prosecution need not prove negligence or gross negligence by the defendant" and "the defendant must have 'voluntarily' decided to drive 'knowing that he had consumed an intoxicating liquor' ") (citation omitted). In contrast, the prosecution was required to prove gross negligence to support defendant's convictions for involuntary manslaughter. *Holtschlag*, 471 Mich at 19, 21-22. Thus, convicting defendant of involuntary manslaughter required proof of an element that OWI causing death did not.

Additionally, a conviction of OWI causing death requires (1) proof that the defendant operated a vehicle while intoxicated or while the defendant's ability to operate the vehicle was visibly impaired "due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance," as well as (2) proof that the defendant voluntarily decided to drive knowing that he or she had consumed an intoxicating agent and might be intoxicated. MCL 257.625(1), (3), and (4); *Schaefer*, 473 Mich at 434. Involuntary manslaughter does not require proof of these elements. *Holtschlag*, 471 Mich at 21-22. Therefore, convicting defendant of OWI causing death also required proof of an element that involuntary manslaughter did not.

Because "each of the offenses for which defendant was convicted has an element that the other does not," it was not a violation of double jeopardy to convict defendant of both involuntary manslaughter and OWI causing death. *Miller*, 498 Mich at 19 (quotation marks and citation omitted); see also *People v Kulpinski*, 243 Mich App 8, 15-16, 23; 620 NW2d 537 (2000) (holding that involuntary manslaughter and OWI causing death each contained an element that the other did not; therefore, convicting the defendant of both offenses did not violate double-jeopardy protections under the *Blockburger* test because involuntary manslaughter required proof of gross negligence while OWI causing death did not, and OWI causing death required proof that the defendant operated a vehicle while under the influence but involuntary manslaughter did not).

2. INVOLUNTARY MANSLAUGHTER AND RECKLESS DRIVING CAUSING DEATH

Defendant next argues, and the prosecution concedes, that defendant's multiple convictions of involuntary manslaughter and reckless driving causing death violate the multiple-punishment strand of double jeopardy, requiring that defendant's convictions of reckless driving causing death be vacated.

We have already set forth the statute relevant to the offense of involuntary manslaughter, MCL 750.321, above. The crime of reckless driving causing death is defined in MCL 257.626, which provides in pertinent part as follows:

> (1) A person who violates this section is guilty of reckless driving punishable as provided in this section.
>
> (2) Except as otherwise provided in this section, a person who operates a vehicle upon a highway . . . *in willful or wanton disregard for the safety of persons or property* is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $500.00, or both.
>
> * * *
>
> (4) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) *and by the operation of that vehicle causes the death of another person* is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not less than $2,500.00 or more than $10,000.00, or both. [Emphasis added.]

A review of both MCL 750.321 and MCL 257.626 does not reflect the Legislature's intention with regard to whether cumulative punishments are permitted for these two offenses. Therefore, we must apply the abstract-legal-elements test. *Miller*, 498 Mich at 19.

As stated above, to convict defendant of involuntary manslaughter, the prosecution was required to prove that defendant committed the "unintentional killing of a human being" with a *mens rea* of "gross negligence." *Holtschlag*, 471 Mich at 21-22 (quotation marks and citation omitted). Our Supreme Court has described this "gross negligence" *mens rea* as "act[ing] carelessly in such a manner that manifests a reckless disregard for another's life . . . ." *Id*. at 19. This Court has further explained as follows:

> The requisite mental state for the type of involuntary manslaughter charged in this case is gross negligence. See [*id*. at 16-17]. Gross negligence means wantonness and disregard of the consequences that may ensue. *People v Feezel*, 486 Mich 184, 195; 783 NW2d 67 (2010). Wantonness exists when the defendant is aware of the risks but indifferent to the results; it constitutes a higher degree of culpability than recklessness. *Id*. at 196. To prove gross negligence, a prosecutor must show:
>
> > (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
> >
> > (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
> >
> > (3) The omission [i.e., failure] to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. [*Head*, 323 Mich App at 532 (quotation marks and last citation omitted; second alteration in original).]

With respect to the crime of reckless driving causing death, our Supreme Court explained as follows in *People v Jones*, 497 Mich 155, 167; 860 NW2d 112 (2014):

> Taken together, then, these provisions [in MCL 257.626] demonstrate the Legislature's intent that a person is

> guilty of reckless driving causing death, a 15-year felony, if that person "operates a vehicle . . . [in willful or wanton disregard for the safety of persons or property] and by the operation of that vehicle causes the death of another person. . . ." [Ellipses and second alteration in original.]

This Court has explained the mental state applicable to the offense of reckless driving causing death as follows:

> The conduct proscribed by Subsection (2) of [MCL 257.626] is the operation of a vehicle in "willful or wanton disregard for the safety of persons or property." It is well settled that "[t]o show that a defendant acted in willful and wanton disregard of safety, something more than ordinary negligence must be proved." When willful and wanton behavior is an element of a criminal offense, it is not enough to show carelessness. Rather, "a defendant must have a culpable state of mind . . . ." [*People v Carll*, 322 Mich App 690, 695; 915 NW2d 387 (2018) (citations omitted; ellipsis and second alteration in original).]

Applying the *Blockburger* test, the crime of reckless driving causing death clearly contains an element that involuntary manslaughter does not, given that a conviction of involuntary manslaughter does not require that the defendant operated a vehicle in causing the death. See *Holtschlag*, 471 Mich at 21-22; *Jones*, 497 Mich at 167.

Turning to the next comparison under the *Blockburger* test, a conviction of involuntary manslaughter requires proof that the defendant acted with *gross negligence* in committing an unintentional killing, *Holtschlag*, 471 Mich at 21-22, while the text of MCL 257.626 provides that a person is "guilty of *reckless* driving" causing death if that person operates a vehicle on a highway "*in willful or wanton disregard for the safety of persons or property*" and causes the death of another, MCL 257.626(1), (2), and (4) (emphasis

added). Legally significant mental states may be viewed as existing "on a continuum" with "criminal intention" at one end and negligence on the other. *People v Datema*, 448 Mich 585, 604; 533 NW2d 272 (1995). "Criminal negligence, also referred to as gross negligence, lies between the extremes of intention and negligence." *Id*. Gross negligence is similar to intention in that "the actor realizes the risk of his behavior and consciously decides to create that risk," and gross negligence is also similar to negligence in that "the actor does not seek to cause harm, but is simply recklessly or wantonly indifferent to the results." *Id*. (quotation marks and citation omitted). Here, while we acknowledge the similarities between gross negligence and recklessness, both our Supreme Court and this Court have indicated that gross negligence involves a greater degree of culpability than recklessness on the continuum of mental states. See *Feezel*, 486 Mich at 196; *Head*, 323 Mich App at 532. Therefore, defendant's conviction of involuntary manslaughter required proof of an element that was not required to convict him of reckless driving causing death. Because each of these offenses contained an element that the other did not, convicting defendant of both offenses did not violate his right to protection against double jeopardy. *Miller*, 498 Mich at 19.[6]

3. OWI CAUSING DEATH AND RECKLESS DRIVING CAUSING DEATH

Next, defendant argues that his convictions of OWI causing death and reckless driving causing death violated double-jeopardy protections for essentially the same reason he asserted with regard to his convictions

[6] We acknowledge that the prosecution conceded error, but we have determined that the prosecution's confession of error was erroneous under these circumstances.

for OWI causing death and involuntary manslaughter. Defendant argues that it is impossible to commit OWI causing death without also committing reckless driving causing death because OWI causing death requires a defendant to have committed the reckless act of operating a vehicle while intoxicated or visibly impaired from alcohol or a controlled substance or their combination. We conclude that defendant has also similarly failed to demonstrate a double-jeopardy violation on this basis.

The plain language of the statutes prohibiting OWI causing death and reckless driving causing death do not shed light on the Legislature's intentions with respect to the permissibility of multiple punishments for these specific offenses. See *Miller*, 498 Mich at 19. However, when applying the abstract-legal-elements test, it is clear that the two offenses are not the same for double-jeopardy purposes.

Reckless driving causing death requires the prosecution to prove that a defendant operated a vehicle "in willful or wanton disregard for the safety of persons or property." MCL 257.626(2) and (4). OWI causing death does not require as an element that the prosecution prove this mental state: as we have already discussed, OWI causing death does not require proof of the higher gross-negligence standard of culpability and does not even require proof of mere ordinary negligence. See *Head*, 323 Mich App at 532 (stating that gross negligence involves a higher degree of culpability than recklessness); *Schaefer*, 473 Mich at 422 n 4 (stating that "the prosecution need not prove negligence or gross negligence by the defendant" under MCL 257.625(4)). Furthermore, OWI causing death requires proof related to the defendant's intoxication or visible impairment, MCL 257.625(1), (3), and (4); *Schaefer*,

473 Mich at 434, while reckless driving causing death contains no such elements, MCL 257.626(2) and (4). Because each of these offenses contains an element that the other does not, convicting defendant of both offenses did not violate double-jeopardy protections. *Miller*, 498 Mich at 19.

4. OWI-SI AND RECKLESS DRIVING CAUSING SERIOUS IMPAIRMENT OF A BODY FUNCTION

Defendant next argues that "[i]t is impossible to commit OWI-[SI] without committing Reckless[driving causing serious impairment of a body function]" because "[b]oth require that defendant acted in a reckless manner."

Like OWI causing death, OWI-SI is contained within MCL 257.625, with the distinguishing element being the nature of the injury caused. We therefore quote only the OWI-SI provision, MCL 257.625(5), without repeating the other subsections that we have already quoted in this opinion. MCL 257.625(5), as amended by 2014 PA 219, provided in pertinent part:

> A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1) [or] (3) . . . and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a crime . . . .

The offense of reckless driving causing serious impairment is likewise related to reckless driving causing death, with both crimes being located in MCL 257.626. The relevant provision of this statute provides in pertinent part as follows:

> (3) Beginning October 31, 2010, a person who operates a vehicle in violation of subsection (2) and by the operation of that vehicle causes serious impairment of a body function to another person is guilty of a felony punishable

> by imprisonment for not more than 5 years or a fine of not less than $1,000.00 or more than $5,000.00, or both.

Neither statute contains any indication of the Legislature's intention with regard to the permissibility of multiple punishments, so we turn to the abstract-legal-elements test. *Miller*, 498 Mich at 19. We conclude that defendant's convictions of these two offenses did not violate double-jeopardy protections for the same reasons that his convictions for OWI causing death and reckless driving causing death did not violate double jeopardy. Regarding OWI-SI, the identical language in MCL 257.625(5) and MCL 257.625(4), both of which expressly incorporate Subsections (1) and (3), is interpreted in the same manner. *Derror*, 475 Mich at 334. We take the same approach to the identical language in MCL 257.626(3) and (4) with respect to the reckless-driving offenses. Cf. *Derror*, 475 Mich at 334.

Reckless driving causing serious impairment requires the prosecution to prove that a defendant operated a vehicle "in willful or wanton disregard for the safety of persons or property," MCL 257.626(2) and (3), which is not an element of OWI-SI, see *Derror*, 475 Mich at 334. OWI-SI requires proof related to the defendant's intoxication or visible impairment, MCL 257.625(1), (3), and (5); *Schaefer*, 473 Mich at 434; *Derror*, 475 Mich at 334, while reckless driving causing serious impairment contains no such elements, MCL 257.626(2) and (3). Because each of these offenses contains an element that the other does not, convicting defendant of both offenses did not violate double-jeopardy protections. *Miller*, 498 Mich at 19.

5. NUMBER OF CONVICTIONS

Finally, we address defendant's argument that he should only have received one conviction for each

deceased victim and for each injured victim in this case, although each of those convictions was supported by multiple "theories." In support of this argument, defendant argues that this Court held in *People v Bigelow*, 225 Mich App 806; 571 NW2d 520 (1997) (*Bigelow I*),[7] that "such dual convictions arising from the death of a single victim violate double jeopardy." Defendant further argues that this Court subsequently held in *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998) (*Bigelow II*), that "the appropriate remedy to protect defendant's rights against double jeopardy is to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder." (Quotation marks and citation omitted.)

In *Bigelow I*, 225 Mich App at 806, this Court held that the defendant's convictions of first-degree premeditated murder and first-degree felony murder violated his right to protection against double jeopardy because "[m]ultiple murder convictions for one killing violate the constitutional guarantee against double jeopardy." This Court further explained that "[b]y providing felony murder and premeditated murder as alternative theories of proving first-degree murder, our Legislature authorized two mental states as alternative means of proving the same crime." *Id*. at 807. We also stated that these two mental states were "alternative means of satisfying the mens rea element of the single crime of first-degree murder." *Id*. (quotation

[7] *Bigelow I* was vacated by an order convening a special conflict panel under MCR 7.215(H). *Bigelow I*, 225 Mich App at 806. *Bigelow I* was largely reinstated by the conflict panel's decision. *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998) (*Bigelow II*).

marks and citations omitted).[8] In *Bigelow II*, a conflict panel of this Court resolved a conflict regarding the remedy for this double-jeopardy violation and held that " 'the appropriate remedy to protect defendant's rights against double jeopardy is to modify defendant's judgment of conviction and sentence to specify that defendant's conviction is for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder.' " *Bigelow II*, 229 Mich App at 220-221, quoting *Bigelow I*, 225 Mich App at 806.

Defendant's reliance on *Bigelow I* and *Bigelow II* is misplaced. Contrary to defendant's characterizations of his convictions, defendant was not convicted of a single crime with respect to each victim (such as first-degree murder as in *Bigelow I* and *Bigelow II*) that was supported by legislatively authorized alternative mental states, all contained within a single statute. Defendant was convicted of multiple, distinct crimes that were defined in separate statutes with respect to each victim. The double-jeopardy issue with respect to these convictions involved the determination whether, despite the seemingly separate offenses defined in separate statutes, these crimes nonetheless constituted the "same offense" for double-jeopardy purposes under the *Blockburger* test. Our holding in *Bigelow I* was specific to the offense of first-degree murder and does not stand for the broader proposition that it is a violation of double jeopardy to convict a defendant of more than one crime per death or injury caused. Accordingly, defendant is not entitled to any

[8] See also MCL 750.316(1)(a) and (b), which generally provide that both premeditated murder and felony murder constitute first-degree murder.

relief on appeal regarding his double-jeopardy arguments under *Bigelow I* and *Bigelow II*.

III. SCORING OF OFFENSE VARIABLES 5, 17, AND 19

Defendant next argues that the trial court erred in scoring three offense variables (OVs) in calculating his guidelines minimum sentence range. He challenges the trial court's assessment of 15 points for OV 5, 10 points for OV 17, and 10 points for OV 19. Defendant concedes that he did not challenge any of these scoring decisions at sentencing, in a motion for resentencing, or in a motion to remand filed in this Court. Therefore, these scoring challenges are unpreserved. See *People v Sours*, 315 Mich App 346, 348; 890 NW2d 401 (2016).

Furthermore, defendant concedes on appeal that even if he were to prevail on all of his scoring challenges, there would be no effect on his guidelines minimum sentence range, which was determined to be 43 to 86 months. Defendant's minimum sentence for each of his involuntary-manslaughter convictions and OWI-causing-death convictions was 86 months. He was sentenced for his other convictions as previously noted, and each of those sentences was less than 86 months. Accordingly, there is no dispute that defendant's minimum sentence was within the appropriate guidelines range.

MCL 769.34(10) provides as follows:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. *A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in*

> *determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals*. [Emphasis added.]

In *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), our Supreme Court explained that

> pursuant to § 34(10), a sentence that is *outside* the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. However, if the sentence is *within the appropriate guidelines sentence range*, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand*. [Emphasis added.]

Our Supreme Court has further clarified that

> if the defendant failed to raise the scoring error at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the Court of Appeals, and the defendant's sentence is within the appropriate guidelines range, the defendant *cannot raise the error on appeal* except where otherwise appropriate, as in a claim of ineffective assistance of counsel. [*People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).]

Because there is no dispute that defendant's sentence is within the appropriate guidelines range and that defendant failed to raise the alleged scoring errors at sentencing, in a proper motion for resentencing, or in a proper motion to remand, defendant is precluded from raising these alleged errors on appeal.[9] MCL 769.34(10); *Francisco*, 474 Mich at 89 n 8;

[9] Defendant has not raised any claim of ineffective assistance of counsel, so these alleged scoring errors have not been presented in that manner either. See *Francisco*, 474 Mich at 89 n 8.

see also *Kimble*, 470 Mich at 310-311. We are aware that in *Kimble*, our Supreme Court reviewed for plain error the defendant's unpreserved claim of an error in scoring the sentencing guidelines when the error resulted in the defendant's sentence being outside the appropriate guidelines range. *Kimble*, 470 Mich at 311-312. In this case, however, defendant expressly concedes that his sentence is *within* the appropriate guidelines range, even if he were to prevail on all of his alleged claims of scoring error. This case is therefore distinguishable from *Kimble*.

Nonetheless, we treat defendant's appellate brief as a motion to remand, and we grant the motion for the limited purpose of permitting defendant to raise his scoring issues by motion in the trial court. MCR 7.211(C)(1).

IV. CORRECTION OF THE JUDGMENT OF SENTENCE

Finally, defendant argues that remand is also necessary to correct a clerical error in his judgment of sentence. At the sentencing hearing, the trial court ordered defendant's sentences for OWI causing death in Counts 3 and 4 to be served consecutively. Defendant's judgment of sentence states:

> Counts 3 & 4 to be served consecutive to Count 3. All other counts to be served concurrent to eachother [sic].

The judgment of sentence is less than clear in accurately reflecting the nature of the consecutive sentences imposed by the trial court at sentencing. Accordingly, we remand for the ministerial task of correcting the judgment of sentence to more accurately

reflect the sentences imposed by the trial court, as stated on the record at sentencing. MCR 7.208(A)(1); MCR 6.435(A).[10]

Affirmed with respect to defendant's convictions and sentences and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

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[10] We note that the prosecution does not contest this issue.

ADAMS v PAROLE BOARD

Docket No. 355588. Submitted December 10, 2021, at Detroit. Decided January 27, 2022, at 9:00 a.m.

Carlton V. Adams brought an action for a writ of mandamus against the Parole Board in the Court of Claims, alleging that defendant had improperly considered conduct of which plaintiff had been acquitted when deciding to deny him parole and that this violated the holding of *People v Beck*, 504 Mich 605 (2019), which prohibited the consideration of acquitted conduct in sentencing. Plaintiff had been found guilty of operating a motor vehicle while having a controlled substance in his body after being involved in a vehicular crash that resulted in a man's death, but he was acquitted of operating a vehicle while having a controlled substance in his body causing death. Plaintiff moved for summary disposition under MCR 2.116(C)(8) and (10). The Court of Claims, MICHAEL J. KELLY, J., instead granted summary disposition in defendant's favor under MCR 2.116(I)(2), explaining that plaintiff's mandamus action was essentially an improper appeal from a parole decision. The court further ruled that plaintiff could not meet the elements for a writ of mandamus because, given the discretionary nature of parole, there was no clear legal duty owed to plaintiff by defendant. Finally, the court held that *Beck* applied only to sentencing decisions and not to parole decisions. Plaintiff appealed.

The Court of Appeals *held*:

1. Plaintiff's appeal was not barred for mootness, despite the fact that he has since been paroled. Given that parole decisions can result in the continued deprivation of liberty through ongoing incarceration, this matter involves an issue of significant public interest. Furthermore, as has been previously recognized, the timing of parole and the appellate process is such that this issue may continue to recur and yet evade judicial review. Therefore, the exception to the mootness doctrine applied.

2. The Court of Claims erred by denying plaintiff's request for a writ of mandamus. The issuance of a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has

the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. A clear legal duty, like a clear legal right, is one that is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. MCL 791.234(11) provides that, in general, a prisoner's release on parole is discretionary with the parole board, and the decision to grant parole is appealable only by the county prosecutor or the victim of the crime for which the prisoner was convicted. However, the Parole Board's discretion in making a parole decision is limited by the requirement that it exercise and perform the powers and duties prescribed and conferred by the Corrections Code, MCL 791.201 *et seq*., pursuant to MCL 791.231a(5). The factors and circumstances that the Parole Board may consider in granting or denying parole are provided in MCL 791.233e, MCL 791.235, Mich Admin Code, R 791.7715, and Mich Admin Code, R 791.7716. MCL 791.233e(2)(e) provides that the Parole Board may consider all factors relevant to the parole decision if not otherwise prohibited by law. In this case, the Court of Claims erred by concluding that plaintiff failed to establish that defendant had the clear legal duty to perform the act requested. The Parole Board was statutorily prohibited under MCL 791.233e(2)(e) from considering facts that it was constitutionally prohibited from considering by *Beck*, and plaintiff expressly argued that defendant had a clear ministerial duty to obey the Michigan and United States Constitutions. Accordingly, plaintiff had the ability to challenge defendant's alleged error and enforce defendant's statutory obligations through mandamus. Under *Jones v Dep't of Corrections*, 468 Mich 646 (2003), mandamus rather than habeas corpus was the appropriate remedy for plaintiff to seek.

3. The holding in *Beck* applies to Parole Board decisions. Although there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence, on some occasions, a liberty interest that gives rise to due-process protections can exist in the context of parole. In particular, the United States Supreme Court has explained that a state creates a protected liberty interest by placing substantive limitations on official discretion through the imposition of particularized standards or criteria that guide the state's decision-makers. In holding that a sentencing court may not consider acquitted conduct in its sentencing of a defendant, the *Beck* Court relied on constitutional principles, such as due process and the presumption of innocence, in support of its holding.

Although Michigan law makes it clear that a prisoner has no right to parole, it did not follow that plaintiff was barred from challenging defendant's consideration of acquitted conduct in a writ of mandamus, on the basis of *Beck*, on the grounds that defendant failed to comply with its statutory obligations. Although defendant was expressly required by statute to consider all the facts and circumstances before granting plaintiff parole, and a death did result from the vehicular crash that was related to plaintiff's underlying conviction, defendant could only consider this fact if not otherwise prohibited by law according to MCL 791.233e(2)(e). Further, while defendant could consider prior arrests that did not result in a conviction, it was not allowed to base its determination on this factor alone under MCL 791.235(3)(b) and Rule 791.7715(3).

Reversed.

1. PAROLE – PAROLE BOARD DECISIONS – CONSIDERATION OF PROHIBITED FACTORS – MANDAMUS.

Under MCL 791.233e(2)(e), the Parole Board may consider all factors relevant to a parole decision if not otherwise prohibited by law; a person denied parole on the basis of the Parole Board's consideration of a fact that it is prohibited from considering may seek a writ of mandamus to compel the Parole Board to conduct a new parole interview and perform its duties as prescribed and conferred by law when reconsidering its decision.

2. PAROLE – PAROLE BOARD DECISIONS – CONSIDERATION OF PROHIBITED FACTORS – ACQUITTED CONDUCT.

The Parole Board is prohibited by *People v Beck*, 504 Mich 605 (2019), from considering conduct for which a defendant was acquitted when deciding whether to grant the defendant parole.

Stuart G. Friedman for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *H. Steven Langschwager*, Assistant Attorney General, for defendant.

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

PER CURIAM. Plaintiff appeals by right the decision of the Court of Claims granting summary disposition to defendant, the Parole Board, under MCR 2.116(I)(2) as

the nonmoving party and denying plaintiff's motion for summary disposition under MCR 2.116(C)(8) and (10). We reverse.[1]

I. BACKGROUND

This is the second time that plaintiff has been before this Court. The facts are not in dispute for purposes of this appeal. In our previous decision, we discussed the underlying facts:

> At about 8:30 p.m. on September 13, 2010, Jeremy Easterbrook was riding his motorcycle southeast on M-37 at a speed in excess of the posted limit. [Plaintiff] was headed west on the same road when he began to turn left onto a cross street. Easterbrook struck the rear passenger wheel well of [plaintiff]'s truck, spinning it about 95 degrees and was killed in the accident. The first responding police officer spoke to [plaintiff], who stated that he never saw what hit him. The officer smelled intoxicants, so he had [plaintiff]'s blood drawn at about 10:30 that night. [Plaintiff]'s blood was tested at the Michigan State Police Crime Lab and found to contain one nanogram per milliliter of THC and a blood alcohol content of 0.02. A state police reconstruction expert testified that his calculations suggested Easterbrook's motorcycle struck [plaintiff]'s truck at about 57 miles per hour, but an expert [plaintiff] retained opined that the motorcycle was traveling at least 100 miles per hour. This expert also estimated that the motorcycle would have been potentially visible to [plaintiff], had he looked, for about 9.5 seconds before impact. [*People v Adams*, unpublished per curiam opinion of the Court of Appeals, issued November 19, 2013 (Docket No. 311084), p 1.]

A jury found plaintiff guilty of operating a motor vehicle while having a controlled substance in his body

[1] Plaintiff was subsequently paroled after the Court of Claims decision. Therefore, we do not remand for further proceedings.

(THC/marijuana), third offense, MCL 257.625(8); MCL 257.625(9)(c). Plaintiff also pleaded guilty to an unspecified probation violation. The jury acquitted plaintiff of operating a vehicle while having a controlled substance in his body causing death, MCL 257.625(4) and (8). Despite this acquittal, there was no dispute that Easterbrook died as a result of the crash. The trial court sentenced plaintiff to serve 30 to 60 months in prison for his conviction of operating a motor vehicle while having a controlled substance in his body, which was to begin on January 31, 2014, after plaintiff served time for his probation violation. We previously affirmed plaintiff's sentence.[2]

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[2] *Adams*, unpub op at 1-3. In his prior appeal, plaintiff argued that the trial court erred by assessing 50 points under Offense Variable (OV) 3, MCL 777.33. *Id*. at 1. This Court affirmed plaintiff's sentence, concluding that, although it was a close call, the "preponderance of the evidence support[ed] that if [plaintiff] had not been driving with intoxicants in his blood he may have noticed the oncoming motorcycle and avoided driving in front of it." *Id*. at 3. Recently, our Supreme Court held that "due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." *People v Beck*, 504 Mich 605, 629; 939 NW2d 213 (2019). Our Supreme Court explained:

> "[W]hen 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. To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." [*Id*. at 626-627 (quotation marks and citation omitted).]

This Court recently concluded that "[t]he *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." *People v Brown*, 339 Mich App 411, 420; 984 NW2d 486 (2021). See *People v Beesley*, 337 Mich App 50, 63; 972 NW2d 294 (2021) ("[A] sentencing court may review a presen-

During plaintiff's incarceration, his case was sent to defendant for parole review. Defendant denied parole. Subsequently, plaintiff requested that defendant reconsider its decision, then filed a complaint for a writ of mandamus in the Court of Claims to compel defendant to conduct another parole hearing. Plaintiff asserted that defendant had improperly considered acquitted conduct in its decision to deny him parole. Specifically, plaintiff argued that defendant had improperly considered Easterbrook's death despite the jury's having acquitted plaintiff of causing Easterbrook's death. Plaintiff relied on a recent decision of our Supreme Court, *People v Beck*, 504 Mich 605, 626-627; 939 NW2d 213 (2019), in which the Court held that a sentencing court may not consider acquitted conduct in

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tence investigation report containing information on acquitted conduct without violating *Beck* so long as the court does not rely on the acquitted conduct when sentencing the defendant, but if the sentencing court specifically references acquitted offenses as part of its sentencing rationale, a *Beck* violation is apparent.") (cleaned up).

We note that *Beck* applies retroactively "to all cases, state or federal, pending on direct review or not yet final." *Beesley*, 337 Mich App at 62 n 4 (quotation marks and citation omitted). Accordingly, because plaintiff's direct appeal was final before *Beck* was decided, he cannot challenge his underlying sentence on that basis. However, we recognize that had *Beck* applied at the time plaintiff appealed his sentence, the 50-point OV 3 score imposed on the basis of the conduct for which he was acquitted would have constituted error requiring reversal. See *Brown*, 339 Mich App at 427 (holding that the trial court erred when it held the defendant responsible for the death of the victim of a shooting because the jury had acquitted the defendant of second-degree manslaughter and voluntary manslaughter; thus, the defendant was not "criminally responsible" for the victim's death and the sentencing court could not consider "the actual shooting and death" when sentencing the defendant); *Beck*, 504 Mich at 629 (holding that the court violated the defendant's due-process rights by basing the defendant's sentence on its finding by a preponderance of the evidence that the defendant had committed the murder of which the jury acquitted him).

its sentencing of a defendant. Plaintiff argued that *Beck*'s holding also applied to parole-review decisions.

Plaintiff contended that he was not asking the Court of Claims to review the parole decision and that he was not appealing the Parole Board's decision. Rather, he was asking the Court of Claims to issue the writ to compel defendant to follow Michigan law by not improperly considering acquitted conduct in its review of his case. In order to do this, a new parole hearing would necessarily be required. Plaintiff moved for summary disposition under MCR 2.116(C)(8) and (10), suggesting that there was no factual dispute and that the case revolved around a legal question. The Court of Claims disagreed with plaintiff and, instead, granted summary disposition in defendant's favor under MCR 2.116(I)(2) as the nonmoving party. The court agreed with defendant that plaintiff's mandamus action was essentially an improper appeal from a parole decision and that, under prior Michigan precedent, such an appeal could not stand. The court further held that plaintiff could not meet the elements for a writ of mandamus because, given the discretionary nature of parole, there was no clear legal duty owed to plaintiff by defendant. Finally, the court held that *Beck* applied only to sentencing decisions and not to parole decisions.

II. ANALYSIS

Plaintiff argues that the Court of Claims erred in its classification of his request for a writ as an improper appeal from a parole-review decision. Plaintiff reiterates his contentions that he was not asking the Court of Claims to review the parole decision but merely to direct defendant to follow Michigan law. Additionally, plaintiff contends that defendant had a clear legal duty

to follow applicable law because *Beck* applied not only to sentencing decisions but also to parole-review decisions. For the reasons explained below, we agree.

A. STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition, as well as questions of statutory interpretation and the construction and application of court rules." *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010) (citations omitted). " 'The 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.' " *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 590; 794 NW2d 76 (2010) (citation omitted). Questions of law are reviewed de novo. *Christenson v Secretary of State*, 336 Mich App 411, 417; 970 NW2d 417 (2021). Accordingly, as a question of law, a decision "whether [a defendant has] a clear legal duty to perform and whether [a] plaintiff has a clear legal right to performance of any such duty" is reviewed de novo. *Id*. In contrast, the trial court's decision whether to issue a writ of mandamus is reviewed for an abuse of discretion. *Younkin v Zimmer*, 497 Mich 7, 9; 857 NW2d 244 (2014). A court abuses its discretion when its decision is "outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). "A trial court necessarily abuses its discretion when it makes an error of law." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 208; 920 NW2d 148 (2018) (quotation marks and citation omitted).

B. MOOTNESS

Before analyzing plaintiff's contentions on the merits, we first address the issue of mootness. As this appeal was pending before this Court, plaintiff was paroled. However, plaintiff has continued to advance his position on appeal because he believes that it is an issue of significant public interest that is likely to recur yet evade judicial review. We agree.

Issues involving mootness are questions of law that are reviewed de novo. *In re Tchakarova*, 328 Mich App 172, 178; 936 NW2d 863 (2019). " 'This Court's duty is to consider and decide actual cases and controversies.' " *Barrow v Detroit Election Comm*, 305 Mich App 649, 659; 854 NW2d 489 (2014) (citation omitted). Generally, this Court does "not address moot questions or declare legal principles that have no practical effect in a case." *Id*. Mootness occurs when " 'an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy.' " *Id*. (citation omitted). There is an exception, however, when an issue " 'is publicly significant, likely to recur, and yet likely to evade judicial review.' " *Id*. at 660 (citation omitted).

Given that parole decisions can result in the continued deprivation of liberty through ongoing incarceration, we agree with plaintiff that this matter involves an issue of significant public interest. Furthermore, as has been previously recognized, the timing of parole and the appellate process is such that this issue may continue to recur and yet evade judicial review. See, e.g., *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001) (stating that criminal defendants "are likely to be on parole by the time their cases reach

this Court" and addressing the appeal on its merits). Therefore, we hold that the exception to the mootness doctrine applies.

C. WRIT OF MANDAMUS

Turning to the merits, we disagree with the Court of Claims' conclusion that mandamus relief was inappropriate in this case.

> [T]he issuance of a writ of mandamus is proper only where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result. [*Morales v Parole Bd*, 260 Mich App 29, 41; 676 NW2d 221 (2003).]

As this Court has stated, "A clear legal duty, like a clear legal right, is one that is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Hayes v Parole Bd*, 312 Mich App 774, 782; 886 NW2d 725 (2015) (quotation marks and citation omitted). " 'A ministerial act is one in which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.' " *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016) (citation omitted). This Court has held that "where there has been a ministerial error or omission, the remedy of mandamus is available to prisoners." *Morales*, 260 Mich App at 42.

The Court of Claims dismissed plaintiff's action "[b]ecause mandamus cannot lie to set the confines of defendant's discretionary parole determinations . . . ." The court also concluded that plaintiff failed to estab-

lish that defendant had a "clear legal duty" to refrain from considering acquitted conduct. We disagree.

Once a prisoner is sentenced and placed within a correctional facility, they fall under the jurisdiction of defendant once "the prisoner has served a period of time equal to the minimum sentence imposed by the court for the crime of which he or she was convicted, less good time and disciplinary credits, if applicable." MCL 791.234(1). "A prisoner must not be given liberty on parole until the board has reasonable assurance, after consideration of *all of the facts and circumstances*, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a) (emphasis added). MCL 791.234(11) provides that, in general,

> a prisoner's release on parole is *discretionary* with the parole board. The action of the parole board in granting a parole is appealable *by the prosecutor* of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted. The appeal must be to the circuit court in the county from which the prisoner was committed, by leave of the court. [Emphasis added.]

Although a prisoner was previously able to apply for leave to appeal a Parole Board decision, this right of appeal by leave was subsequently eliminated by our Legislature. See *Morales*, 260 Mich App at 34-36. A prisoner has no right to parole and, therefore, " 'enjoys no constitutional or inherent right to be conditionally released from a validly imposed sentence.' " *Id*. at 39 (citation omitted). Only the prosecutor or a victim may appeal a parole decision. MCL 791.234(11).

However, the Parole Board's discretion in making a parole decision is not without limitations. The Parole

Board is required to "exercise and perform the powers and duties prescribed and conferred by [the Corrections Code, MCL 791.201 *et seq*.]." MCL 791.231a(5). The factors and circumstances that the Parole Board may consider in granting or denying parole are provided in MCL 791.233e; MCL 791.235; Mich Admin Code, R 791.7715; and Mich Admin Code, R 791.7716. As part of exercising its discretion, the Parole Board may consider all "relevant factors" to the parole decision, "if not otherwise prohibited by law." MCL 791.233e(2)(e); see also MCL 791.233e(1)[3].

We hold that the Court of Claims erred by concluding that plaintiff failed to establish that defendant had the clear legal duty to perform the act requested. In this case, plaintiff sought to enforce defendant's obligation to comply with its statutory requirements and guidelines in exercising its discretion and issuing its parole decision. Plaintiff argued that the Parole Board was statutorily prohibited from considering facts prohibited by the Constitution, on the basis of *Beck*, under MCL 791.233e(2)(e). Plaintiff expressly argued that defendant had a "clear ministerial duty to obey the Michigan and US Constitutions." On the basis of defendant's statutory obligations and those governing its discretion under the administrative code, we conclude that defendant had a clear legal duty " 'inferable as a matter of law from uncontroverted facts,' " *Hayes*, 312 Mich App at 782 (citation omitted), to refrain from considering facts prohibited by law under MCL

[3] MCL 791.233e(1) provides:

> The department shall develop parole guidelines that are consistent with section 33(1)(a) to govern the exercise of the parole board's discretion under sections 34 and 35 as to the release of prisoners on parole under this act. The purpose of the parole guidelines is to assist the parole board in making objective, evidence-based release decisions that enhance the public safety.

791.233e(2)(e), and that plaintiff had the ability to challenge defendant's alleged improper omission or ministerial error during its deliberation process and enforce defendant's statutory obligations through mandamus, *Morales*, 260 Mich App at 42.

The Court of Claims noted that it was "not entirely apparent that [defendant] even weighed the acquitted conduct" from defendant's notes on its decision regarding plaintiff. Nonetheless, the court concluded that even if defendant did rely on the acquitted conduct, plaintiff was not entitled to the relief requested because he sought to control the manner in which defendant exercised its discretion. However, as indicated, defendant's discretion is not without limitation, and it is required to comply with its statutory obligations. See MCL 791.231a(5).

Defendant asserts that plaintiff is requesting that it exercise its discretion in a particular manner. Mandamus is an "extraordinary remedy and it will not lie to review or *control the exercise of discretion* vested in a public official or administrative body." *Morales*, 260 Mich App at 41-42 (emphasis added). We recognize that the decision whether to grant parole is explicitly a matter of discretion. MCL 791.234(11). However, the issue in the instant case is whether defendant complied with its statutory obligations when it considered acquitted conduct in exercising its discretion. Plaintiff did not request an order requiring parole to be granted. Rather, plaintiff requested that defendant comply with the applicable statute in undertaking its decision and conduct a new parole interview at which the acquitted conduct is not considered. See *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984) ("[M]andamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular

manner.") Further, our Supreme Court has stated, "When agencies of government fail to perform duties imposed by the Legislature or the constitution, the courts will not hesitate to order performance." *Id*. at 411.

We conclude that plaintiff's legal right is also " 'inferable as a matter of law from uncontroverted facts,' " *Hayes*, 312 Mich App at 782 (citation omitted), on the basis of the limitations imposed on defendant by statute, see *In re Parole of Hill*, 298 Mich App 404, 413; 827 NW2d 407 (2012). See also *Teasel*, 419 Mich at 414-415 (concluding that the plaintiff, who had been hospitalized by court order, had a clear, legal right derived from the mental health code on the basis that the defendant had a clear legal duty to determine whether the plaintiff was suitable for release or a person requiring treatment as defined by law and that the plaintiff did not seek to control the defendant's discretion, but to "compel [the defendant] to make an informed judgment").

The Court of Claims also stated that plaintiff could have filed a petition for habeas corpus to obtain relief.[4] In *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664

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[4] As our Supreme Court has explained:

> [A]n action for habeas corpus may be brought by or on the behalf of any person restrained of his liberty within this state under any pretense whatsoever. Habeas relief is appropriate only where a habeas petitioner can show a radical defect that renders a proceeding or judgment void. Habeas corpus does not function as a writ of error, and it is not available to test questions of evidence. [*Kenney v Booker*, 494 Mich 852, 852 (2013) (cleaned up).]

This Court has also concluded that "[a]lthough not a completely exhaustive list, in the unlikely scenario where the Parole Board has denied a prisoner parole exclusively on the basis of his race, religion, or national origin, a complaint for habeas corpus would be proper." *Morales*, 260 Mich App at 40-41.

NW2d 717 (2003), our Supreme Court held, "Where an official has a clear legal duty to act and fails to do so, the appropriate remedy is an order of mandamus." *Id*. The Court concluded that "a plaintiff may seek a writ of mandamus to compel compliance with [a] statutory duty," rather than a petition for habeas corpus, where "the Legislature has established a clear, ministerial duty, but has failed to prescribe any consequence for a violation of that duty . . . ." *Id*.[5] The instant case is analogous to *Jones* because plaintiff sought to enforce the statutory requirements imposed on defendant. See *id*. Additionally, because plaintiff is not entitled to appeal a parole decision, see MCL 791.234(11), plaintiff asserts a ministerial error or omission, and "no other remedy exists, legal or equitable, that might achieve the same result," *Morales*, 260 Mich App at 41, we conclude that mandamus was appropriate in this case.

D. APPLICATION OF *BECK*

Finally, we disagree with the Court of Claims that *Beck* does not apply to Parole Board decisions. The court recognized that the same due-process safeguards recognized in *Beck* no longer apply by the time parole is considered, citing *In re Parole of Hill*, 298 Mich App 404. In *In re Parole of Hill*, this Court recognized "that 'there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence,' because the person's 'conviction, with all its procedural safeguards, has extinguished that liberty right.' " *Id*. at 413, quoting *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*, 442 US 1, 7; 99 S Ct 2100; 60 L Ed 2d

[5] The *Jones* decision related to the failure to hold a timely hearing as required under MCL 791.240a(1). See *Jones*, 468 Mich at 658.

668 (1979). However, this Court has recognized that, on some occasions, "a liberty interest can arise in the context of parole," explaining:

> For example, a parolee facing parole revocation has a protected liberty interest such that he is entitled to some due process protection. Similarly, a probationer has a protected liberty interest that requires due process protection during revocation proceedings. Furthermore, specific language in a state statute can create a liberty interest in parole release that requires some form of due process protection where the statute limits discretion of the parole authority. The United States Supreme Court has explained that "a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show that particularized standards or criteria guide the State's decisionmakers." *Olim v Wakinekona*, 461 US 238, 249; 103 S Ct 1741; 75 L Ed 2d 813 (1983) (quotation marks and citation omitted). However, Michigan's parole system, in and of itself, does not create a constitutionally protected interest in parole. [*In re Parole of Hill*, 298 Mich App at 413-414 (citations omitted).]

Plaintiff concedes that *Beck* involved a *sentencing* court and whether such a court may consider acquitted conduct when sentencing a defendant. As previously stated, our Supreme Court in *Beck* held that a sentencing court may not consider acquitted conduct in its sentencing of a defendant. *Beck*, 504 Mich at 626-627. The *Beck* Court relied on constitutional principles, such as due process and the presumption of innocence, in support of its holding, see *Beck*, 504 Mich at 620-622. Although Michigan law makes it explicitly clear that a prisoner has no *right* to parole, constitutional or otherwise, see *Morales*, 260 Mich App at 39; MCL 791.235(1), it does not follow that plaintiff is barred from challenging defendant's consideration of acquitted conduct in a writ of mandamus, on the basis of

Beck, on the grounds that defendant failed to comply with its statutory obligations.[6]

We recognize that defendant is expressly required by statute to consider "*all* of the facts and circumstances" before granting parole to a prisoner. MCL 791.233(1)(a) (emphasis added). We are also cognizant that Easterbrook's death was a result of the vehicular crash that was related to plaintiff's underlying conviction. However, we are persuaded that *Beck* should apply to defendant because of the limitation "if not otherwise prohibited by law," imposed by MCL 791.233e(2)(e). Further, while defendant may consider prior arrests that do not result in a conviction, it is not allowed to base its determination on this factor alone. MCL 791.235(3)(b); Mich Admin Code, R 791.7715(3). Additionally, although defendant may consider a number of factors and circumstances as part of its parole

[6] Although *Beck* had not been decided at the time plaintiff filed his first appeal, similar concerns apply to post-*Beck* defendants. We note that there will be a finite number of cases where a similar issue could arise. Defendants who are sentenced after the *Beck* decision have the ability to raise a *Beck* challenge to their sentence in their appeal by right. However, because *Beck* was decided after plaintiff appealed his sentence, such a challenge was unavailable to him. Notably, it would be inconsistent for the Parole Board to consider acquitted conduct in determining parole for a *post-Beck* defendant that the sentencing court was barred from considering in imposing the sentence. See *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998) ("Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest.").

consideration, see MCL 791.233e and Rule 791.7716,[7] MCL 791.233e(2)(e) is still applicable.

E. CONCLUSION

We hold that *Beck* applies to defendant's decision regarding plaintiff, future cases before the Parole Board, decisions currently pending before the Parole Board, and cases pending on appeal in this Court. Therefore, we conclude that the Court of Claims erred by granting summary disposition in favor of defendant and denying plaintiff's request for a writ of mandamus.

Reversed.

K. F. KELLY, P.J., and JANSEN and RICK, JJ., concurred.

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[7] Rule 791.7716 provides, in pertinent part:

> (1) Parole guidelines that do not create disparities in release decisions based on race, color, national origin, gender, religion or disability shall be used to assist the parole board in making release decision[s] that enhance the public safety.
>
> * * *
>
> (3) A parole guideline score shall be based on a combination of the length of time the prisoner has been incarcerated *for the offense for which parole is being considered* and each of the following factors:
>
> (a) The nature of the offense(s) for *which the prisoner is incarcerated* at the time of parole consideration, as reflected by all of the following aggravating and mitigating circumstances:
>
> * * *
>
> (ii) Physical or psychological injury to a victim. [Emphasis added.]

PRECISE MRI OF MICHIGAN, LLC v STATE AUTO INSURANCE COMPANY

Docket No. 354653. Submitted August 10, 2021, at Detroit. Decided January 27, 2022, at 9:05 a.m.

State Auto Insurance Company moved for partial summary disposition against Precise MRI of Michigan, LLC, in the Washtenaw Circuit Court arguing that it was not liable for no-fault benefits. Airee Martin, who was not a party to this action, was injured in a motor vehicle crash and sought treatment with a chiropractor. The chiropractor ordered MRIs of Martin's cervical spine, thoracic spine, lumbar spine, and sacroiliac (SI) joints. After defendant refused to reimburse plaintiff for the MRIs provided to Martin, plaintiff obtained an assignment of rights from Martin and filed a complaint against defendant. Defendant moved for partial summary disposition, arguing that under MCL 500.3107b(b), reimbursement was not required for a practice of chiropractic service unless that service was included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009. The trial court, David S. Swartz, J., denied defendant's motion for partial summary disposition. Defendant applied for leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. Under the no-fault act, MCL 500.3101 *et seq*., personal protection insurance benefits are generally payable for medical expenses that are reasonably necessary for an insured's care, recovery, and rehabilitation. However, under MCL 500.3107b(b), as amended by 2009 PA 222, reimbursement is not required under the no-fault act for a practice of chiropractic service unless that service was included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009. Defendant argued that plaintiff could not lawfully render MRIs prescribed by a chiropractor who acted outside the scope of chiropractic practice as it was defined by MCL 333.16401 as of January 1, 2009. However, in *Skwierc v Whisnant*, 339 Mich App 393 (2021), the Court of Appeals held that even if an MRI was not within the "practice of chiropractic" as of January 1, 2009, as it was defined by MCL 333.16401, such a determination did not necessarily

render an MRI unlawful. The Court of Appeals has noted that this is so because the purpose of the licensing statute is not to prohibit the doing of acts that are excluded from the definition of chiropractic but to make it unlawful to do those things that *are* within the definition without a license. Another step in the analysis required the court to determine whether the use of the analytical instrument at issue was barred by MCL 333.16423. Under MCL 333.16423, use of an analytical instrument is not prohibited if the instrument either (1) meets nationally recognized standards or (2) has been approved by the "Board of Chiropractic." MRIs have been approved by the Board since at least 2010. Although it was not clear whether MRIs were on the Board's list of approved analytical instruments as of January 1, 2009, this information was irrelevant because MCL 500.3107b(b) refers to the "practice of chiropractic" as that term was defined on January 1, 2009. The definition of "practice of chiropractic" as of that date included the use of analytical instruments as approved by the Board. The definition of the term did not require an analytical instrument to be approved by the Board by a specific date. Therefore, regardless of whether MRIs had received approval by January 1, 2009, they were nevertheless approved by the Board. Accordingly, MRIs were not necessarily excluded from the practice of chiropractic under MCL 333.16423.

2. The Court of Appeals has stated that the mere fact that an instrument has been approved by the Board and is therefore not prohibited by MCL 333.16423 is not determinative of whether the instrument falls within the permissible scope of chiropractic in the first instance. However, in *Skwierc*, the Court of Appeals concluded that MRIs met the definition of "practice of chiropractic" in MCL 333.16401 as of January 1, 2009, and are therefore compensable when limited to an analysis of the spine. The Court in *Skwierc* noted that a chiropractor's authority to analyze and monitor the body's physiology is limited to the spinal area; therefore, when an MRI is limited to a portion of the spine, its use comes within the definition of "practice of chiropractic" as that term was defined under MCL 333.16401(1)(b)(*i*) as of January 1, 2009. The Court further concluded in *Skwierc* that because an MRI satisfied the definition of an analytical instrument, its use was appropriate within the practice of chiropractic as of January 1, 2009. Accordingly, the MRIs performed on Martin's cervical, thoracic, and lumbar spine were clearly included within the scope of chiropractic because they were limited to analysis of the spine and were used to detect and diagnose conditions related to Martin's spine. Additionally, the fourth MRI, of Martin's SI joint, was also compensable because the SI joint is part of the spine,

according to relevant authorities. Plaintiff was therefore entitled to reimbursement for these four MRIs.

Affirmed.

NO-FAULT ACT – PERSONAL PROTECTION INSURANCE BENEFITS – PRACTICE OF CHIROPRACTIC SERVICES – ANALYTICAL INSTRUMENTS – MRI.

Under MCL 500.3107b(b), as amended by 2009 PA 222, of the no-fault act, MCL 500.3101 *et seq*., reimbursement for a practice of chiropractic service is not required unless that service was included in the definition of "practice of chiropractic" in MCL 333.16401 as of January 1, 2009; additionally, under MCL 333.16423, use of an analytical instrument is not prohibited if it meets nationally recognized standards or has been approved by the Board of Chiropractic; MRIs had been approved by the board at least since 2010, but it was irrelevant whether the board had approved MRIs as analytical instruments as of January 1, 2009, because the definition of "practice of chiropractic" as of that date in MCL 500.3107b(b) included the use of analytical instruments as approved by the board, and the definition of the term did not require that an analytical instrument had to be approved by the board by a specific date; therefore, MRIs were not necessarily excluded from the practice of chiropractic under MCL 333.16423 because they were approved by the board, regardless of whether the board had approved them by January 1, 2009.

The Cronin Law Firm, PLLC (by *Dani A. Jajou* and *Sabrina Shaheen Cronin*) for Precise MRI of Michigan, LLC.

Secrest Wardle (by *Drew W. Broaddus* and *Justin A. Grimske*) for State Auto Insurance Company.

Before: RICK, P.J., and RONAYNE KRAUSE and LETICA, JJ.

RONAYNE KRAUSE, J. Defendant, State Auto Insurance Company, appeals by leave granted[1] the trial court's denial of its motion for partial summary disposition.

[1] *Precise MRI of Mich, LLC v State Auto Ins Co*, unpublished order of the Court of Appeals, entered December 11, 2020 (Docket No. 354653).

Defendant argued that four of the six magnetic resonance imaging (MRI) scans performed by plaintiff, Precise MRI of Michigan, LLC, on nonparty Airee Martin after Martin was injured in a motor vehicle collision, were not compensable under the no-fault act, MCL 500.3101 *et seq*., because the MRIs were prescribed by a chiropractor, Hassan Reichouni. Defendant specifically argued that MRI scans were not included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009, as required by MCL 500.3107b(b). Plaintiff, on the other hand, argued that summary disposition was premature and the four MRIs prescribed by Reichouni were compensable because they were taken of Martin's spine, the examination of which is within the scope of chiropractic practice. Plaintiff also argued that because chiropractors could use x-rays to locate spinal subluxations, so too could MRIs be used to locate spinal issues. The trial court agreed with plaintiff. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Martin injured her neck, lower back, and shoulders in a July 2019 motor vehicle collision. As part of the treatment of those injuries, Martin underwent six MRIs. Four of those MRIs—one of the cervical spine, one of the thoracic spine, one of the lumbar spine, and one of the sacroiliac (SI) joints—were prescribed by Reichouni and conducted by plaintiff in September 2019. The other two MRIs were conducted by plaintiff in November 2019. It is not known who prescribed the November 2019 MRIs, but the record does not reflect any challenge by defendant to those two MRIs.

After defendant refused to reimburse plaintiff for services provided to Martin, plaintiff obtained an

assignment of rights from Martin and filed a complaint against defendant alleging breach of contract and seeking declaratory relief. Defendant denied, or neither admitted nor denied, the allegations against it and asserted the bills for the MRIs prescribed by Reichouni were not compensable under the no-fault act.

Defendant then moved for partial summary disposition of plaintiff's claim for benefits related to the four MRIs prescribed by Reichouni. Defendant noted that no-fault benefits were generally payable for medical expenses lawfully rendered and reasonably necessary for an insured's care. Defendant argued, however, that, pursuant to MCL 500.3107b(b), reimbursement was not required for a practice of chiropractic service unless that service was included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009. Defendant, relying on this Court's decision in *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995), asserted that because MRIs were not included in the definition of "practice of chiropractic" as defined under MCL 333.16401 as of January 1, 2009, and that definition specifically limited chiropractors to ordering x-rays to locate spinal issues, the MRIs prescribed by Reichouni were not compensable.

Plaintiff responded, asserting that summary disposition was premature because discovery was not complete, and, in any event, the MRIs were compensable under the no-fault act. Specifically, plaintiff argued that because the MRIs related to evaluation of Martin's spine, Reichouni could lawfully prescribe them and they were, therefore, compensable. The trial court, without holding a hearing, denied defendant's motion for partial summary disposition "for the reasons stated in"

plaintiff's responsive brief. Defendant applied for leave to appeal that denial, and this Court granted defendant's application. While this appeal was pending, this Court decided *Skwierc v Whisnant*, 339 Mich App 393, 403-408; 984 NW2d 495 (2021), which held that when an MRI is used for analysis of the spine, it falls within the scope of chiropractic practice as it was defined as of January 1, 2009.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision whether to grant or deny a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 120.]

As noted in *Skwierc*, "Michigan is a state where the parameters of chiropractic care have been set not by the profession, but rather by politicians." *Skwierc*, 339 Mich App at 399. Therefore, "[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." *Id*. at 399-400, quoting *Hofmann*, 211 Mich App at 67 (quotation marks omitted; alterations in original).

> 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).]

"The primary goal of statutory interpretation is to give effect to the Legislature's intent." *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 119; 949 NW2d 73 (2020).

III. "PRACTICE OF CHIROPRACTIC" AND THE COMPENSABILITY OF MRI SCANS

Defendant argues that the MRIs prescribed by Reichouni and conducted by plaintiff are not compensable under the no-fault act. Specifically, defendant contends that under MCL 500.3107b(b), reimbursement for the MRIs is precluded because MRIs were not included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009.[2] We disagree.

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[2] Plaintiff also argued below that summary disposition was premature because discovery was not complete. To the extent plaintiff raises this argument on appeal, we disagree. "[A] party opposing summary disposition cannot simply state that summary disposition is premature without identifying a disputed issue and supporting that issue with independent evidence. The party opposing summary disposition must offer the required MCR 2.116(H) affidavits, with the probable testimony to support its contentions." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292-293; 769 NW2d 234 (2009) (citations omitted). Plaintiff failed to identify any disputed factual issues relevant to the motion for partial summary disposition for which discovery was not yet complete and did not attach any supporting affidavits. Therefore, summary disposition was not premature. See *id*.

Generally, under the no-fault act, personal protection insurance (PIP) benefits are payable for medical expenses that are reasonably necessary for an insured's care, recovery, and rehabilitation. MCL 500.3107(1)(a); *Measel*, 314 Mich App at 326; see also MCL 500.3157 (stating that a "reasonable amount" may be charged for products, services, and accommodations lawfully rendered to an injured person who is covered by insurance). However, in 2009, the Legislature enacted 2009 PA 222, which added MCL 500.3107b(b) to the no-fault act. The statute is an exception to the general rule in MCL 500.3107, and states, in relevant part:

> Reimbursement or coverage for expenses within personal protection insurance coverage under [MCL 500.3107] is not required for any of the following:
>
> * * *
>
> (b) A practice of chiropractic service, unless that service was included in the definition of practice of chiropractic under . . . MCL 333.16401, as of January 1, 2009. [MCL 500.3107b(b), as amended by 2009 PA 222.][3]

"2009 PA 222 was one of several tie-barred bills, all effective January 5, 2010, that addressed a tension between chiropractors and insurance providers

[3] MCL 500.3107b was amended by 2020 PA 104, effective July 1, 2020. As of July 1, 2020, MCL 500.3107b(b) states that reimbursement 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 section 16401 of the public health code, 1978 PA 368, MCL 333.16401, as of January 1, 2009." As will be discussed, given our conclusion that MRIs were included in the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009, the amended version of MCL 500.3107b(b) has no substantive effect in this case. In any event, the MRIs at issue were taken on September 30, 2019, *before* the effective date of the amendment.

regarding the scope of chiropractic care and related insurance liability." *Measel*, 314 Mich App at 327. "Along with 2009 PA 222, the Legislature also enacted 2009 PA 223, which expanded the scope of the definition of 'practice of chiropractic' under MCL 333.16401 of the Public Health Code." *Id*. "Thus, while 2009 PA 223 expanded the scope of the definition of 'practice of chiropractic,' 2009 PA 222 limited insurance providers' liability under the no-fault act for the newly included services." *Id*. (footnote omitted).

In *Skwierc*, this Court summarized the framework for determining whether a chiropractic service falls within the exception in MCL 500.3107b(b):

> 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. 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)." In *Measel*, 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."
>
> 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." [*Skwierc*, 339 Mich App at 402 (alterations in original; citations omitted).]

As of January 1, 2009, MCL 333.16401(1) stated:

> (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 misalignments 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 [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. 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. [*Measel*, 314 Mich App at 335-336, quoting MCL 333.16401(1), as amended by 2002 PA 734.]

The trial court did not address the initial threshold questions. Rather, it only addressed whether the MRIs at issue were within the scope of chiropractic practice as of January 1, 2009, and it concluded that the MRIs came within that definition. Defendant argues on appeal (as it did below), however, that plaintiff could not lawfully render MRIs prescribed by a chiropractor who acted outside the scope of his license, i.e., the MRIs prescribed by Reichouni were outside the scope of chiropractic practice and, therefore, not compensable.

But as this Court stated in *Skwierc*, even if an 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." *Skwierc*, 339 Mich App at 402. In *Hofmann*, this Court 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.]

This is so 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 (quotation marks and citation omitted).

After addressing the lawfulness of an MRI, the *Skwierc* Court analyzed whether the MRIs at issue came within the definition of "practice of chiropractic" under MCL 333.16401 as of January 1, 2009. *Hofmann*, however, necessitates a preliminary step before this analysis—whether use of the analytical instrument is barred by MCL 333.16423. *Hofmann*, 211 Mich App at 68-70. MCL 333.16423, as originally enacted and before it was amended by 2009 PA 221, provided:

> (1) The board shall promulgate rules to establish criteria for the approval of analytical instruments and adjustment apparatus to be used for the purpose of examining patients in locating spinal subluxations and misalignments of the human spine. The criteria established shall be substantially equivalent to nationally recognized standards in the profession for the use and operation of the

> instruments. The board may approve types and makes of analytical instruments that meet these criteria.
>
> (2) An individual shall not use analytical instruments or adjustment apparatus which does not meet nationally recognized standards or which is not approved by the board. [*Attorney General v Beno*, 422 Mich 293, 329; 373 NW2d 544 (1985).]

Mich Admin Code, R 338.12001(1)(f) defines "nationally recognized standards" as "that which is taught in a chiropractic educational program or postgraduate educational program that is accredited by the council on chiropractic education."

Before examining the extent to which a diagnostic examination came within the former definition of MCL 333.16401, the *Hofmann* Court concluded that MCL 333.16423 "does not prohibit the use of an analytical instrument or adjustment apparatus if the instrument *either* (1) meets nationally recognized standards, *or* (2) has been approved by the Board of Chiropractic." *Hofmann*, 211 Mich App at 69. Thus, "if an analytical instrument or adjustment apparatus meets nationally recognized standards *or* has been approved by the board, its use is not prohibited by § 16423(2)." *Id*. at 70. In *Hofmann*, "each of the instruments" at issue[4] had been approved by the Board and, as a result, "none of the instruments" were prohibited by MCL 333.16423. *Hofmann*, 211 Mich App at 70. This Court noted it was therefore "unnecessary to assess independently the nationally recognized standards prong of § 16423(2)." *Id*.

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[4] The instruments and services at issue in *Hofmann* included: (1) orthopedic and neurological examinations; (2) nutritional analysis and nutritional supplements; (3) cervical supports, cervical pillows, and lumbar supports; (4) cervical, spinal, and intersegmental traction; (5) hot and cold packs; (6) SOT (Sacro Occipital Technique) blocking and wedges; (7) re-evaluation x-rays; and (8) pelvic x-rays. *Hofmann*, 211 Mich App at 61.

Accordingly, before reaching the question of whether MRIs come within the definition of "practice of chiropractic" as of January 1, 2009—*Skwierc* held that they do—we must first address whether MRIs are an analytical instrument that either meets "nationally recognized standards" or is "approved by the board." *Id*. at 68-70. We conclude that MRIs satisfy MCL 333.16423.

MRIs have indeed been approved by the Board, at least as of May 2010. A document from the Michigan Association of Chiropractors regarding the Board's approval of various analytical instruments, adjustment apparatus, physical measures, and tests related to the new chiropractic scope of practice[5] states, in relevant part:

> **Analytical Instruments**
>
> Instruments used in the diagnosis of human conditions and disorders of the human musculoskeletal and nervous systems as they relate to subluxations, misalignments and joint dysfunctions. These instruments shall be used for the purpose of detecting those conditions and disorders or offering advice to seek treatment from other health

[5] This Court may take judicial notice of public records. See *Johnson v Dep't of Natural Resources*, 310 Mich App 635, 649; 873 NW2d 842 (2015), citing MRE 201. We also note this Court's statement in *Measel*, 314 Mich App at 331: "On June 1, 2010, the Michigan Department of Community Health issued a letter to chiropractic licensees outlining an approved list of analytical instruments, adjustment apparatus, tests, and physical measures falling within the broadened scope of chiropractic practice under 2009 PA 223." The content of the June 1, 2020 letter is essentially identical to that found in the document from the Michigan Association of Chiropractors regarding the Board's approval of various analytical instruments, adjustment apparatus, physical measures, and tests. This Court can take judicial notice of its own records. See, e.g., *In re Albert*, 383 Mich 722, 724; 179 NW2d 20 (1970); *In re Jones*, 286 Mich App 126, 129; 777 NW2d 728 (2009).

professionals in order to restore and maintain health, including, but not limited to:

* * *

X-ray: For diagnostic purposes only[.]

* * *

Tests

The performance, ordering or use of tests for the diagnosis of human conditions and disorders of the human musculoskeletal and nervous systems as they relate to subluxations, misalignments and joint dysfunctions. These tests shall be for the purpose of detecting those conditions and disorders or offering advice to seek treatment from other health professionals in order to restore and maintain health, including, but not limited to:

* * *

Ordering and use of non-invasive imaging tests, consistent with modern technology and related to spinal subluxations: May use an MRI of the spine to determine a patient's biomechanical problems in the spine or to offer advice to seek treatment from other healthcare professionals in order to restore or maintain health if the condition is outside the scope of chiropractic[.]

Although we lack information regarding whether MRIs were on the approved list of analytical instruments as of January 1, 2009, such information is irrelevant. MCL 500.3107b(b) refers to the "practice of chiropractic" as *that term* was defined on January 1, 2009. The definition of "practice of chiropractic" as of January 1, 2009, includes the use of analytical instruments as approved by the Board. See *Measel*, 314 Mich App at 335-336, citing MCL 333.16401(1), as amended by 2002 PA 734. Nowhere in the definition of "practice

of chiropractic" as of January 1, 2009, does it require an analytical instrument be approved by the Board by a specific date. Thus, even if MRIs did not receive approval by the Board until after January 1, 2009, they are still just that—approved by the Board. Accordingly, MRIs are, at a minimum, not necessarily excluded from the practice of chiropractic under MCL 333.16423.

Moreover, although the list from the Michigan Association of Chiropractors places MRIs under the "Tests" subheading, this Court is "interested not in form or color but in nature and substance." *Wilcox v Moore*, 354 Mich 499, 504; 93 NW2d 288 (1958); see also *Westfield Cos v Grand Valley Health Plan*, 224 Mich App 385, 389-390; 568 NW2d 854 (1997) (refusing to "put[] form over substance" to deny coverage under a contract). Thus, to hold inclusion of MRIs under the "Tests" subheading as dispositive of whether MRIs are reimbursable under the no-fault act would inappropriately exalt form over substance. Therefore, because MRIs are approved by the Board, MRIs, such as those at issue here, are not necessarily excluded from the practice of chiropractic under MCL 333.16423.[6]

"[T]he mere fact that an instrument has been approved by the board, and thus is not prohibited by § 16423(2), is not determinative of whether the instrument falls within the permissible scope of chiropractic in the first instance." *Hofmann*, 211 Mich App at 70. Accordingly, "to resolve the initial 'scope' question, we must look to the definition of 'practice of chiropractic' " in MCL 333.16401(1)(b) "and determine whether the use of a given instrument is allowed under that defi-

[6] Given our conclusion that MRIs are an analytical instrument that is "approved by the board," we need not address whether MRIs meet "nationally recognized standards." See *Hofmann*, 211 Mich App at 70.

nition." *Id*. This determination was made in *Skwierc*, where this Court concluded MRIs meet the definition of "practice of chiropractic" in MCL 333.16401 as of January 1, 2009, and, therefore, are compensable. *Skwierc*, 339 Mich App at 403-408.

The trial court denied defendant's motion for partial summary disposition for the reasons provided in plaintiff's responsive brief. Although somewhat convoluted, plaintiff argued in its responsive brief that an MRI was a "more advanced" and "safer" tool than an x-ray machine for locating and diagnosing spinal subluxations and misaligned vertebrae. Additionally, plaintiff asserted that, regardless of the advantages or disadvantages between an MRI and x-ray, "they are both analytical-diagnostic tools with the capability of locating spinal subluxations and/or misaligned vertebrae . . . ." Thus, plaintiff's argument below was premised on (1) using MRIs as a means of diagnosis, by spinal analysis, to determine the existence of spinal subluxations or misalignments under MCL 333.16401(1)(b)(*i*) as of January 1, 2009; and (2) MRIs qualifying as an "analytical instrument" used to locate spinal subluxations or misaligned vertebrae under MCL 333.16401(1)(b)(*iii*) as of January 1, 2009. The *Skwierc* Court addressed both subparagraphs on which plaintiff relied and concluded that MRIs are included within the definitions in Subparagraphs (*i*) and (*iii*).

In *Skwierc*, the plaintiff sought treatment from a chiropractor for low back pain after an automobile collision. *Skwierc*, 339 Mich App at 397. Pursuant to a referral from the chiropractor, the medical provider performed an MRI of the plaintiff's lumbar spine. *Id*. The plaintiff assigned his rights to the medical provider. *Id*. After the plaintiff sued the defen-

dant and the insurer, the medical provider intervened and filed a complaint seeking reimbursement from the insurer for services provided to the plaintiff. *Id*. at 398.

The medical provider moved for summary disposition, asserting there was no genuine issue of material fact that it was "entitled to compensation for the MRI performed on [the plaintiff]." *Id*. The medical provider alleged that the insurer had improperly denied its 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.' " *Id*. Asserting that an MRI constituted "an analytical instrument, tool, or method used by chiropractors to diagnose spinal conditions," and the MRI at issue was ordered to "diagnose the source of [the plaintiff's] low back pain," the medical provider 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." *Id*. The insurer countered and sought partial summary disposition of the medical provider's charges for the MRI services. *Id*. The insurer 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 therefore was not compensable under MCL 500.3107b(b). *Id*. at 398.

The trial court denied the medical provider's dispositive motion and granted the insurer's motion, concluding that the insurer was not required to reimburse the medical provider for the MRI under the no-fault act. *Id*. at 399. The trial court found that the MRI was "outside the scope of chiropractic practice" and concluded that the chiropractor "engaged in the unauthorized practice of medicine when ordering the MRI." *Id*.

This Court reversed, explaining that "[r]esolution of the initial scope question requires us to consider the above statutory definition of 'practice of chiropractic' [in MCL 333.16401 as of January 1, 2009,] and 'determine whether the use of a given instrument is allowed under that definition.' " *Id*. at 404, quoting *Hofmann*, 211 Mich App at 70. Analyzing the issue, the *Skwierc* Court concluded that MRIs were within the definition of practice of chiropractic as of January 1, 2009. *Skwierc*, 339 Mich App at 403-408.

The *Skwierc* Court concluded that the plaintiff's lumbar spine MRI fell within Subparagraphs (*i*) and (*iii*) of MCL 333.16401(b) as of January 1, 2009. *Skwierc*, 339 Mich App at 403-408. First, under Subparagraph (*i*), the practice of chiropractic included "[d]iagnosis, including spinal analysis, to determine the existence of spinal subluxations or misalignments that produce nerve interference, indicating the necessity for chiropractic care." MCL 333.16401(1)(b)(*i*), as amended by 2002 PA 734. *Skwierc* noted that a chiropractic "diagnosis" was "limited to the determination of existing spinal subluxations or misalignments, which can only be located at their source, i.e., the spine." *Id*. at 404 (quotation marks and citation omitted). This Court noted the trial court's findings that the lumbar spine MRI did not fall under Subparagraph (*i*) because MRIs must be interpreted by a doctor to reach a diagnosis and, thus, by themselves, MRIs did not constitute a diagnosis. *Id*. at 404-405. This Court concluded, however, that the trial court seemingly "misunderstood the applicable limits on a chiropractor's diagnostic authority in this context, which is essentially defined by the distinction between spinal and non-spinal areas." *Id*., citing *Hofmann*, 211 Mich App at 85-87. This Court further stated:

> "[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 . . . ." 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 trial court erred by concluding otherwise. [*Skwierc*, 339 Mich App at 405, quoting *Hofmann*, 211 Mich App at 85-87 (citations omitted).]

Thus, when an MRI is "limited to a portion of the spine," its use comes within the definition of "practice of chiropractic" as that term is defined under MCL 333.16401(1)(b)(*i*) as of January 1, 2009. *Skwierc*, 339 Mich App at 405.

Under MCL 333.16401(1)(b)(*iii*), the practice of chiropractic includes the "use of analytical instruments . . . regulated by rules promulgated by the board pursuant to [MCL 333.16423] . . . for the purpose of locating spinal subluxations or misaligned vertebrae of the human spine." In *Skwierc*, this Court noted that, as of January 1, 2009, "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.' " *Skwierc*, 339 Mich App at 405, quoting 2006 Annual Admin Code Supp, R 338.12001(b); see also *Hofmann*, 211 Mich App at 85 (citing earlier version of this rule containing the same language). As *Skwierc* notes, this Court previously described the nature of an MRI as "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). Thus, *Skwierc* held that, "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 in January 1, 2009." *Skwierc*, 339 Mich App at 406, citing *Hofmann*, 211 Mich App at 87-88.[7] This Court therefore concluded that because an MRI "satisfies the definition of 'analytical instrument[],' its appropriate use is within the practice of chiropractic as of January 1, 2009." *Skwierc*, 339 Mich App at 407 (alteration in original).

Accordingly, we conclude that, under *Skwierc*, at least three of the four MRIs for which defendant refused to reimburse plaintiff are clearly included within the scope of chiropractic because they were limited to an analysis of the spine and were used to detect and diagnose conditions related to subluxations and misalignments in Martin's spine. Specifically, three of the MRIs focused on Martin's cervical, thoracic, and lumbar spine. The summaries of the cervical, thoracic, and lumbar spine MRIs indicated there was no evidence of fractures or subluxation and little to no disc herniation. Because these three MRIs were limited to an analysis of Martin's cervical, lumbar, and

[7] To the extent defendant's argument can be read as asserting that x-rays are the only imaging technology usable by chiropractors, *Skwierc* rejected this argument. Specifically, this Court stated that the practice of chiropractic included the " 'use of analytical machines . . . *and* the use of x-ray machines[.]' " *Skwierc*, 339 Mich App at 407, quoting MCL 333.16401(1)(b)(*iii*), as amended by 2002 PA 734. Thus, the *Skwierc* Court concluded, x-ray machines could be used "*in addition to* the broader category of 'analytical instruments.' " *Skwierc*, 339 Mich App at 406.

thoracic spine, their use in such a manner is permitted by MCL 333.16401(1)(b)(*i*) and (*iii*), and plaintiff may be reimbursed for performing these scans on Martin. *Skwierc*, 339 Mich App at 403-408.

Determining whether the fourth MRI at issue, which involved an analysis of Martin's SI joint, is compensable requires first determining whether the SI joint constitutes a part of the spine. We conclude that it does.

According to the Mayo Clinic, "[t]he sacroiliac [(SI)] joints link your pelvis and lower spine. They're made up of the sacrum—the bony structure above your tailbone and below your lower vertebrae—and the top part (ilium) of your pelvis." Mayo Clinic, *Sacroiliac Joints* <https://www.mayoclinic.org/diseases-conditions/sacroiliitis/multimedia/sacroiliac-joints/img-200059627> (accessed December 12, 2021) [https://perma.cc/4KN3-UTBW]. Moreover, regarding whether the SI joints constitute part of the spine for purposes of this appeal, this Court in *Hofmann* explained that "[t]he relevant inquiry, as we see it, is not whether the pelvis as a whole comprises part of the spine, but rather, as the statute indicates, whether a pelvic x-ray serves the purpose of 'locating spinal subluxations or misaligned vertebrae of the human spine.' " *Hofmann*, 211 Mich App at 71, quoting MCL 333.16401(1)(b)(*iii*). The Attorneys' Dictionary of Medicine, quoted with approval by *Hofmann*, 211 Mich App at 71-72, defines the pelvis and spine respectively as follows:

> [*Pelvis*.] 1. An irregularly formed ring or girdle of bones, sometimes compared to a basin, at the lower end of the trunk, supported on the thigh bones and itself supporting the spine. It is composed of two roughly semicircular hip bones (innominate bones) *and the lower, wedgeshaped end of the spine (sacrum and coccyx)*. The two hip bones unite in front, but in the back they leave a gap which is filled in

> by the *part of the lower spine called* [*the*] *sacrum*. The coccyx is continued below the sacrum but does not touch the hip bones. The pelvis or the pelvic girdle is, therefore, actually composed of the two innominate bones *and the sacrum*. The coccyx is merely an extension. Each innominate bone (os coxae) is composed of three parts, ilium, ischium, and pubis. The spine sits on the top of the sacrum. [4 Schmidt, The Attorneys' Dictionary of Medicine (2000), p P-133 (emphasis added).]
>
> [*Spine*.] 1. The flexible bony column, in the back of the body, composed of 33 irregularly shaped, ring-like bones placed one on top of the other and held together by ligaments and muscles. Each individual bone is called *vertebra*, and the lower nine of these are fused together to form two larger bones, *the sacrum and the coccyx*. [5 Schmidt, The Attorneys' Dictionary of Medicine (2000), p S-245 (second emphasis added).]

As this Court concluded in *Hofmann*:

> These definitions disclose that, while the pelvis as a whole is not part of the spine, both the sacrum and the coccyx, which comprise part of the pelvis, also comprise part of the spine. Here, each of the plaintiffs testified, and the trial court found, that the purpose of a pelvic x-ray is to determine the existence of a sacral subluxation. Because the sacrum is considered part of the spine, a sacral subluxation would constitute a spinal subluxation within the meaning of the statute. We conclude, therefore, that a pelvic x-ray taken "for the purpose of locating [a sacral] subluxation" is authorized by § 16401(1)(b)(iii). [*Hofmann*, 211 Mich App at 72 (alteration in original).]

We conclude that the definition of "pelvis" and "spine" in The Attorneys' Dictionary of Medicine, *Hofmann*'s discussion of the pelvis, and the Mayo Clinic's description of the SI joints lead to the conclusion that the SI joints comprise part of the spine. The summary of the SI joint MRI indicates Martin complained of pain in her SI joints and sacrum. The summary also indi-

cates a finding that the "sacrum and coccyx . . . appear[ed] to be intact" and "[n]o abnormal soft tissue structure [was] seen anterior or posterior to the [SI] joints." Because the SI joints include the sacrum, which is part of the spine, and the MRI was limited to Martin's SI joint,[8] the use of the MRI to analyze Martin's SI joints is permitted by MCL 333.16401(1)(b)(*i*) and (*iii*). See *Skwierc*, 339 Mich App at 403-408. Therefore, plaintiff may also be reimbursed for the fourth MRI of Martin's SI joints.

Affirmed.

RICK, P.J., and LETICA, J., concurred with RONAYNE KRAUSE, J.

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[8] The summary indicated Martin's uterus was "[i]ncidentally" observed when the MRI was performed. "[T]o 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).' " *Skwierc*, 339 Mich App at 407, quoting *Hofmann*, 211 Mich App at 72.

PEOPLE v DIXON-BEY

Docket No. 354866. Submitted December 14, 2021, at Lansing. Decided February 1, 2022, at 9:00 a.m.

Dawn M. Dixon-Bey was charged in the Jackson Circuit Court with first-degree murder, MCL 750.316, in connection with the stabbing death of her boyfriend in their home, and she was convicted following a jury trial of second-degree murder, MCL 750.317. The court, John G. McBain, J., sentenced defendant to 35 to 70 years in prison; the 35-year minimum sentence was outside the guidelines minimum sentence range of 12 to 20 years in prison. Defendant appealed. In a published opinion, the Court of Appeals, O'BRIEN, P.J., and HOEKSTRA and BOONSTRA, JJ., affirmed defendant's conviction but vacated her sentence and remanded for resentencing. 321 Mich App 490 (2017). The Court held that the trial court abused its discretion when it imposed a minimum sentence 15 years above the top of the guidelines range without adequately explaining why its sentence was more proportionate than a sentence within the guidelines range and that none of the factors articulated by the trial court for the departure provided a reasonable basis for a departure. After the opinion was issued but before resentencing, the Supreme Court decided in *People v Beck*, 504 Mich 605 (2020), that the Due Process Clause of the United States Constitution bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which they were acquitted and basing a sentence on that finding. On remand, the trial court resentenced defendant to 30 to 70 years in prison, stating that, even though defendant was acquitted of first-degree murder, and under the facts of the case it was clear that the jury acquitted defendant of first-degree murder because it found that the element of premeditation was not established, the 10-year upward departure was because the stabbing was premeditated. Defendant appealed.

The Court of Appeals *held*:

1. Under *Beck*, it violates a defendant's right to due process when a judge increases a defendant's sentence because the judge believes that the defendant really committed one or more of the crimes on which the jury acquitted. Accordingly, a trial court may

not consider conduct of which a defendant was acquitted when crafting a sentence. While lower courts do not have to agree with the opinions of higher courts, they are obligated to comply with those opinions. In other words, a trial court is not free to disregard rules, orders, and caselaw with which it disagrees. Indeed, a lower court must follow the decision of a higher court even if it believes that the higher court incorrectly decided the matter or that the higher court's decision has become obsolete. In this case, the jury acquitted defendant of first-degree murder because it found that the element of premeditation was not established. The trial court abused its discretion when it imposed the upward-departure sentence because it based the sentence on its finding of premeditation and deliberation, a finding necessarily rejected by the jury given its verdict and contrary to the clear precedent of *Beck*.

2. Allocution before being sentenced is the defendant's opportunity to address the court, not the court's opportunity to conduct an interrogation or deliver a lecture. During allocution, the defendant must be given a meaningful opportunity to speak; a single interruption, when a defendant otherwise receives a reasonable opportunity to speak, does not deprive the defendant of the right of allocution. The Code of Judicial Conduct, Canon 3(A)(12)—which provides that a judge should avoid interruptions of counsel in their arguments except to clarify their positions and should not be tempted to the unnecessary display of learning or a premature judgment—also applies to a defendant's allocution. In this case, the trial court repeatedly questioned defendant during her allocution, taking on the role of prosecutor and abandoning its role as an impartial magistrate. As a result, defendant was denied her right of allocution.

3. At the resentencing hearing, the trial court did not act impartially and it refused to conform its rulings to the law. The appearance of justice could only be preserved by reassigning the case on remand.

Sentence vacated and case remanded for resentencing before a different judge.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Adrienne N. Young* and *Jacqueline J. McCann*) for defendant.

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

RONAYNE KRAUSE, J. Defendant, Dawn Marie Dixon-Bey, appeals as of right her sentence for second-degree murder, MCL 750.317. This case returns to this Court following our decision vacating defendant's first sentence and ordering resentencing. See *People v Dixon-Bey*, 321 Mich App 490; 909 NW2d 458 (2017). We again vacate defendant's sentence and remand for resentencing before a different judge.

I. BACKGROUND

In defendant's prior appeal, this Court set forth the following background facts:

> Defendant, Dawn Marie Dixon-Bey, was arrested after admittedly stabbing her boyfriend, Gregory Stack (the victim), to death in their home on February 14, 2015. At first, she claimed that the victim must have been stabbed during an altercation with others before returning to their home. Later, however, defendant admitted that she was the person who stabbed the victim but claimed that she had only done so in self-defense. She was subsequently charged with first-degree murder, MCL 750.316, and, after an eight-day jury trial, was found guilty of second-degree murder, MCL 750.317. [*Dixon-Bey*, 321 Mich App at 494-495.]

Defendant's guidelines minimum sentence range was 12 to 20 years' imprisonment, but the trial court imposed a sentence of 35 to 70 years in prison.

On appeal, this Court affirmed defendant's conviction but vacated her sentence and remanded for resen-

tencing *Id*. at 495. We held that the trial court's upward departure of 15 years from the top of defendant's guidelines range violated the principle of proportionality, that the trial court erred by failing to adequately explain why its sentence was more proportionate than a sentence within the guidelines range, and that the trial court erred by concluding that defendant had a noteworthy criminal history on this record. *Id*. at 523-526. We also held that none of the factors discussed by the trial court provided a reasonable basis for a departure sentence because those factors were either already accounted for by the sentencing guidelines or inconsistent with the scoring of the guidelines. *Id*. at 526-527. We noted that we were "highly skeptical of a trial court's decision to sentence a defendant convicted of second-degree murder as though the murder were premeditated."[1] *Id*. at 528. We observed that many factors relied upon by the trial court were neither special nor relevant. *Id*. at 529. At defendant's resentencing hearing, the trial court again acknowledged that the guidelines minimum sentence range was 12 to 20 years' imprisonment. The trial court resentenced her to 30 to 70 years' incarceration.

II. STANDARDS OF REVIEW AND PRINCIPLES OF LAW

"A sentence that departs from the applicable guidelines range will be reviewed by an appellate court for reasonableness." *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015). "[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."

[1] *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019), cert den sub nom *Michigan v Beck*, ___ US ___; 140 S Ct 1243 (2020), which is discussed later in this opinion, had not yet been decided when this Court issued its prior opinion.

People v Steanhouse, 500 Mich 453, 471; 902 NW2d 327 (2017). A trial court abuses its sentencing discretion when the sentence imposed by the trial court is disproportionate to the seriousness of the circumstances involving the offense and the offender. *Id*. at 459-460. A number of factors have been deemed appropriate to consider when determining the proportionality of a departure sentence, including the seriousness of the offense; factors not accounted for by the guidelines, such as the prior relationship between the victim and the defendant, a lack of remorse, or a low potential for rehabilitation; and factors accounted for by the guidelines but given inadequate weight under the circumstances. *People v Houston*, 448 Mich 312, 321-325; 532 NW2d 508 (1995). "[D]epartures are appropriate [when] the guidelines do not adequately account for important factors legitimately considered at sentencing." *People v Milbourn*, 435 Mich 630, 657; 461 NW2d 1 (1990). The existence of a departure factor is a factual question reviewed for clear error on appeal. See *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

The interpretation of court rules and statutes "is a question of law that we review de novo." *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). When a defendant argues that a trial court denied them the right of allocution at sentencing in violation of MCR 6.425, this Court also reviews "de novo the scope and applicability of the common-law right to allocute, also a question of law." *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003). Trial courts must strictly comply with a defendant's right of allocution. *People v Kammeraad*, 307 Mich App 98, 149; 858 NW2d 490 (2014). Claims alleging a violation of constitutional due process are reviewed de novo; however, any underlying factual findings are reviewed for clear error. *People v Brown*, 339 Mich App 411, 419; 984 NW2d 486 (2021).

III. PROPORTIONALITY

After this Court's opinion in defendant's prior appeal, but before the trial court held the resentencing hearing, our Supreme Court decided *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019), cert den sub nom *Michigan v Beck*, ___ US ___; 140 S Ct 1243 (2020). *Beck* held that, unlike uncharged conduct, a trial court is forbidden from using acquitted conduct when crafting a sentence. *Beck*, 504 Mich at 609, 629. Our Supreme Court explicitly held that it violates a defendant's right to due process when a judge increases a defendant's sentence "because the judge believes that the defendant really committed one or more of the crimes on which the jury acquitted." *Id*. at 609. As this Court has observed, there may be situations in which it is not obvious what conduct should be considered "acquitted." *Brown*, 339 Mich App at 421-422. However, this is not one of those situations. The jury acquitted defendant of first-degree murder and convicted her of second-degree murder. It could not be plainer that the jury acquitted defendant of first-degree murder because it found that the element of premeditation was not established. Nevertheless, the trial court, in its own words, "g[ave] [defendant] an additional 10 years in prison for a cold blooded, premeditated stabbing of a victim of this community . . . ." The trial court's blatant refusal to follow *Beck* persisted-despite both attorneys advising the trial court that *Beck* prohibited the use of acquitted conduct when crafting a sentence.[2]

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[2] After the trial court stated its view that the murder was premeditated, the prosecutor stated:

> Your Honor, you have the right to believe that it was first degree murder. But the Michigan Supreme Court has, for better or worse, ruled that you're not allowed to consider that in sentencing. That's what the bottom line is.

No law or rule obligates courts or individual judges to agree with opinions from higher courts. Nor is there any law or rule obligating courts or judges to pretend to agree with decisions and opinions from higher courts. However, courts are obligated to *comply* with decisions and opinions from higher courts. We remind the trial court that

> Michigan has a hierarchical judicial system, and trial courts are required to follow applicable rules, orders, and caselaw established by appellate courts, including the United States Supreme Court. This structure is essential to the orderly, uniform, and equal administration of justice. A trial court is not free to disregard rules, orders, and caselaw with which it disagrees or to become a law unto itself. Although a trial court is not required to agree with appellate rules, orders, and caselaw, as with litigants and all other citizens seeking to comply with the law, the court is required in good faith to follow those rules, orders, and caselaw. Judges, like all other persons, are required to act *within* the law. This is the essence of the rule of law, and this is the essence of the equal rule of the law. [*Pellegrino v AMPCO Sys Parking*, 486 Mich 330, 352-354; 785 NW2d 45 (2010).]

To be clear, lower courts must follow decisions of higher courts even if they believe the higher court's decision was wrongly decided or has become obsolete. *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). If a trial judge is unable to follow the law as determined by a higher appellate court, the trial judge is in the wrong line of work. See Code of Judicial Conduct, Canon 2 and Canon 3(A)(1); see also *Pellegrino*, 486 Mich at 352.

The prosecution argues that we should ignore *Beck* and instead follow *United States v Watts*, 519 US 148, 157; 117 S Ct 633; 136 L Ed 554 (1997), in which the United States Supreme Court held that a federal

sentencing court, applying the federal sentencing guidelines, may conclude by a preponderance of the evidence that a defendant committed a crime even though acquitted of the conduct by a jury. However, *Beck* binds us no less than it does the trial court. See, e.g., *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987). In any event, we do not agree that *Beck* was wrongly decided, and we would have no reason to express such an opinion here. In *Watts*, the United States Supreme Court analyzed whether 18 USC 3661 and the United States Sentencing Guidelines permitted sentencing courts to consider acquitted conduct. *Watts*, 519 US at 149-153. As our Supreme Court observed, *Watts* noted that such consideration did not violate the Fifth Amendment, but *Watts* never addressed the Fourteenth Amendment right to due process. *Beck*, 504 Mich at 615. Moreover, the United States Supreme Court later regarded *Watts* as having " 'presented a very narrow question' " without " 'the benefit of full briefing or oral argument,' " and as a consequence, *Watts* failed to consider whether reliance upon acquitted conduct violated due process. *Id*. at 624-625, quoting *United States v Booker*, 543 US 220, 240 n 4; 125 S Ct 738; 160 L Ed 2d 621 (2005). In short, *Watts* does not conflict with *Beck*, and our Supreme Court has already given *Watts* ample consideration.

The trial court's upward sentence departure based on its finding of premeditation and deliberation, contrary to the jury's verdict, was an abuse of discretion and a willful violation of controlling precedent from our Supreme Court. We therefore need not consider the trial court's other stated justifications for imposing a departure sentence.[3]

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[3] This Court has not previously held, and we do not now hold, that an upward departure from defendant's sentencing guidelines would necessarily constitute an abuse of discretion.

IV. RIGHT OF ALLOCUTION

Defendant further argues that she was deprived of her right of allocution. We agree.

At the resentencing, after both attorneys informed the trial court that it was not permitted to factor its belief that defendant committed first-degree murder into sentencing, the following exchange occurred:

> *The Court*: Ms. Bey, is there anything that you'd like to tell the Court for further consideration at your resentencing?
>
> [*Defendant*]: Well, since I've been here I've tried to do all—get into all the programming I can as far as like anger management, grief counseling. All my programming for paroling and all of that I can't get into because of the years I have.
>
> I got into—my jobbing is like for visual aid, wheelchair aid, things like that to help other people out because of things that I've done. I take responsibility for what I did. I can't stress enough how—
>
> *The Court*: Well, let me ask you, do you think you took responsibility for it when you were sentenced?
>
> [*Defendant*]: I did take responsibility. I took a life that didn't belong to me. I took a life from his children, from his family, from everybody that knew him. And that is something that I'm going to have to deal with for the rest of my life, that I took a life that didn't belong to me. I should not have took [sic] that life.
>
> I should—that's my burden. And—
>
> *The Court*: And how do you think you took his life?
>
> [*Defendant*]: What do you mean?
>
> [*Defense Counsel*]: Your Honor—
>
> *The Court*: No, no—
>
> [*Defense Counsel*]: Your Honor, I'm not trying—
>
> *The Court*: You know, counsel—

[*Defendant*]: I took—

The Court: Go ahead, I'll just comment on the facts myself.

[*Defendant*]: I killed him.

The Court: Yeah, with two stab wounds directly to the heart, right? That's not in dispute.

[*Defense Counsel*]: Your Honor, can I place something on the record, I want to make a record?

The Court: Sure, go ahead, counsel.

[*Defense Counsel*]: Yeah, I would object. I don't think this is appropriate to rehash all of this. And we're not—

The Court: Okay. I'm the one that's answering and asking a couple—

[*Defense Counsel*]: (Multiple speakers).

The Court: —questions to your client who wants to testify, all right? And she tells me she's remorseful and I asked her, how did you kill him. I mean, I sat as the trial Judge, I'm intimately aware how she killed him.

[*Defense Counsel*]: Again, I just put my objection on the record. It's your courtroom, your Honor, I know that position. Obviously, you will make the decisions and call the shots, I'm just placing an objection on the record.

The Court: Your objection is so noted, counsel. Let's move on.

Anything further, Ms. Bey?

[*Defendant*]: No, sir.

The Court: All right. Thank you.

Thereafter, the prosecutor again noted that the trial court was not permitted to consider defendant to have committed first-degree murder, but it urged the trial court to consider other reasons for departing upwards from the sentencing guidelines.

As an initial matter, allocution is not testimony. Defendant was not sworn in, and even if she had been

sworn in, it would not have been the trial court's role to conduct what was effectively a cross-examination. Furthermore, the trial court actively prevented defendant from expressing remorse and responsibility after the crime by focusing on the crime itself—and its impermissible consideration of its interpretation of that crime. The trial court's commentary indicated that it wished to provide its own testimony, seemingly in the pursuit of a sentencing decision it had already decided upon before allocution and contrary to the law as explained by both attorneys.

The trial court was, of course, not under any obligation to accept anything defendant said, and it would have been appropriate for the trial court to state as much when imposing sentence. See *People v Westbrook*, 188 Mich App 615, 616-617; 470 NW2d 495 (1991). Furthermore, a single interruption, where a defendant otherwise receives a reasonable opportunity to speak, does not deprive the defendant of the right of allocution. *People v Reeves*, 143 Mich App 105, 107; 371 NW2d 488 (1985). It would also have been appropriate for the court to interrupt for the purpose of seeking clarification of a defendant's statements. See *People v Howell*, 168 Mich App 227, 236-237; 423 NW2d 629 (1988). However, allocution is the *defendant's* opportunity to *address the court*, not the court's opportunity to conduct an interrogation or deliver a lecture. See *People v Bailey*, 330 Mich App 41, 67-68; 944 NW2d 370 (2019). The trial court may deliver a lecture or express its disbelief afterwards, during sentencing. During allocution, it must permit the defendant a meaningful opportunity to speak.

Code of Judicial Conduct, Canon 3(A)(12) states that "a judge should avoid interruptions of counsel in their arguments except to clarify their positions, and should

not be tempted to the unnecessary display of learning or a premature judgment." The same principle applies to a defendant's allocution. Defendant declined to speak further, following the trial court's dismissive response to her attorney's objection to the trial court grilling defendant instead of listening to her. Under the circumstances, that can hardly be construed as an expression of satisfaction; it is far more likely to have been the result of intimidation in light of the fact that the trial court had abandoned its role as an impartial magistrate and instead usurped the role of prosecutor. See *People v Redfern*, 71 Mich App 452, 456-457; 248 NW2d 582 (1976).[4] Defendant reasonably would have wished to avoid incurring even further displeasure from the trial court. *Id*. Under the circumstances, it is clear defendant was offered only an illusory and superficial opportunity for allocution. The distinction between a conversation and an argument may not always be clear, but the trial court plainly violated defendant's rights here.

V. REMAND BEFORE A DIFFERENT JUDGE

Defendant finally argues that resentencing should be assigned to a different trial court judge. We agree.

When a case is remanded for resentencing, the reviewing court may hold that resentencing should be carried out by a different judge. *People v Evans*, 156 Mich App 68, 71-72; 401 NW2d 312 (1986); see also

[4] In *Redfern*, at issue was whether the trial court's improper questioning of the defendant deprived the defendant of a fair trial by prejudicing the jury, which is not a concern at sentencing. However, *Redfern* nevertheless illustrates the point that a trial court may overstep its bounds by going beyond merely seeking to clarify ambiguous statements. *Redfern*, 71 Mich App at 457.

People v Hill, 221 Mich App 391, 398; 561 NW2d 862 (1997). In determining whether to reassign, this Court examines three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed [sic] views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*Evans*, 156 Mich App at 72 (quotation marks and citation omitted).]

The trial court's abandonment of impartiality and unwillingness to follow the law would be bad enough, but the trial court also went so far as to state on the record, "And if they want another Judge to do it again and maybe they can convince some Judge that, oh, I should get only 12 years for a second-degree murder[5] when I stabbed somebody in the heart twice." This statement further reflects the inability of the trial court to conform its rulings to the law, and the appearance of justice can only be preserved by reassigning this case on remand. Furthermore, the trial court's conduct and statements may warrant investigation by the Judicial Tenure Commission. See *Pellegrino*, 486 Mich at 352.

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[5] The trial court apparently failed to recognize that it was not limited to a 12-year minimum sentence: it could have sentenced defendant to a 20-year minimum sentence and remained within the guidelines, drastically curtailing appellate review. See *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018). Furthermore, although we express no opinion under the circumstances as to their substantive merit, the prosecutor argued to the trial court that there were other possible grounds for an upwards departure that would not have contravened *Beck*.

Defendant's sentence is vacated, and this matter is remanded for resentencing before a different judge. We do not retain jurisdiction.

MARKEY, P.J., and SHAPIRO, J., concurred with RONAYNE KRAUSE, J.

GAVRILIDES MANAGEMENT COMPANY, LLC v MICHIGAN INSURANCE COMPANY

Docket No. 354418. Submitted December 15, 2021, at Lansing. Decided February 1, 2022, at 9:05 a.m. Leave to appeal denied 510 Mich 1086 (2022).

Gavrilides Management Company, LLC, Gavrilides Property Management, LLC, and Gavrilides Management Williamston, LLC, filed a breach-of-contract action in the Ingham Circuit Court against Michigan Insurance Company, seeking to recover payment for business losses under a commercial insurance policy they had with defendant. Relevant here, the policy contained a business-income form in which defendant agreed to pay for actual loss of business income sustained by plaintiffs because of a necessary suspension of their operations during a period of restoration. The provision required that the suspension be caused by direct physical loss of or damage to property at the premises and that the loss or damage be caused by or result from a covered cause of loss. In addition, the policy included an exclusion for loss because of virus or bacteria (virus exclusion); specifically, under the exclusion, defendant would not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness, or disease. In 2020, Governor Whitmer issued EO 2020-21 and EO 2020-42 in response to the Covid-19 pandemic; the orders applied statewide and prohibited nonessential in-person work, generally ordered persons to stay at home, and required people to stay at least six feet away from each other. Because of the orders, plaintiffs' two restaurants were closed to in-person service, resulting in a significant loss of income; at the time plaintiffs filed their complaint, one of their restaurants remained open for carryout services only, and the other one had closed entirely. Plaintiffs submitted a claim to defendant for business-interruption losses. Defendant denied the claim, stating that the virus-exclusion endorsement precluded the claim because plaintiffs failed to demonstrate "direct physical loss of or damage to property" and that other exclusions or limitations on coverage could also apply. Plaintiffs filed this action, and defendant moved

for summary disposition. The court, Joyce Draganchuk, J., granted defendant's motion and dismissed plaintiffs' complaint. Plaintiffs appealed.

The Court of Appeals *held*:

1. In the absence of definite indications in the law of some contrary public policy, contracts generally must be enforced as written. In that regard, an insurance policy is enforced in accordance with its terms, and when a term is not defined in the policy, it is accorded its commonly understood meaning. An insurance policy must be read as a whole to determine and effectuate the intent of the parties. Courts may not rewrite clear and unambiguous language in an insurance policy. However, exclusionary clauses are strictly construed against the insurer. The policy in this case required direct physical loss of property or direct physical damage to property for the coverage to apply. The word "physical" required the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises, and plaintiffs failed to assert this in their complaint. Plaintiffs asserted in their complaint that their restaurants were not contaminated with the SARS-CoV-2 virus, but the executive orders applied to all businesses without regard to whether the virus could be found within those businesses. Thus, plaintiffs' restaurants were unambiguously closed by the impersonal operation of a general law, not because anything about or inside the particular premises had physically changed. Thus, plaintiffs failed to establish "direct physical loss of or damage to property" as required by the policy. Plaintiffs' claim also appeared to be precluded under another provision of the policy, which excluded coverage, in part, for loss or damage caused directly or indirectly by the enforcement of any ordinance or law regulating the use of any property; the executive orders presumably constituted "the enforcement of any law" for purposes of the policy. Coverage for business losses were also precluded because plaintiffs' losses were not amenable to physical remediation given the nature of the executive orders. Plaintiffs also could not recover business losses under the policy's civil-authority provision—which allowed for the recovery of business losses when an action of civil authority prohibits access to the insured's property because of damage to another person's property and the civil authority's action is taken in response to dangerous physical conditions resulting from the damage—because plaintiffs did not allege the required damage to nearby property and the executive orders did not cordon off a defined area, an expected requirement of the provision.

2. The virus exclusion applied to the business-income form because the policy provided that it applied to all coverage under all forms and endorsements, including forms or endorsements that covered business income, extra expense, or action of civil authority; as used in the virus exclusion, "loss or damage" was not restricted to physical losses or damages. The exclusion was narrowly construed as applying to any loss that was caused by or that resulted from a virus that can cause distress, illness, or disease; because SARS-CoV-2 is a virus that fits within that definition, if plaintiffs suffered any material loss, that loss could only have been caused by the virus, so the virus exclusion necessarily applied. Accordingly, defendant properly denied plaintiffs' claim under the virus exclusion.

3. The trial court correctly granted defendant's motion for summary disposition because plaintiffs' business losses were not covered under the terms of their policy with defendant. The court did not abuse its discretion by denying plaintiffs' motion to amend their complaint. The proposed amendment—that their premises were physically affected by the SARS-CoV-2 virus—would have been futile because, if the amendment were permitted, the virus exclusion would have applied to deny coverage.

Affirmed.

The Nichols Law Firm, PLLC (by *Matthew J. Heos*), *DiCello Levitt Gutzler LLC* (by *Adam J. Levitt*, *Mark Hamill*, and *Kenneth P. Abbarno*), *The Lanier Law Firm PC* (by *Mark Lanier*), *Burns Bowen Bair LLP* (by *Timothy W. Burns* and *Freya K. Bowen*), and *Daniels & Tredennick* (by *Douglas Daniels*) for plaintiffs.

Secrest Wardle (by *Henry S. Emrich* and *Drew W. Broaddus*), *Butzel Long* (by *Kurtis T. Wilder*), and *Horst Krekstein & Runyon LLC* (by *Robert M. Runyon III*) for defendant.

Amici Curiae:

Robinson & Cole LLP (by *Thomas J. Donlon*) for American Property Casualty Insurance Association and National Association of Mutual Insurance Companies.

Reed Smith LLP (by *Kevin B. Dreher*) for United Policyholders.

Honigman LLP (by *Peter B. Ruddell* and *Keith D. Underkoffler*) for Michigan Restaurant and Lodging Association and Restaurant Law Center.

Miller Canfield Paddock and Stone, PLC (by *Paul D. Hudson* and *Joel C. Bryant*) for Insurance Alliance of Michigan.

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

PER CURIAM. Plaintiffs, the corporate entities that operate two restaurants in the mid-Michigan area, appeal by right the trial court's order granting summary disposition in favor of defendant, which provided plaintiffs with a commercial insurance policy. We affirm.

I. BACKGROUND

The year 2020 saw the outbreak of a global pandemic caused by the SARS-CoV-2 coronavirus, which causes a disease known as COVID-19. The outcome of infection can range from no symptoms at all to death, and surviving an infection can cause lasting health effects. It is an understatement to say that governments worldwide, national to local, have struggled with how best to address not only the medical fallout from the pandemic, but also the social and economic ramifications. Although the virus remains not fully understood, it is generally believed to be transmissible primarily through airborne viral particles or virus-bearing droplets, but it can also be transmissible through touching contaminated surfaces and then

touching the eyes, nose, or mouth. Not surprisingly, one of the more common methods implemented by governments for reducing the spread of the disease has been "social distancing." Very broadly, social distancing generally entails keeping one's distance from others; avoiding large groups, especially in enclosed spaces; and staying home to the extent possible.

Governor Whitmer issued a number of Executive Orders (EOs) in an effort to address and stem the rising tide of COVID-19 in Michigan. Effective March 24, 2020, Governor Whitmer signed EO 2020-21, which, in relevant part, prohibited nonessential in-person work, generally ordered persons to stay home, and required persons to stay at least six feet away from each other ("social distancing"). Subsequently, EO 2020-42, in relevant part, extended EO 2020-21. As a consequence of those EOs, plaintiffs' restaurants—like many other businesses in Michigan and elsewhere—experienced substantial loss of income. As of the date of plaintiffs' complaint, one of its restaurants remained in operation, limited to carryout services, and one restaurant had closed entirely.

Defendant issued a commercial insurance policy to plaintiffs. The policy contains a "Business Income (and Extra Expense) Coverage Form," which provides, in relevant part:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the declarations. The loss or damage must be caused by or result from a Covered Cause of Loss.

The form provides, in relevant part, the following definitions:

> **2.** "Operations" means:
>
> **a.** Your business activities occurring at the described premises; and
>
> **b.** The tenantability of the described premises, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.
>
> **3.** "Period of restoration" means the period of time that:
>
> **a.** Begins:
>
> **(1)** 72 hours after the time of direct physical loss or damage for Business Income Coverage; or
>
> **(2)** Immediately after the time of direct physical loss or damage for Extra Expense Coverage;
>
> caused by or resulting from any Covered Cause of Loss at the described premises; and
>
> **b.** Ends on the earlier of:
>
> **(1)** The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
>
> **(2)** The date when business is resumed at a new permanent location.
>
> * * *
>
> **6.** "Suspension" means:
>
> **a.** The slowdown or cessation of your business activities; or
>
> **b.** That a part or all of the described premises is rendered untenantable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.

The parties agree that a "special form" governs causes of loss as follows:

> **A. Covered Causes Of Loss**
>
> When Special is shown in the Declarations, Covered Causes of Loss means Risks Of Direct Physical Loss unless the loss is:
>
> **1.** Excluded in Section **B.**, Exclusions; or
>
> **2.** Limited in Section **C.**, Limitations;
>
> that follow.
>
> **B. Exclusions**
>
> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> **a. Ordinance Or Law**
>
> The enforcement of any ordinance or law:
>
> **(1)** Regulating the construction, use or repair of any property; or
>
> **(2)** Requiring the tearing down of any property, including the cost of removing its debris.
>
> This exclusion, Ordinance or Law, applies whether the loss results from:
>
> **(a)** An ordinance or law that is enforced even if the property has not been damaged; or
>
> **(b)** The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

* * *

> **c. Governmental Action**
>
> Seizure or destruction of property by order of governmental authority.
>
> * * *
>
> **3.** We will not pay for loss or damage caused by or resulting from any of the following, **3.a.** through **3.c.** But if an excluded cause of loss that is listed in **3.a.** through **3.c.** results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> * * *
>
> **b.** Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Finally, the policy includes an "Exclusion of Loss Due to Virus or Bacteria" endorsement, which provides, in relevant part:

> **A.** The exclusion set forth in Paragraph **B.** applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority.
>
> **B.** We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.

Plaintiffs submitted a claim for business-interruption losses to defendant. Defendant denied the claim. Defendant explained that the Exclusion of Loss Due to Virus or Bacteria endorsement precluded plaintiffs' claim: plaintiffs had not demonstrated "direct physical loss of or damage to property," and "other exclusions or

limitations on coverage may also apply." Plaintiffs commenced this action, whereupon defendant moved for summary disposition. The trial court agreed with defendant, and this appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record 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). Defendant moved for summary disposition under MCR 2.116(C)(10), and the trial court granted summary disposition under MCR 2.116(C)(8). "Where summary disposition is granted under the wrong rule, Michigan appellate courts, according to longstanding practice, will review the order under the correct rule." *Spiek v Dep't of Transp*, 456 Mich 331, 338 n 9; 572 NW2d 201 (1998).

When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all evidence submitted by the parties in the light most favorable to the nonmoving party and grants summary disposition only when the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. A motion brought under MCR 2.116(C)(8) should be granted only when the complaint is so legally deficient that recovery would be impossible even if all well-pleaded facts were true and construed in the light most favorable to the nonmoving party. *Id*. at 119. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. Because plaintiffs attached a copy of the insurance policy to their complaint, the policy is part of the pleadings.

Veritas Auto & Machinery LLC v FCA Int'l Operations LLC, 335 Mich App 602, 608; 968 NW2d 1 (2021).

This Court reviews de novo the interpretation and application of an insurance policy. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). This Court reviews for an abuse of discretion a lower court's decision regarding an amendment of a complaint. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). An abuse of discretion occurs when a trial court makes a decision that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. CONTRACT INTERPRETATION PRINCIPLES

As an initial matter, we have been presented with several thoughtful, well-written, and thorough briefs from various amici, but much of what amici present are policy arguments outside the scope of this Court's remit. For example, whether our decision will have apocalyptic ramifications to the insurance industry or to the restaurant industry is certainly of concern, but no facts supporting such dire predictions are developed in the record and, more importantly, are concerns more appropriately directed to the Legislature or Congress. Amicus United Policyholders argues that many insurers use "standard-form" policies, the contents of which are only negotiated between "the insurance industry" and certain regulatory bodies, following which "policyholders are offered the approved forms on a take-it-or-leave-it basis." United Policyholders argues that the insurance industry nationwide misrepresented the nature of the virus exclusion when obtaining approval for that form from the relevant regulatory bodies and therefore should be estopped from denying coverage on

the basis of the exclusion. We decline to consider this argument because it was not made by plaintiffs, and the record does not contain any evidence showing that any such alleged misrepresentation occurred in Michigan.[1]

We emphasize that we do not believe the concerns raised by amici are unwarranted or unimportant. Furthermore, there are occasions in which public-policy concerns can and should compel courts to rescind contracts. See *Badon v Gen Motors Corp*, 188 Mich App 430, 438-439; 470 NW2d 436 (1991). However, a "public policy" clear enough to force the rescission of an otherwise valid contract must come from objective sources, not from individual judges' subjective views. *Terrien v Zwit*, 467 Mich 56, 66-69; 648 NW2d 602 (2002). Ideally, the best source of public policy is the Legislature. *Woodman v Kera LLC*, 486 Mich 228, 245-246; 785 NW2d 1 (2010). "By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition." *Van v Zahorik*, 227 Mich App 90, 98; 575 NW2d 566 (1997) (quotation marks and citation omitted). "To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue." *Id*. at 98-99

[1] Although we do not necessarily foreclose such an argument as a matter of law, we note that a lack of bargaining power by a policyholder justifies construing language in an insurance policy strictly against the insurer but not, standing alone, rewriting an unambiguous policy. *American Bumper & Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 448; 550 NW2d 475 (1996). If the kind of misrepresentation alleged by United Policyholders did occur in Michigan, we suggest that plaintiffs seek action by the Insurance Commission because, absent action by our Supreme Court, our decision to affirm concludes this litigation.

(quotation marks and citation omitted). In the absence of "definite indications in the law of some contrary public policy," contracts generally must be enforced as written. *Bronner v Detroit*, 507 Mich 158, 166; 968 NW2d 310 (2021) (quotation marks and citation omitted).

"An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning." *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). This Court may consult dictionary definitions. See *id*. at 534-535. "An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to determine what the agreement was and effectuate the intent of the parties." *Hunt v Drielick*, 496 Mich 366, 372; 852 NW2d 562 (2014) (quotation marks and citation omitted). "[A]n insurance policy must be read as a whole to determine and effectuate the parties' intent." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 292; 778 NW2d 275 (2009). "An insurance contract must be construed so as to give effect to every word, clause, and phrase, and a construction should be avoided that would render any part of the contract surplusage or nugatory." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005).

This Court may not rewrite clear and unambiguous language in an insurance policy. *Group Ins Co of Mich v Czopek*, 440 Mich 590, 596-597; 489 NW2d 444 (1992). However, exclusionary clauses are strictly construed against the insurer, *Hunt*, 496 Mich at 373, and "any ambiguities are strictly construed against the insurer to maximize coverage," *American Bumper & Mfg Co*, 452 Mich at 448. In addition, the courts may not create an ambiguity where none exists, and unam-

biguous language must be applied as written. *Id*.; *Farm Bureau Mut Ins Co of Mich v Stark,* 437 Mich 175, 181-182; 468 NW2d 498 (1991), overruled on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446 (1999); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 470-477; 663 NW2d 447 (2003).

IV. "DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY"

Plaintiffs argue that they suffered "direct physical loss of or damage to property" within the meaning of defendant's policy. We disagree.

The word "or" typically indicates a disjunction or separation. *Mich Pub Serv Co v Cheboygan*, 324 Mich 309, 341; 37 NW2d 116 (1949). As used here, the policy clearly requires "direct physical loss of property" or "direct physical damage to property" in order for coverage to apply. For purposes of resolving this appeal, we accept, without deciding, plaintiffs' contention that any such loss or damage need not be permanent. Nevertheless, the word "physical" necessarily requires the loss or damage to have some manner of tangible and measurable presence or effect in, on, or to the premises.[2] Plaintiffs also argue that any such loss or damage can include contamination to the environment within a building, such as the air, even in the absence of any detectable alteration to the structure or other property. We find this latter argument questionable because it seemingly describes an *indirect* physical loss

[2] The word "physical" "means of or pertaining to that which is material[.]" *People v Yamat*, 475 Mich 49, 54 n 15; 714 NW2d 335 (2006) (quotation marks and citation omitted). "Material means relating to, derived from, or consisting of matter and being of a physical or worldly nature." *Total Armored Car Serv, Inc v Dep't of Treasury*, 325 Mich App 403, 409; 926 NW2d 276 (2018) (quotation marks, citation, and brackets omitted).

or damage, which would be precluded by the word "direct" in the policy. We need not decide the substantive merits of this argument, however, because in any event, plaintiffs' complaint does not assert the requisite material existence.

In particular, the allegations in the complaint indicate that plaintiffs' restaurants were *not* contaminated with the SARS-CoV-2 virus. The complaint asserts that nothing happened to the premises beyond partial or complete closure because of two EOs that had statewide applicability. Furthermore, EO 2020-21 and EO 2020-42 unambiguously indicate that their primary purpose is to curtail person-to-person transmission of the virus. The orders mandated social distancing to the extent possible even at businesses that remained open. The orders also mandated "[i]ncreasing standards of facility cleaning and disinfection to limit worker and patron exposure to COVID-19, as well as protocols to clean and disinfect in the event of a positive COVID-19 case in the workplace." EO 2020-21, § 5(c)(4); EO 2020-42, § 10(e). We do not think mandating a more rigorous cleaning regimen constitutes damage or loss, and the complaint explicitly alleges that there were no positive COVID-19 cases at plaintiffs' establishments. Importantly, the EOs applied to all businesses without regard to whether a single viral particle could be found within. Plaintiffs' restaurants were unambiguously closed by impersonal operation of a general law, not because anything about or inside the particular premises at issue had physically changed.[3]

[3] Plaintiffs seek to amend their complaint to allege, in relevant part, that the virus was physically present within its restaurants, so there was a material change in the premises. As we will discuss, however, any such amendment would be futile because it would implicate the exclusion for damage or loss caused by a virus.

In addition to failing to establish "direct physical loss of or damage to property," plaintiffs' claim would appear to be precluded by § B(1)(a)(1) of the "special form," which states, in relevant part, "[w]e will not pay for loss or damage caused directly or indirectly by . . . [t]he enforcement of any ordinance or law . . . [r]egulating the construction, *use* or repair of any property[.]" (Emphasis added; paragraph structure omitted.) "[A]s a general proposition, it cannot be denied that executive orders may be given the force of law if authorized by a statute that constitutionally delegates power to the executive or, indeed, as a function of any other constitutional authority, including that inherent within the executive power." *In re Certified Questions from United States Dist Court, Western Dist of Mich, Southern Div*, 506 Mich 332, 343 n 6; 958 NW2d 1 (2020) (opinion by MARKMAN, J.).[4] Presuming the EOs relevant to this matter constituted "the enforcement of any . . . law" within the meaning of § B(1)(a)(1), plaintiffs effectively claim to have suffered losses as a consequence of the closure of their restaurants because of the enforcement of a law. In addition to such loss or damage lacking any tangible presence in or on the premises, the policy provision expressly states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

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[4] Furthermore, § B(3)(b) of the same "special form" precludes payment for losses or damage "resulting from . . . [a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." (Paragraph structure omitted.) This provision also states that defendant will pay for such loss or damage if it "results in a Covered Cause of Loss[.]" However, the Executive Orders themselves did not result in a covered cause of loss, i.e., physical loss or damage to the premises.

We also observe that the business-income-loss provision applies "during the 'period of restoration.' " The "period of restoration" ends, by definition, either "when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality" or "when business is resumed at a new permanent location." As noted, contracts must be read as a whole, and we must strive to avoid rendering any part of a contract nugatory. *Hastings Mut Ins Co*, 286 Mich App at 292; *Royal Prop Group, LLC*, 267 Mich App at 715. The EOs applied statewide and without regard to actual contamination of premises. Consequently, moving to a new location would not have permitted plaintiffs' restaurants to reopen. Likewise, no repair, reconstruction, or replacement of the premises would have permitted plaintiffs' restaurants to reopen. The clear and unambiguous import of the definition of "period of restoration" is that the contract expects the loss or damage to be amenable to some kind of physical remediation—either by making tangible alterations or repairs to the premises, or by replacing the premises altogether. No alteration to, or replacement of, plaintiffs' premises would have permitted the restaurants to reopen.

The policy also contains a civil-authority provision, which provides:

> When a Covered Cause of Loss causes damage to property other than the property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> **(1)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a

> result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> **(2)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

A "Covered Cause[] of Loss" includes a "Risk[] Of Direct Physical Loss." Plaintiffs contend that coverage was available under this provision. We disagree.

Plaintiffs correctly point out that this provision does not require any damage to, or indeed any physical effect upon, plaintiffs' premises. See *Sloan v Phoenix of Hartford Ins Co*, 46 Mich App 46, 50; 207 NW2d 434 (1973). However, the provision unambiguously requires damage to nearby property, and none is alleged. To the extent access to any neighboring properties was prohibited, that prohibition was a result of a health crisis and the specter of person-to-person transmission of a dangerous virus, irrespective of whether those properties were altered. Furthermore, the provision clearly expects a defined area to be cordoned off. The EOs did not do so: any person who was excepted from the stay-at-home provision of the EOs could, at least in principle, have driven or walked past plaintiffs' restaurants. Finally, this provision anticipates a response by a civil authority to some discrete damage or threat of damage. We find persuasive[5] the observation in *Newchops Restaurant Comcast LLC v Admiral Indemnity Co*, 507 F Supp 3d 616, 625 (ED Penn, 2020), that

[5] Although we are not bound by decisions of lower federal courts, we may find them persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

"[t]he civil authority action cannot be both the cause of [the] damage and the response to it." Again, the gravamen of the complaint is that plaintiffs' losses occurred because of the closure of their restaurants by the EOs.

We conclude that defendant properly denied coverage to plaintiffs because the EOs did not result in "direct physical loss of or damage to property." Plaintiffs have also failed to establish that an "action of civil authority [prohibited] access to the described premises" within the meaning of the policy. Finally, plaintiffs' claim would appear to be precluded in any event because their losses were "caused directly or indirectly by . . . [t]he enforcement of any ordinance or law . . . [r]egulating the construction, use or repair of any property[.]" (Paragraph structure omitted.)

V. VIRUS EXCLUSION

Defendant also denied coverage under the virus exclusion in the policy.[6] Plaintiffs argue that we should find the virus exclusion void for vagueness or void as against public policy. We reject plaintiffs' public-policy argument for the same reason we rejected United Policyholders's public-policy argument, and we do not find that the virus exclusion is vague.

Plaintiffs argue that the virus exclusion does not apply to the business-income form, because the virus exclusion uses the phrase "loss or damage" without

[6] We note that an exclusion is only relevant if the loss is covered, and the loss in this matter was not covered. The exclusion would therefore not be applicable to plaintiffs' claims as presented. As noted in footnote 3, however, plaintiffs propose to amend their complaint to allege that the presence of the virus inside their restaurants caused a material change in the premises. It is therefore necessary for us to address this alternative basis for denying coverage.

qualification and, therefore, is ambiguous. As already set forth, however, the virus exclusion expressly and plainly states that it "applies to all coverage under all forms and endorsements . . . including but not limited to forms or endorsements that cover . . . business income, extra expense or action of civil authority." Plaintiffs argue that "loss or damage" means only physical damage, which is disproved by the fact that at other places in the policy, the qualifier "physical" is prepended to the phrase "loss or damage." The only reasonable interpretation is that, as used in the virus exclusion, "loss or damage" is not restricted to physical losses or damages.

Plaintiffs also argue that the absence of phrases like "regardless of any other cause" or "directly or indirectly" suggests that the exclusion should apply narrowly. It does apply narrowly: it applies to losses or damage "caused by or resulting from" a subset of microorganisms capable of causing physical distress, illness, or disease. As discussed, a covered loss must have some material basis, so the virus exclusion plainly applies to any such loss that was caused by or that resulted from a virus that can cause distress, illness, or disease. There is no serious dispute that SARS-CoV-2 is a virus that induces disease. Under the circumstances of this case, if plaintiffs suffered any material loss, that loss could only have been caused by the virus, so the virus exclusion would necessarily apply. Therefore, defendant properly denied plaintiffs' claim under the virus exclusion.

VI. AMENDMENT OF COMPLAINT

Plaintiffs finally argue that the trial court should have granted them leave to amend their complaint. We disagree.

Plaintiffs failed to present any written offer of proof as to what such an amendment would contain. The trial court therefore did not abuse its discretion by denying leave to amend. *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999); *Grayling Twp v Berry*, 329 Mich App 133, 151-152; 942 NW2d 63 (2019). On appeal, plaintiffs contend that "the complaint could have been amended to add allegations concerning the physical spread of the virus on covered or nearby property." It appears that plaintiffs seek to allege that, contrary to what was stated in their complaint, their premises *were* physically affected (or at least infiltrated) by the SARS-CoV-2 virus. However, as just noted, if such an amendment were permitted, the virus exclusion would clearly apply. Indeed, the applicability of the virus exclusion would be even more unambiguous because plaintiffs' losses would therefore directly "result from" the virus without even the single intermediate link of the EOs. Amendment would therefore be futile. See *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 8-9; 772 NW2d 827 (2009). We also deny plaintiffs' request for remand to explore more fully the virus exclusion because the interpretation of a contract is a question of law that we review de novo. *Cohen*, 463 Mich at 528.

Affirmed. Because this matter presents an issue of significant public importance, we direct that the parties shall bear their own costs. MCR 7.219(A).

MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., concurred.

In re JACKISCH/STAMM-JACKISCH

Docket No. 357001. Submitted December 15, 2021, at Lansing. Decided February 1, 2022, at 9:10 a.m.

The Department of Health and Human Services petitioned the Genesee Circuit Court, Family Division, to remove three minor children, CJ, ASJ, and MSJ, from respondent-mother's care. An initial petition alleged that respondent was not properly caring for the children or providing proper medical treatment for ASJ and MSJ, who had special medical needs. A second petition alleged further neglect of the children, domestic violence in the home, and that respondent improperly stored a firearm in a couch where it was accessible to the children. The trial court authorized the petition, and the children were placed in foster homes. Petitioner later filed a supplemental petition for termination of respondent's parental rights, noting that respondent had taken some steps to address various problems identified by Child Protective Services but continued to struggle with appropriate parenting and meeting the children's medical and other special needs. Following a termination hearing, the trial court, Brian S. Pickell, J., terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions of adjudication), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). Respondent appealed.

The Court of Appeals *held*:

1. The trial court erred to the extent that it based termination of respondent's parental rights on her involvement in domestic violence because the record did not establish that respondent was a perpetrator; if respondent was a victim of domestic violence, this could not be relied upon as a basis for termination of her parental rights. While termination may properly be based on the fact that a respondent's own behavior was directly harming the children or exposing them to harm, the record in this case offered only vague references to domestic violence "between" respondent and the children's father or her current husband. The record clearly established that respondent was a victim, but it was not clear as to whether she may also have been a perpetrator. If

petitioner believed that respondent was a perpetrator of domestic violence, it needed to state so expressly and provide supportive evidence.

2. Regardless of the trial court's inappropriate references to domestic violence, the record amply supported the court's conclusion that statutory grounds for termination were established by clear and convincing evidence under MCL 712A.19b(3)(c)(*i*), (g), and (j). Under MCL 712A.19b(3)(c)(*i*), there was no question that more than 182 days elapsed between the issuance of the initial dispositional order on April 20, 2018, and the termination order on March 31, 2021. The original reasons for the children's removal, i.e., medical neglect and improper supervision, were never satisfactorily resolved, nor did the evidence indicate that there was a reasonable likelihood that they would be rectified within a reasonable time. Respondent struggled to engage with the children during parenting visits, engaged in inappropriate discipline, and never progressed to unsupervised parenting time during the three years that she participated in services while the children were under care. Respondent was also unable to properly administer ASJ's medications or to properly and timely feed MSJ. Respondent testified that she had not been provided with tips or techniques from caseworkers to help her with her parenting, which contradicted testimony that she was given specific education to understand and respond to the children's trauma. Respondent showed an overall, consistent pattern of failing to understand, appreciate, and respond appropriately to her own medical and mental health needs and those of her children. Therefore, the trial court did not err by concluding that the condition of medical neglect would continue and would not be rectified within a reasonable time given the children's ages. Because termination of parental rights must be supported by at least one statutory ground, the additional grounds for termination did not need to be addressed.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David S. Leyton*, Prosecuting Attorney, *Michael A. Tesner*, Managing Assistant Prosecuting Attorney, and *Rachel L. Smith*, Assistant Prosecuting Attorney, for the Department of Health and Human Services.

Nicholas R. D'Aigle for respondent-mother.

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

RONAYNE KRAUSE, J. Respondent[1] appeals as of right the order terminating her parental rights to CJ, ASJ, and MSJ,[2] pursuant to MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions of adjudication), (g) (failure to provide proper care or custody), and (j) (reasonable likelihood of harm if returned to parent). We affirm.

I. FACTUAL BACKGROUND

In March 2017, Child Protective Services filed a petition to remove the children from respondent's care. The petition alleged that respondent; the children's father, JS; and the children were living in the basement of a relative's home. The relative monitored their food, laundry, and bath time, and the children were observed to be dirty. The family had no other place to live. Both MSJ and ASJ were in the hospital at the time. ASJ was born with only one functioning lung and her heart on the wrong side of her body, and she needed special medical treatment. Respondent repeatedly refused to engage in education regarding ASJ's care and did not follow the dosage requirements for her breathing treatments. MSJ was diagnosed with failure to thrive; respondent failed two 24-hour supervised periods of care for him because she missed his feedings. Additionally, respondent was not responsive to MSJ's needs and did not properly feed him or change his diapers. The petition also noted that there had previ-

[1] Although the children's father, JS, was a respondent to the termination proceedings, he is not a party to this appeal. Therefore, "respondent" refers to respondent-mother.

[2] Respondent's parental rights concerning another child, IF, are not at issue in this appeal.

ously been a substantiated allegation that respondent had committed unspecified domestic violence against CJ. Although the initial petition was authorized, it was dismissed because the Department of Health and Human Services failed to provide discovery.

In February 2018, a second petition was filed. The second petition reiterated and expanded upon the concerns of medical neglect, noting in addition that respondent had admitted to medical staff that she found it "difficult to keep things straight" and "was unable to report which medications she is administering to [ASJ] and how often they are being administered." Medical staff also opined that respondent had "become increasingly difficult to work with." Respondent was observed to "smack the children in the head and the children flinch when she raises her hand." Respondent threatened CJ with an ice-cold shower if he did not eat dinner, and respondent threatened ASJ with hot sauce when she used a swear word. A teenaged niece of JS was residing "off and on" in the home and assisting with the children, but the niece had serious and inadequately treated mental health issues and had threatened to burn down the home, broken windows, threatened to stab her parents in their sleep, and attempted to commit suicide by drinking bleach while watching the children. Drugs and drug paraphernalia were observed to be within reach of the children. Respondent's jaw was broken at some point, apparently by JS while in the home as evidenced by blood spatter, and respondent variously claimed that she had lied about JS breaking her jaw and that her jaw had been broken at work. There was evidence that respondent and JS both engaged in physical altercations with each other and other reckless behavior. Respondent "shot off her gun outside her home because a car full of men was parked in her driveway," and

respondent kept "her gun in a hole in the couch" where it was accessible to the children. The trial court authorized the petition, and the children were placed in separate foster homes.

Over the course of the next year, respondent participated in several services but failed to follow through with others. She completed parenting classes, but she continued to demonstrate difficulty with parenting and understanding the children's needs. A psychological evaluation indicated that respondent's intellectual difficulties would make it difficult for her to understand and apply learned techniques, and her "prognosis for independent parenting [was] poor." Respondent was referred to mental health counseling and substance abuse evaluation on multiple occasions, but she failed to follow through or verify that she participated. She was also referred to mental health services for MSJ, but she attended few of the individual sessions. Respondent "was informed of all medical appointments for [ASJ]" but failed to attend these appointments. She did, however, complete a domestic violence counseling class. Furthermore, although she obtained housing that could have been suitable, it needed repairs. She depended entirely on the income of her then-partner, MF.

As of June 2019, respondent had missed ten scheduled parenting-time visits. Respondent struggled to remain engaged with the children when she did show up for parenting time, often asked to end sessions early, brought inappropriate sweet snacks despite knowing that ASJ had dental issues, and sometimes said inappropriate things to the children. During this time, respondent became pregnant with her youngest child, IF,[3] and when hospitalized with complications

[3] As noted, respondent's parental rights as to IF are not at issue in this appeal.

from the pregnancy, she left the hospital against the advice of medical staff and did not return for a follow-up appointment. When respondent gave birth to the child, the baby was placed with its father, MF. CJ, ASJ, and MSJ struggled with behavioral issues and regressed in potty training. As of June 2019, respondent had missed nineteen random drug screens, tested positive for THC on six occasions, and tested positive for cocaine on one occasion.

As of July 2020, when a supplemental petition for termination was filed, ASJ was only required to take a single medication, but respondent was "still unable to remember the treatment plan for at home." A request under the Freedom of Information Act, MCL 15.231 *et seq*., had revealed that the police were summoned to the home where respondent and MF were residing on numerous occasions, mostly for fights between the two of them, but the nature of those fights was not clear and, insofar as we can determine, was never fully explained. At the termination trial, it was revealed that respondent had punched someone for asking her to wear a mask at a store, and respondent reported that she sometimes got so angry she blacked out. MF and respondent both testified that they had only had a single physical altercation, a single police contact, and no domestic violence issues. MF further testified that he was attempting to help respondent with her "anger issues." Respondent claimed to be seeing a therapist, but she did not provide any verification that she was engaged in therapy.

Respondent continued to show an inability to manage the needs of all three children, or even one child at a time. However, respondent was compliant with drug screens and was removed from a drug-court program to focus on her mental health. Respondent continued to

struggle with parenting time, missed 26 visits, often asked to leave visits 20 minutes early, struggled to appropriately discipline the children, and struggled to keep the children engaged. The children's behavior worsened—CJ displayed extreme and violent behaviors toward himself and others, ASJ engaged in bullying, and MSJ was extremely dysregulated.

Following a termination hearing, the trial court terminated respondent's parental rights as described above, reasoning in its conclusion:

> In view of all the above, the Court finds that [respondent] failed to adequately follow and comply with, complete, and/or benefit from the services and elements of the treatment plan and, thus, was unable to rectify the barriers that brought the children into care over three years ago. In particular, progress that [respondent] made toward rectifying the conditions that led to the children's removal still failed to adequately address the main barriers that her mental health, parenting skills, and domestic violence posed to the children's care. For instance, her interactions with the children and choices put the children at risk as she struggled with recognizing and meeting their basic and special needs. Furthermore, [respondent] did not show enough that she can provide a long-term, safe, stable housing environment for the children within a reasonable amount of time. In addition, there was no indication that [respondent] adequately benefited from any of these services, satisfactorily addressed the issues that caused the children's removal, or showed sufficient progress toward demonstrating her ability to care for the children's extensive special needs as she continued to be overwhelmed and struggled with her parenting [of] all three children and understanding their respective cues. Moreover, [respondent] has unsuccessfully participated in several domestic-violence classes, had a long history of engaging in domestic violence, and even commented at one time that she was in an unsafe environment/relationship with her then fiancé (now husband) [MF].

The trial court found by clear and convincing evidence that, as noted above, MCL 712A.19b(3)(c)(*i*), (g), and (j) were satisfied. The trial court further stated that it did not doubt that respondent loved the children, but it was in the best interests of the children to terminate respondent's parental rights, citing:

> 1) the parents' parenting ability; 2) the children's need for permanency, stability, finality, and consistency; 3) the advantages of their respective foster homes over the parents' home; 4) the parents' history of domestic violence; 5) the parents' compliance with the case-service plan; 6) the children's special needs; 7) the length of time the children have been in foster care (i.e., over three years); 8) the children's well-being while in care; 9) the high likelihood of adoption by the respective foster parents, who can provide proper care and custody to the children; and 10) all of the caseworkers, [the legal guardian ad litem], and experts opining for it.

This appeal followed.

II. STANDARD OF REVIEW

"In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). "We review the trial court's determination for clear error." *Id*. We also review for clear error a trial court's decision that termination is in a child's best interests. *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). "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." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004). If we conclude that termination is

supported by at least one statutory ground, additional grounds for the trial court's decision need not be considered. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009). Even if conditions improved in the months before the termination hearing, a trial court may look to the totality of the evidence to determine whether a parent accomplished meaningful change in the conditions that led to adjudication. *In re Williams*, 286 Mich App 253, 272-273; 779 NW2d 286 (2009).

III. ANALYSIS

Respondent argues that the trial court erred by finding that clear and convincing evidence supported termination of her parental rights. We disagree.

As an initial matter, we conclude that the trial court erred to the extent it based termination on respondent's involvement in domestic violence because the record fails to establish that respondent was a perpetrator. The fact that respondent was or is a *victim* of domestic violence may not be relied upon as a basis for terminating parental rights. *In re Plump*, 294 Mich App 270, 273; 817 NW2d 119 (2011). This is not to say that being a victim of domestic violence necessarily precludes termination of parental rights. To the extent such a victim is also a perpetrator, the commission of domestic violence is an appropriate concern. Similarly, termination may be "properly based on the fact that [a] respondent's own behaviors were directly harming the children or exposing them to harm." *Id.*; see also *In re Ellis*, 294 Mich App 30, 34-35; 817 NW2d 111 (2011). However, the record in this case offers nothing more than vague references to "domestic violence between" respondent and MF or JS. The critical question is *who is the abuser* (or abusers), and without that information, mere references to domestic violence in the

abstract cannot be used to support termination. The record clearly shows that respondent was a victim of domestic violence, but it contains nothing beyond hints or suggestions that she may also have been a perpetrator. Hints and suggestions are not enough. If petitioner believes that respondent was a perpetrator of domestic violence, it must say so explicitly and provide evidence in support of that conclusion. The trial court erred by relying on respondent being a victim.

Nevertheless, even striking trial court's inappropriate references to domestic violence, we find the record amply supports the trial court's findings that statutory grounds for termination were established by clear and convincing evidence. The trial court terminated respondent's parental rights pursuant to MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds . . . :
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> * * *
>
> (g) The parent, although, in the court's discretion, financially able to do so, fails to provide proper care or custody for the child and there is no reasonable expecta-

> tion that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.
>
> * * *
>
> (j) There 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.

Regarding MCL 712A.19b(3)(c)(*i*), there is no question that more than 182 days elapsed between the issuance of the initial dispositional order on April 20, 2018, and the issuance of the termination order on March 31, 2021. The children were originally brought into care for, in relevant part, medical neglect and improper supervision. Those issues were never satisfactorily resolved, and the evidence indicated no reasonable likelihood that they would be rectified within a reasonable time.

Multiple caseworkers testified that respondent struggled to properly supervise the children during parenting time. Respondent struggled to handle multiple children at once, struggled to engage with them during visits, and often ignored one child if focusing on another. Respondent struggled with appropriate discipline, and she would initiate discipline that was inappropriate and would exacerbate the children's behavioral problems despite instructions from caseworkers and therapists. Respondent would say inappropriate things to the children and struggled to understand the children's emotional cues. Although respondent participated in more than three years of services, she never progressed to unsupervised parenting time. As the trial court observed, the children had exceptional behavioral, emotional, and social needs; moreover, a

psychological evaluation indicated that respondent had a poor prognosis for ever becoming an independent parent. Therefore, the trial court did not err by finding that respondent could not provide proper supervision to the children and would not be able to do so within a reasonable time given the children's ages.

Furthermore, respondent was unable to properly administer ASJ's medications and missed feedings for MSJ. Although those specific issues were rectified by the time of the termination hearing, the totality of the circumstances suggested that respondent had not rectified the condition of medical neglect. See *Williams*, 286 Mich App at 272. Although respondent knew that ASJ had severe dental issues, she continued to bring sticky and sweet food that hurt ASJ's teeth to parenting time, and she did not stop until the court ordered her to do so. When respondent was hospitalized due to complications with her last pregnancy, she left the hospital against the advice of medical staff and did not return for follow-up appointments. Respondent also initially struggled to attend mental health counseling, and, at times, allowed her mental health medications to lapse. Respondent struggled to follow through with the direction of therapists regarding MSJ's care and repeatedly missed therapy appointments for MSJ despite being warned of the negative impact of missing such appointments. Respondent also minimized the severity of CJ's behavior and testified at trial that her strategy of dealing with him was to ignore his "fits." Respondent testified that none of the caseworkers or therapists provided her with tips and techniques to help with her parenting, which directly contradicted testimony that she was given specific education to understand and respond to her children's trauma. Overall, respondent showed a consistent pattern of failing to understand, appreciate, and respond appro-

priately to the medical and mental health needs of herself and her children. Therefore, the trial court did not err by finding that the condition of medical neglect continued and would not be rectified within a reasonable time given the children's ages.

Because termination of parental rights must be supported by at least one statutory ground, we need not address the additional grounds for termination. *In re HRC*, 286 Mich App at 461.

Affirmed.

MARKEY, P.J., and SHAPIRO, J., concurred with RONAYNE KRAUSE, J.

DOUGHERTY v CITY OF DETROIT

Docket No. 354624. Submitted December 10, 2021, at Detroit. Decided December 21, 2021. Approved for publication February 3, 2022, at 9:00 a.m.

Kelly Dougherty, individually and as personal representative of the estate of her son, Kevin McGriff, Jr., brought an action in the Wayne Circuit Court against the city of Detroit, the Detroit Fire Department (DFD), and Sergeant Roger Harper, alleging that Harper, a DFD firefighter, negligently caused the death of McGriff and negligently inflected emotional distress on her by failing to locate McGriff after a house fire. DFD and Harper arrived to extinguish a fire at the house. Harper ordered firefighters to begin extinguishing the fire and to search the house; Harper also entered the house and searched it. Multiple firefighters reported that they had searched the kitchen, and Harper asserted that the kitchen was well lit and clear of smoke when he searched it; no bodies were found. Five days later, McGriff's 6-foot-2-inch body was discovered in the kitchen huddled in a "cubby" between the cabinets and the stove. The medical examiner determined that McGriff died as a result of smoke and soot inhalation and thermal burns. Although Harper maintained that he did not see the body in the kitchen during his search and did not know how the body ended up there, DFD disciplined Harper for failing to supervise a proper search of the house. Plaintiff brought the instant action, and defendants moved for summary disposition, arguing that they were immune from liability on the basis of governmental immunity under the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*. The trial court, Kevin J. Cox, J., granted summary disposition in favor of DFD and the city of Detroit, and plaintiff did not appeal those decisions. However, the trial court denied summary disposition to Harper, holding that he was not entitled to governmental immunity under the GTLA because evidence suggested that his conduct amounted to gross negligence and was the proximate cause of McGriff's death. Harper appealed.

The Court of Appeals *held*:

Harper was entitled to governmental immunity under the GTLA given that plaintiff failed to establish (1) that Harper

owed any legal duty, (2) that there existed a question of fact as to whether Harper's conduct was grossly negligent, and (3) that Harper's conduct was the proximate cause of McGriff's death. MCL 691.1407(2) of the GTLA provides, in pertinent part, that a governmental employee is immune from tort liability for an injury to a person while in the course of employment if all the following are met: the employee is acting or reasonably believes that they are acting within the scope of their authority, the governmental agency is engaged in the exercise or discharge of a governmental function, and the employee's conduct does not amount to gross negligence that is the proximate cause of the injury. Neither party disputed that the first two conditions were met; the sole issue was whether Harper's conduct was grossly negligent and the proximate cause of McGriff's death. The GTLA defines gross negligence as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. In this case, Harper did not owe any duty. The GTLA does not create any duty, and whether a common-law duty existed in this case depended on the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. No special relationship existed between Harper and McGriff or plaintiff; there was no evidence that plaintiff turned herself over to Harper's protection, and no evidence suggested that McGriff was completely incapable of protecting himself from the fire. Additionally, there was no evidence that Harper knew that anyone was in the house at the time of the fire, and Harper and other firefighters searched the house and found no one inside; accordingly, Harper likely could not have foreseen that his conduct would result in McGriff's death or that his failure to locate the body would cause plaintiff's emotional injuries. Finally, imposing an affirmative duty on firefighters to ensure the survival of individuals that are unobservable at the scene of a fire was too heavy a burden. Accordingly, Harper owed no duty and was entitled to governmental immunity. Next, the evidence did not establish a question of fact as to whether Harper's conduct was grossly negligent. Given that multiple firefighters searched the kitchen and did not find McGriff's body, plaintiff failed to establish a genuine issue of fact as to this issue. Additionally, no evidence suggested that Harper knew that anyone was in the house at the time of the fire; therefore, Harper was not on notice to conduct a more thorough search. Nothing in the evidence suggested that Harper acted recklessly or willfully disregarded the safety of anyone he knew or suspected was in the house. Lastly, even if Harper owed a legal duty and his conduct was grossly negligent, he still would have been entitled to govern-

mental immunity because he did not proximately cause McGriff's death. To establish factual cause, the plaintiff must establish that the defendant's conduct in fact caused harm to the plaintiff. To establish proximate cause, the plaintiff must establish that it was foreseeable that the defendant's conduct could result in harm to the plaintiff. A governmental employee's conduct cannot be the proximate cause under the GTLA unless it was the one most immediate, efficient, and direct cause of the plaintiff's injuries. In this case, speculation that Harper could have saved McGriff was insufficient to establish that Harper was the factual and, therefore, proximate cause of McGriff's death, especially considering that Harper did not search the kitchen until *after* the fire was extinguished. Further, Harper could not be considered the most immediate, efficient, and direct cause of McGriff's death because Harper did not cause McGriff to be in the house during the fire or initiate the fire. Given the evidence that Harper searched the house and that numerous other firefighters also failed to locate McGriff's body during their own searches, it was not foreseeable that Harper's conduct could have resulted in McGriff's death. Accordingly, Harper was entitled to governmental immunity.

Reversed and remanded for entry of summary disposition in favor of Harper.

The Law Offices of Gregory J. Rohl, PC (by *Gregory J. Rohl*) for plaintiff.

City of Detroit Law Department (by *Sheri L. Whyte* and *Lawrence T. Garcia*) for Roger Harper.

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

RICK, J. This case arises out of a fire and the subsequent tragic death of plaintiff's son, Kevin McGriff, Jr. Plaintiff alleged that defendant Sergeant Roger Harper, a Detroit Fire Department (DFD) firefighter,[1] negligently caused the death of McGriff and negligently

[1] Sergeant Harper is an employee of DFD in the city of Detroit (the City). While DFD and the City were defendants in the trial court, the trial court granted summary disposition in their favor, and plaintiff did not appeal those decisions. Therefore, only Sergeant Harper is a party to this appeal.

inflicted emotional distress on plaintiff by failing to locate McGriff after a house fire.[2] Defendant contended that he was entitled to summary disposition under MCR 2.116(C)(7) because he was entitled to governmental immunity under the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*. The trial court denied summary disposition to defendant, holding that he was not entitled to governmental immunity under the GTLA because evidence suggested that his conduct amounted to gross negligence and was the proximate cause of McGriff's death. Defendant now appeals as of right. We reverse the order denying summary disposition to defendant and remand for entry of an order granting summary disposition to defendant under MCR 2.116(C)(7).

I. BACKGROUND

This case arises out of a fire that occurred on March 5, 2018, at McGriff's house, where McGriff's deceased body was found in the kitchen five days later. At approximately 5:00 a.m. on the day of the fire, McGriff's father left the house while McGriff was sleeping in bed. At approximately 8:25 a.m., DFD dispatched firefighters to extinguish a fire at the house. Defendant was one of the first firefighters to arrive at the house, arriving approximately five minutes after the dispatch call. Defendant ordered firefighters to begin extinguishing the fire and to search the house. After firefighters reported to defendant that there were no bodies or fire in the basement, defendant

[2] On appeal, defendant disputes that plaintiff raised a claim of "negligent or intentional infliction of emotional distress" in the complaint. However, the third amended complaint asserts, in relevant part, that plaintiff suffered emotional distress as a result of defendant's conduct.

entered the house and began searching it himself. Once he concluded his search of the second floor and found no bodies there, defendant and another firefighter began inspecting the dining room and kitchen on the first floor. Although defendant could not confirm whether anyone else searched the kitchen before him, multiple firefighters reported that they were in the kitchen extinguishing a fire before defendant entered. Defendant asserted that the kitchen was well lit and clear of smoke when defendant searched it. Defendant reported that he was able to clearly see the areas in front of the lower kitchen cupboards and saw no bodies in the room. Other firefighters also searched the kitchen after defendant and also did not find McGriff's body. After defendant completed his search of the house and was satisfied that all other searches were completed, he informed DFD dispatch that the house was cleared of any individuals.

Later that day, DFD informed McGriff's father that firefighters did not locate anyone inside the house. McGriff's father then searched the city for his missing son for five days until McGriff's body was discovered in the kitchen huddled by the stove. The medical examiner determined that McGriff died as a result of smoke and soot inhalation and thermal burns. Although defendant maintained that he did not see the body in the kitchen during his search and did not know how the body ended up there, DFD disciplined defendant for failing to supervise a proper search of the house.

Following several amendments of the complaint and summary-disposition proceedings involving the city of Detroit (the City) and DFD, plaintiff filed a complaint against the City and defendant, alleging that defendant negligently caused McGriff's death and caused severe emotional distress to plaintiff. The City and

defendant moved for summary disposition, arguing that they were immune from liability on the basis of governmental immunity because defendant owed no duty to McGriff or plaintiff and because defendant's conduct was neither grossly negligent nor the proximate cause of McGriff's death. Plaintiff opposed summary disposition, arguing that defendant was not entitled to governmental immunity because his conduct was grossly negligent and a jury could find that he was the proximate cause of McGriff's death.[3] After a hearing on the matter, the trial court concluded that defendant's failure to locate McGriff's body was circumstantial evidence demonstrating that his conduct was reckless enough to constitute gross negligence and was a proximate cause of McGriff's death. Consequently, the trial court held that defendant was not entitled to governmental immunity and denied summary disposition to defendant.

II. DISCUSSION

Defendant argues that the trial court erred by denying him summary disposition because he was entitled to governmental immunity under the GTLA. Specifically, defendant argues that plaintiff failed to establish that defendant owed any legal duty, that there existed a question of fact as to whether defendant's conduct was grossly negligent, and that defendant's conduct was the proximate cause of McGriff's death. We agree.

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[3] Before the trial court had resolved the City's and defendant's motion for summary disposition, plaintiff filed an amended complaint that removed the City as a party.

A. STANDARD OF REVIEW AND BACKGROUND LAW

This Court reviews de novo the applicability of governmental immunity and a trial court's decision regarding a motion for summary disposition. *Ray v Swager*, 501 Mich 52, 61-62; 903 NW2d 366 (2017). "[W]hether a party owes an actionable legal duty is a question of law" that this Court also reviews de novo. *Downs v Saperstein Assoc Corp*, 265 Mich App 696, 699; 697 NW2d 190 (2005). When deciding whether a claim is barred under MCR 2.116(C)(7) on the basis of immunity granted by law, "a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party." *Clay v Doe*, 311 Mich App 359, 362; 876 NW2d 248 (2015) (cleaned up). "Although questions regarding whether a governmental employee's conduct constituted gross negligence are generally questions of fact for the jury, if reasonable minds could not differ, summary disposition may be granted." *Wood v Detroit*, 323 Mich App 416, 424; 917 NW2d 709 (2018).

Under the GTLA, governmental employees are "generally immune from tort liability when they are engaged in the exercise or discharge of a governmental function." *Ray*, 501 Mich at 62. One exception under the GTLA is MCL 691.1407(2), which provides, in pertinent part:

> [E]ach . . . employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the . . . employee . . . while in the course of employment . . . if all of the following are met:
>
> (a) The . . . employee . . . is acting or reasonably believes he or she is acting within the scope of his or her authority.

> (b) The governmental agency is engaged in the exercise or discharge of a governmental function.
>
> (c) The . . . employee's . . . conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

Neither party disputes that Subdivisions (a) and (b) under MCL 691.1407(2) are met in this case. Therefore, the applicability of governmental immunity to defendant depends on whether his conduct was grossly negligent and the proximate cause of McGriff's death. See MCL 691.1407(2)(c). The GTLA defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). The GTLA thus protects governmental employees who are not grossly negligent from "all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *In re Bradley Estate*, 494 Mich 367, 385; 835 NW2d 545 (2013). The governmental employee bears the burden of raising and proving their entitlement to immunity as an affirmative defense. *Ray*, 501 Mich at 62. Under the GTLA, which both parties agree controls here, a governmental employee is entitled to governmental immunity against a claim of negligence involving a wrongful death when the employee owed no duty to the plaintiff, *Downs*, 265 Mich App at 699, the employee's conduct was not grossly negligent, *Wood*, 323 Mich App at 424, or the employee's conduct was not the proximate cause of the plaintiff's injuries, *Ray*, 501 Mich at 64-65.

B. DEFENDANT OWED NO LEGAL DUTY

Under the GTLA, a governmental employee is entitled to governmental immunity and, thus, summary

disposition if the plaintiff fails to establish that the employee owed a duty in tort. *Downs*, 265 Mich App at 699. Generally, "[a] duty may be created expressly by statute, or it may arise under the common law." *Id*. Firefighters are not held to the public-duty doctrine imposed on police officers. *Beaudrie v Henderson*, 465 Mich 124, 134; 631 NW2d 308 (2001).[4] Additionally, the GTLA does not create any duty. See *id*. at 139 n 12. Therefore, a plaintiff must establish that the governmental employee owed the plaintiff a common-law duty "without regard to the defendant's status as a government employee." *Id*. at 134.

Whether a common-law duty exists is dependent on "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." *Murdock v Higgins*, 454 Mich 46, 53; 559 NW2d 639 (1997). There is no general duty obligating one person to aid or protect another unless there exists some sufficiently strong "special relationship" between the parties that requires a defendant to protect an injured party. *Id*. at 54. A special relationship exists only when one party "entrust[ed] [themself] to the protection and control of another and, in doing so, that party loses the ability to protect [themself]." *Downs*, 265 Mich App at 701.

Plaintiff did not allege that defendant owed any statutory duty, and the relevant portion of the GTLA does not create a duty. Therefore, defendant only owed a duty to plaintiff if one existed under the common law.

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[4] Under the public-duty doctrine, a police officer owes a duty to protect the public as a whole—not any one particular individual. *Beaudrie*, 465 Mich at 131. Accordingly, police officers cannot be held liable for personal injuries unless they breach some other duty owed to a specific individual. See *id*. at 131, 141. Our Supreme Court expressly limited the public-duty doctrine to governmental employees who allegedly failed to provide police protection. *Id*. at 134.

See *Murdock*, 454 Mich at 53. First, it is undisputed that defendant did not know McGriff or plaintiff at the time of the incident. See *id*. (stating that the relationship of the parties is a relevant factor in determining the existence of a common-law duty). Moreover, there is no evidence to suggest that defendant knew that McGriff was in the house at the time of the fire or that there existed some special relationship between the parties. Indeed, the facts reveal that defendant and his fellow firefighters searched the house during the fire and after it was extinguished, looking for any occupants. This Court has held that no "special relationship" exists when no evidence suggests that individuals injured in a fire "completely turned themselves over to" a firefighter for their fire protection or that the injured individuals were "completely incapable of protecting themselves" from the fire. *Downs*, 265 Mich App at 701. In the instant case, there is no evidence or suggestion that plaintiff turned herself over to protection by defendant. Similarly, no evidence suggests that McGriff turned himself over to protection by defendant. Moreover, no evidence suggests that McGriff, a 26-year-old, was "completely incapable" of protecting himself from the fire. Consequently, there existed no special relationship between the parties that imposed a duty on defendant to protect McGriff or plaintiff.

Second, while defendant certainly would be able to foresee that someone in a house could be harmed or killed by a fire, there is no evidence indicating that defendant knew that anyone was in the house at the time of the fire. See *Murdock*, 454 Mich at 53 (stating that the foreseeability of the harm is a relevant factor in determining the existence of a common-law duty). This fact, coupled with the fact that defendant and other firefighters searched the house and found no one inside, makes it less foreseeable that someone could

have been injured or killed by the specific fire at the house. Additionally, defendant likely could not have foreseen that his conduct—searching the entire house and ordering others to search the entire house—would result in McGriff's death or, following the search, that his failure to locate McGriff's body would cause plaintiff's emotional injuries.

Third, we think it is too heavy a burden to impose an affirmative duty on firefighters to ensure the survival of individuals that are unobservable at the scene of a fire. See *id*. (stating that the burden on the defendant is a relevant factor in determining the existence of a common-law duty). As defendant pointed out, imposing such a broad duty that places personal liability on firefighters not only contradicts established law but could also have a chilling effect on recruitment of firefighters. Similarly, this enhanced burden would alter how long a firefighter must remain in a fire-compromised building, thereby jeopardizing their own safety and the safety of their crew. See *id*. (stating that the nature of the risk presented is a relevant factor in determining the existence of a common-law duty). We see no reason to impose an affirmative duty on firefighters that would require them to ensure the survival of individuals who the firefighters are unaware exist and who cannot be located despite numerous searches of an area.

Because defendant had no special relationship with plaintiff or McGriff, defendant owed no duty to them and was, therefore, entitled to governmental immunity.

C. DEFENDANT WAS NOT GROSSLY NEGLIGENT

Even if defendant owed a legal duty to plaintiff or McGriff, he still would have been entitled to govern-

mental immunity because the evidence did not establish a question of fact as to whether his conduct was grossly negligent.

As noted earlier, the GTLA defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence "suggests almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks." *Wood*, 323 Mich App at 424 (cleaned up). "Evidence of ordinary negligence" or "simply alleging that an actor could have done more" is insufficient to meet the standard for gross negligence under the GTLA. *Id*. at 423-424 (cleaned up).

Viewing all evidence and pleadings in the light most favorable to plaintiff, the evidence established that: (1) defendant conducted numerous searches of the inside and outside of the house during and after the fire; (2) even if defendant did not order other firefighters to search the kitchen, he searched the kitchen at least once and found no body; (3) both before and after defendant searched the kitchen, other firefighters searched the kitchen and found no body; (4) McGriff's body was found in the kitchen five days after the fire; (5) McGriff died as a result of fire-related injuries, specifically smoke and soot inhalation and thermal burns, suggesting that he was in the house at the time of the fire; and (6) as a result of believing that McGriff did not die in the fire, plaintiff asserted that she suffered emotional injuries after McGriff's deceased body was later found in the house. Plaintiff alleges that it is more likely that defendant undertook no search of the kitchen than it is that he failed to locate the body during his search. The trial court also concluded that defendant's failure to locate the body, despite searching

the kitchen, constituted circumstantial evidence that defendant was reckless. As defendant asserted, however, any suggestion that defendant did not conduct a thorough enough search was speculation that contradicted the direct evidence demonstrating that he and numerous firefighters searched the entire house.

The circumstances surrounding McGriff's death are peculiar, especially considering that his 6-foot-2-inch body was subsequently found in a "cubby" between the cabinets and the stove in the kitchen. Nonetheless, given the reports indicating that multiple firefighters searched the kitchen without finding McGriff's body, we conclude that plaintiff failed to establish a genuine issue of material fact as to whether defendant's conduct amounted to gross negligence. The fact that other firefighters did not find McGriff's body despite multiple searches indicates that McGriff's body was not readily observable while the firefighters were at the house, regardless of how readily observable it was five days later. Plaintiff alleged that defendant was grossly negligent because he did not search the kitchen twice or failed to conduct a search entirely. As indicated, the evidence suggests that several searches of the kitchen were completed. Moreover, although a more thorough search may have uncovered McGriff's body, plaintiff's contention is no more than a simple allegation that defendant could have done more. However, failing to conduct a more thorough search is insufficient to defeat governmental immunity. See *Wood*, 323 Mich App at 424. Further, while defendant's failure to find McGriff's body may circumstantially suggest that he could have conducted a more thorough search, no evidence suggests that a more thorough search would have prevented McGriff's unfortunate death.

Defendant's conduct is similar to that of the defendant in *Wood*. In *Wood*, a bus driver failed to ensure that the lug nuts on the tires of a van he drove were properly secured. When the bus driver drove the van, a tire came off and struck and injured a pedestrian. *Wood*, 323 Mich App at 418, 424. Although it was the bus driver's responsibility to inspect the tires and lug nuts of any *bus* he drove, he testified that it was the responsibility of maintenance workers to ensure proper working conditions of *vans* such as the one he drove at the time of the incident. *Id*. at 424-425. Further, no evidence suggested that the bus driver had knowledge that one of the van's tires was missing lug nuts before he drove it. *Id*. at 425. This Court concluded that, even though it was not the bus driver's responsibility to inspect the van's tires before driving, the bus driver's failure to do so could still amount to negligence, but not gross negligence. *Id*.

Similarly, in the instant case, no evidence suggests that defendant knew anyone was in the house at the time of the fire. Therefore, defendant was not on notice to conduct a more thorough search. Further, even if he was responsible for conducting additional searches of the kitchen, defendant searched the kitchen at least once with another firefighter for five minutes and other firefighters searched the kitchen before and after defendant. Just as in *Wood*, the evidence suggests that defendant's conduct—searching the house but failing to locate McGriff's body—could constitute ordinary negligence, but not gross negligence. Defendant's thorough search of the house and his orders to others to search various parts of the house do not constitute a reckless and substantial lack of concern for possible injury or a willful disregard for safety. MCL 691.1407(8)(a); *Wood*, 323 Mich App at 424.

On the basis of the evidence presented, reasonable minds might differ as to whether defendant was ordinarily negligent in the way he searched the house, but reasonable minds could not differ as to whether his conduct was grossly negligent. Nothing in the evidence suggests that defendant acted recklessly or willfully disregarded the safety of anyone he knew or suspected was in the house. Therefore, defendant was entitled to governmental immunity.

D. DEFENDANT DID NOT PROXIMATELY CAUSE MCGRIFF'S DEATH

Even if defendant owed a legal duty to plaintiff or McGriff and his conduct was grossly negligent, he still would have been entitled to governmental immunity because he did not proximately cause McGriff's death.

A governmental employee's grossly negligent conduct does not except them from governmental immunity unless it was the factual and proximate cause, or "legal causation," of the plaintiff's injuries. *Ray*, 501 Mich at 65. "[S]o long as the defendant is *a* factual cause of the plaintiff's injuries, then the court should address legal causation by assessing foreseeability and whether the defendant's conduct was *the* proximate cause." *Id*. at 74. To establish factual cause, the plaintiff must establish that "the defendant's conduct in fact caused harm to the plaintiff" or was a "but-for cause." *Id*. at 64, 66 (cleaned up). To establish proximate cause, the plaintiff must establish that "it was foreseeable that the defendant's conduct could result in harm" to the plaintiff. *Id*. at 65. In other words, "the harm caused to the plaintiff was the general kind of harm the defendant negligently risked." *Id*. at 64 (cleaned up). Although there generally may be more than one proximate cause to an injury, a governmental employee's conduct cannot be the proximate

cause under the GTLA unless it was "the one most immediate, efficient, and direct cause of the [plaintiff's] injuries." *Id*. at 76 (cleaned up).

In *Ray*, 501 Mich at 70-76, our Supreme Court clarified the analysis of factual cause and proximate cause under the GTLA and discussed *Beals v Michigan*, 497 Mich 363; 871 NW2d 5 (2015), overruled in part by *Ray*, 501 Mich at 73 n 49, and *Dean v Childs*, 474 Mich 914, 914 (2005) (*Dean II*), rev'g *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004) (*Dean I*), overruled by *Ray*, 501 Mich at 72 & n 49.[5]

In *Beals*, our Supreme Court held that a lifeguard's failure to intervene in a swimmer's drowning was insufficient to establish that the lifeguard's inaction was the proximate cause of the swimmer's death under the GTLA. *Beals*, 497 Mich at 366, 373-374. *Beals* involved a 19-year-old swimmer with a developmental disability who waded to the shallow end of a pool in a state residential facility, swam underwater to the deep end, and never resurfaced. *Id*. at 366-367. There was no evidence indicating that the swimmer visibly struggled in the water or that the lifeguard or any of the 24 other students witnessed the swimmer in distress. *Id*. at 367. The swimmer was not discovered until he had been underwater for approximately eight minutes, at which point the lifeguard attempted cardiopulmonary resuscitation (CPR) to no avail. *Id*. The cause of the swimmer's death was "drowning" and the underlying reason for the accidental downing was unknown. *Id*. Evidence suggested that the lifeguard was distracted at the time the

[5] *Dean II*, 474 Mich 914, was a peremptory order of our Supreme Court that reversed this Court's ruling in *Dean I*, 262 Mich App 48. Subsequently in *Ray*, 501 Mich at 72 & n 49, our Supreme Court overruled *Dean II* and concluded that the reasoning adopted by the peremptory order was erroneous.

swimmer drowned and that the lifeguard did not sit in the lifeguard observation stand or notice that the swimmer had slipped underwater until the body was discovered. *Id*. at 368.

Our Supreme Court concluded that the lifeguard's failure to intervene was not the "most immediate, efficient, and direct cause" of the swimmer's drowning because the lifeguard did not cause the swimmer to swim underwater or remain submerged. *Id*. at 373. The Court noted that the swimmer voluntarily entered the pool and dove under the surface of the water and that it was "unknown" what caused the swimmer to remain underwater. *Id*. The Court concluded that this "unidentified reason" as to why the swimmer remained underwater was the "most immediate, efficient, and direct cause" of the drowning. *Id*. at 373-374. The Court also noted that the lifeguard's failure to intervene in the drowning could have been one of numerous reasons the swimmer drowned, but it was not the proximate cause of his death. *Id*. at 374. The Court also explained that any evidence indicating that proper intervention could have prevented the swimmer's death was speculation that did not establish a proximate relationship between the lifeguard's conduct and the swimmer's death. *Id*.

The *Beals* Court also analogized the case to *Dean*, which involved a claim that a governmental employee's failure to intervene to prevent the death of the plaintiff's children during a house fire was the proximate cause of the children's deaths. *Id*. at 375-377; *Dean I*, 262 Mich App at 51-52. In *Dean II*, 474 Mich at 914, our Supreme Court reversed this Court's opinion in *Dean I* that had affirmed the denial of summary disposition on the basis of governmental immunity and instead adopted the reasoning of Judge GRIFFIN's dissent in *Dean I*, 262 Mich App at 61

(GRIFFIN, J., concurring in part and dissenting in part), which concluded that the defendant was immune from tort liability under the GTLA because "the most immediate, efficient, and direct cause" of the children's deaths "was the fire itself, not defendant's alleged gross negligence in fighting it." (Cleaned up.) Our Supreme Court subsequently held that the adoption of such analysis and conclusion was erroneous and overruled *Dean II*. *Ray*, 501 Mich at 71-72. The Court reasoned:

> Determining proximate cause under the GTLA, or elsewhere, does not entail the weighing of factual causes but instead assesses the legal responsibility of the actors involved. Moreover, because proximate cause is concerned with the foreseeability of consequences, only a human actor's breach of a duty can be a proximate cause. Consequently, nonhuman and natural forces, such as a fire, cannot be considered "the proximate cause" of a plaintiff's injuries for the purposes of the GTLA. Instead, these forces bear on the question of foreseeability, in that they may constitute superseding causes[6] that relieve the actor of liability if the intervening force was not reasonably foreseeable. [*Id*. at 71-72 (cleaned up).]

The *Beals* Court concluded that, similar to *Dean I*, the lifeguard's failure to intervene in the "already-initiated drowning [did] not transform [the lifeguard's] inaction into the proximate cause of [the swimmer's] death . . . ." *Beals*, 497 Mich at 376. As indicated, *Dean II*, which adopted the conclusion and reasoning of

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[6] Our Supreme Court has recognized "intervening cause" or "superseding cause" to mean "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985) (cleaned up); see also *Ray*, 501 Mich at 72 & n 48. Such a cause "breaks the chain of causation and constitutes a superseding cause which relieves the original actor of liability, unless it is found that the intervening act was 'reasonably foreseeable.' " *McMillian*, 422 Mich at 576 (cleaned up).

Judge GRIFFIN's dissent in *Dean I*, was overruled by *Ray*, 501 Mich at 72 & n 49. Although our Supreme Court rejected the analogy to *Dean I* in *Beals*, the Court upheld the portion of the *Beals* analysis that was "consistent with the principle that a government actor's conduct cannot be 'the proximate cause' of one's injuries without being a factual cause thereof." *Ray*, 501 Mich at 73 n 49. Additionally, the *Ray* Court noted that the brief discussion of *Dean* in *Beals* "was not necessary to [the Court's] ultimate conclusion that the lifeguard was not 'the proximate cause' because factual causation could not be established." *Id*. In interpreting *Beals* in *Ray*, our Supreme Court explained:

> *Beals* is best understood as holding that the lifeguard could not have been 'the proximate cause' of the decedent's drowning because the plaintiff failed to show even a genuine issue of factual causation. When a plaintiff attempts to establish factual causation circumstantially, that circumstantial proof must go beyond mere speculation. The plaintiff in *Beals* failed to make this showing. We emphasized that any connection between the lifeguard's breach of a duty and the drowning was only speculative. We also noted that it was unclear that even a prudent lifeguard would have been able to observe and prevent the deceased's drowning, which further illustrated that the causal connection was simply too tenuous. In other words, the plaintiff failed to show that the lifeguard was a but-for cause of the deceased's death. Accordingly, we held that the defendant lifeguard was not "the proximate cause" of the deceased's death for the purposes of the GTLA. The holding, if not all of the reasoning, of *Beals* is consistent with our understanding of the GTLA's use of "the proximate cause." [*Ray*, 501 Mich at 70-71 (cleaned up).]

Similar to *Beals*, as recognized in *Ray*, plaintiff in the instant case has failed to establish that defendant's conduct or inaction was the proximate cause of McGriff's death. Plaintiff postulates, as any grieving

parent would, that McGriff would not have died had defendant conducted a more thorough search of the kitchen. However, plaintiff has not provided any evidence suggesting that McGriff was still alive when defendant arrived at the house, searched the house, or left the house, or that defendant could have rescued McGriff from the fire. Just as in *Beals*, speculation that defendant could have saved McGriff is insufficient to establish that defendant was the factual and, therefore, proximate cause of McGriff's death, especially considering that defendant did not search the kitchen until *after* the fire was extinguished. See *Ray*, 501 Mich at 70; *Beals*, 497 Mich at 374. Further, defendant cannot be considered the "most immediate, efficient, and direct cause" of McGriff's death because defendant did not cause McGriff to be in the house during the fire or initiate the fire. *Beals*, 497 Mich at 373. As recognized in *Ray*, plaintiff in the instant case has failed to show that defendant was a "but-for cause of the deceased's death." *Ray*, 501 Mich at 71. The record contains no evidence indicating why McGriff remained in the house at the time of the fire. Whatever might have been that "unidentified reason," however, was a much more immediate and direct cause of his death than defendant's failure to locate him *after* the fire was extinguished. *Beals*, 497 Mich at 373.

Given defendant's extensive search of the house and that numerous other firefighters also failed to locate McGriff's body during their own searches, it was not foreseeable that defendant's conduct could have resulted in McGriff's death. *Ray*, 501 Mich at 64-65. Therefore, defendant's conduct could not have been the proximate cause of McGriff's death because it was not a "but-for cause" or "the one most immediate, efficient, and direct cause" of his death, even if it was a contrib-

uting factor. *Id*. at 65. For that reason, defendant was entitled to governmental immunity.

III. CONCLUSION

Defendant owed no duty to plaintiff or McGriff, there was no question of fact as to whether defendant's conduct was grossly negligent, and defendant's conduct was not the proximate cause of McGriff's death. For these reasons, defendant was entitled to governmental immunity under the GTLA. Consequently, the trial court erred by denying summary disposition to defendant.

Reversed and remanded for entry of an order granting summary disposition in favor of defendant. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

K. F. KELLY, P.J., and JANSEN, J., concurred with RICK, J.

MICHELI v MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY

Docket No. 356559. Submitted January 5, 2022, at Detroit. Decided February 10, 2022, at 9:00 a.m.

Kathleen Micheli brought an action in the Macomb Circuit Court against the Michigan Automobile Insurance Placement Facility and Citizens Insurance Company, seeking personal protection insurance benefits following a car-pedestrian collision in which plaintiff was hit by a car insured by Citizens. Citizens retained Mary Kneiser, M.D., as an expert witness to conduct an insurance medical examination (IME) of plaintiff. Plaintiff's counsel sent a subpoena to Dr. Kneiser's office. The subpoena was directed to Ability Assessments, PC, of which Dr. Kneiser was the sole owner; Ability Assessments employed or contracted no other physicians or medical providers. The subpoena asked Ability Assessments to produce the number of IMEs that Dr. Kneiser had performed in the years 2017 through 2020; the number of patient examinations that Dr. Kneiser had performed in the years 2017 through 2020; copies of records pertaining to money paid to Dr. Kneiser for conducting IMEs, sitting for depositions pertaining to IMEs, and providing live testimony at trial pursuant to IMEs performed in the years 2017 through 2020; all materials pertaining to medical records or other items regarding plaintiff; and copies of all reports and drafts of reports pertaining to plaintiff that Dr. Kneiser had written. Citizens moved to quash the subpoena under MCR 2.305(A)(4)(a) and for a protective order under MCR 2.302(C), arguing that plaintiff could not subpoena its expert witnesses without first seeking leave of the trial court by motion and that the records showing the number of patient examinations Dr. Kneiser had performed—and her compensation for doing so—were not relevant to the core issues of the case. Finally, Citizens argued that the subpoena merely sought to harass, embarrass, and dissuade participation in the litigation process and would impose a burden on the expert. Plaintiff responded that the information sought was relevant to the credibility and potential bias of Dr. Kneiser. Plaintiff also argued that MCR 2.302(B)(4) was inapplicable, so she did not need to move the trial court to allow her to subpoena Citizens' experts. The trial court, Diane M.

Druzinski, J., denied Citizens' motion and held that MCR 2.302(B)(4) was inapplicable because plaintiff was seeking information about Dr. Kneiser from her employer—Ability Assessments—not from Dr. Kneiser herself. The trial court also found that Citizens failed to show how producing the requested records would be burdensome to Ability Assessments. Citizens then moved for reconsideration, attaching an affidavit from Dr. Kneiser, who stated that Ability Assessments does not prepare or maintain documents that separate sources of income from forensic evaluations, examinations, deposition testimony, and trial testimony from other sources of income. The trial court denied the motion for reconsideration. Dr. Kneiser and Ability Assessments (nonparty appellants) sought leave to appeal, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. MCR 2.302(B)(4) sets forth the rules governing pretrial discovery and facts known and opinions held by experts acquired or developed in anticipation of litigation or for trial. By its plain language, MCR 2.302(B)(4) did not apply to this case. Plaintiff requested that nonparty appellants produce records from 2017 through 2020 showing Dr. Kneiser's earnings for performing medicolegal work and showing the number of patient examinations Dr. Kneiser performed. In other words, plaintiff sought records kept in the ordinary course of business. Plaintiff did not seek facts or opinions acquired or developed in anticipation of litigation or trial. Accordingly, regardless of the trial court's reasoning, the trial court reached the correct result: MCR 2.302(B)(4) was inapplicable to plaintiff's request.

2. MCR 2.302(B)(1) addresses the general scope of discovery and provides, in pertinent part, that parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. In this case, although the records were unrelated to the substantive legal issues in the case, they were related to Dr. Kneiser's credibility, and information that bears on witness credibility or bias is never irrelevant. Whether nonparty appellants had a history of serving as experts for insurance companies, and their compensation for doing so, had a bearing on Dr. Kneiser's credibility and therefore was relevant.

3. MCR 2.305(A)(1) allows a party to subpoena a nonparty to produce documents in the nonparty's possession. However, MCR 2.305(A)(4)(a) provides that the court may quash or modify a subpoena if it is unreasonable or oppressive. In this case, nonparty appellants argued that the trial court erred by failing to quash the subpoena as being "unreasonable or oppressive" under MCR 2.305(A)(4)(a). While MCR 2.305(A)(4)(a) uses the word "may," which connotes a grant of discretion, the plain language of MCR 2.302(B)(1) clearly obligated the trial court to balance the burden of the proposed discovery against the value of the proposed discovery. The trial court dispensed with this obligation by merely stating that Citizens had "not argued how compliance with the subpoenas would cause any hardship to the Doctors." The trial court's analysis was inadequate. Citizens had argued that compliance with the subpoena would have been time-consuming and expensive and that doing so would constitute an unfair invasion into Dr. Kneiser's privacy. Citizens also implicitly argued that to the extent plaintiff sought discoverable information, there were less-intrusive means of obtaining that information. The trial court failed to explicitly balance these considerations as required by MCR 2.302(B)(1). The trial court was directed on remand to balance the value of plaintiff's proposed discovery, particularly in light of the disclosures provided in Dr. Kneiser's affidavit, against the burden of the discovery, including addressing nonparty appellants' privacy concerns and the practically available alternative means for plaintiff to discover the information.

Vacated and remanded.

GLEICHER, C.J., concurring, agreed with the majority that the information sought was discoverable and that the case was not moot. Chief Judge GLEICHER emphasized that mootness did not surface as an issue until after the case was submitted to a panel for decision, which smacked of gamesmanship. The "mootness" argument was nothing more than a calculated diversionary tactic intended to avoid a decision by the three judges randomly assigned to hear this case. Ability Assessments went to an unusual and costly length—filing an interlocutory application for leave to appeal—to seek redress for a judicial ruling it characterized as clearly wrong and a flagrant abuse of discretion. The application was granted because it raised an issue worthy of plenary consideration. Because the situation presented here is likely to recur the next time a party seeks similar information from an expert witness, the public interest was served by addressing the fully briefed and well-argued legal issue here.

Furthermore, the court rule governing discovery from expert witnesses, MCR 2.302(B)(4), and the court rule allowing a party to subpoena a nonparty for documents, MCR 2.305(A)(1), should be read individually and then harmonized. Doing so here yielded the conclusion that the discovery of evidence relevant to an expert's *credibility* may be pursued in several different ways. Additionally, reading MCR 2.305 in conjunction with MCR 2.306(B) led to the conclusion that MCR 2.305 offers an alternative pathway for discovering facts relevant to an expert's credibility. Finally, Chief Judge GLEICHER would have held that the circuit court did not abuse its discretion in finding the discovery proportional, but given that the circuit court, in its opinion on reconsideration, afforded Citizens the option of filing a separate motion requesting a protective order, she agreed that remand regarding that question alone was appropriate.

The Saperstein Law Firm, PLLC (by *Andrew M. Saperstein*) for Kathleen Micheli.

Secrest Wardle (by *Sidney A. Klingler* and *Renee T. Townsend*) for Mary Kneiser, M.D., and Ability Assessments, PC.

Vandeveer Garzia, PC (by *Donald C. Brownell* and *Stephanie L. Arndt*) for Citizens Insurance Company.

Before: GLEICHER, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

RONAYNE KRAUSE, J. Nonparty appellants, Ability Assessments, P.C. (Ability Assessments) and Dr. Mary Kneiser, M.D., appeal by leave granted the order denying the motion of defendant-appellee, Citizens Insurance Company (Citizens), to quash plaintiff's subpoena and for a protective order.[1] On appeal, non-

[1] *Micheli v Mich Auto Ins Placement Facility*, unpublished order of the Court of Appeals, entered March 25, 2021 (Docket No. 356559).

party appellants[2] argue that the trial court abused its discretion by denying Citizens' motion to quash plaintiff's subpoena. We vacate the trial court's order and remand for further proceedings that are consistent with this opinion.

I. FACTS

This case arises from a December 2018 car-pedestrian collision. In her complaint, plaintiff alleged that she was hit by a car insured by Citizens. After this collision, plaintiff sued Citizens for personal protection insurance (PIP) benefits. Citizens retained Dr. Kneiser as an expert witness to conduct an insurance[3] medical examination (IME) of plaintiff. On November 10, 2020, plaintiff's counsel sent a subpoena to Dr. Kneiser's office. The subpoena was directed to Ability Assessments, of which Dr. Kneiser is the sole owner; Ability Assessments employs or contracts no other physicians or medical providers. The subpoena asked Ability Assessments to produce the following:

> 1. The number of independent medical examinations performed by Mary K. Kneiser, MD at the Ability Assessments, P.C. offices in the years 2017, 2018, 2019, and 2020;
>
> 2. The number of patient examinations conducted by Mary K. Kneiser, MD at the Ability Assessments, P.C. offices in the years 2017, 2018, 2019, and 2020;

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[2] We use the term "nonparty appellants" when referring collectively to Ability Assessments and Dr. Kneiser. We note that Citizens also disrespectfully filed a brief the day before oral argument. We have nevertheless considered the arguments presented by Citizens.

[3] Although IMEs are commonly referred to as "independent medical examinations," that appellation is a euphemistic term of art. In reality, and to a great extent central to this matter, an IME involves obtaining a second opinion from a doctor who is entirely selected and paid for by an insurance company, rendering the "independence" of the examination somewhat questionable.

> 3. Copies of any records of pertaining [sic] to earnings, income, or other money Mary K. Kneiser, MD has been paid for conducting independent medical examinations, sitting for depositions pertaining to independent medical evaluations she has performed, and providing live testimony at trial pursuant to independent medical evaluations she has performed in the years of 2017, 2018, 2019, and 2020;
>
> 4. Any and all materials, including medical records and/or other tangible items provided to Ability Assessments, P.C. and/or Mary K. Kneiser, MD pertaining to the medical and/or other evaluations requested by Citizens Insurance Company of the Midwest with regard to Kathleen Micheli (DOB: 12/24/1953). This request is for copies of any and all documents that were provided to Mary K. Kneiser, MD as it pertains to Kathleen Micheli.
>
> 5. Copies of any and all reports and drafts of reports written by Mary K. Kneiser, MD pertaining to Kathleen Micheli (DOB 12/24/1953).

Citizens moved to quash the subpoena under MCR 2.305(A)(4)(a) and for a protective order under MCR 2.302(C). Citing MCR 2.302(B)(4)(a)(iii), Citizens argued that plaintiff could not subpoena its expert witnesses without first seeking leave of the trial court by motion. Citizens further argued that records showing the number of patient examinations Dr. Kneiser had performed—and her compensation for doing so—were not relevant to the core issues of the case: whether Citizens was required to pay plaintiff PIP benefits and whether plaintiff's injuries arose from the collision. Finally, Citizens argued that the subpoena merely sought to harass, embarrass, and dissuade participation in the litigation process and would impose a burden on the expert. Although Citizens in the trial court—and nonparty appellants on appeal—nominally challenged all five of the requests, the substance of their arguments applies only to requests (1) through

(3). We therefore regard requests (4) and (5) as tacitly unchallenged both in the trial court and on appeal.

Plaintiff responded that the information sought was relevant to the credibility and potential bias of Dr. Kneiser. Plaintiff also argued that MCR 2.302(B)(4) was inapplicable, so she did not need to move the trial court to allow her to subpoena Citizens' experts. Finally, plaintiff argued that even if MCR 2.302(B)(4) did apply, the court should still require nonparty appellants to produce the requested records because deposing Dr. Kneiser would be costly and would impose an undue hardship on plaintiff.

In a written order and opinion, the trial court denied Citizens' motion. The trial court found that MCR 2.302(B)(4) was inapplicable because plaintiff was seeking information about Dr. Kneiser from her employer—Ability Assessments—not from Dr. Kneiser herself. The trial court also found that Citizens failed to show how producing the requested records would be burdensome to Ability Assessments. Citizens then moved for reconsideration, attaching an affidavit from Dr. Kneiser, who stated that Ability Assessments does not prepare or maintain documents that separate sources of income from forensic evaluations, examinations, deposition testimony, and trial testimony from other sources of income. The trial court admitted that "employer" had been a poor word to use in describing the relationship between Dr. Kneiser and Ability Assessments, but it nevertheless denied Citizens' motion for reconsideration. Thereafter, nonparty appellants filed an emergency application for leave to appeal. We granted nonparty appellants' application. *Micheli v Mich Auto Ins Placement Facility*, unpublished order of the Court of Appeals, entered March 25, 2021 (Docket No. 356559).

II. STANDARDS OF REVIEW

We review a trial court's decision to grant or deny discovery for an abuse of discretion. *Arabo v Mich Gaming Control Bd*, 310 Mich App 370, 397; 872 NW2d 223 (2015). We also review for an abuse of discretion a trial court's decision on a motion for a protective order. *Id*. "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id*. at 397-398 (quotation marks and citation omitted). "A trial court necessarily abuses its discretion when it makes an error of law." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016).

We review de novo the interpretation and application of statutes, rules, and legal doctrines. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). "When ascertaining the meaning of a court rule, the reviewing court should focus first on the plain language of the rule in question, and when the language of the rule is unambiguous, it must be enforced as written." See *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 350; 852 NW2d 22 (2014). This Court will generally not reverse when a trial court reached a correct result, even if the trial court did so on the basis of incorrect reasoning. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 216; 888 NW2d 916 (2016).

III. APPLICABILITY OF MCR 2.302(B)(4)

Nonparty appellants and Citizens first argue that the trial court erred by concluding that MCR 2.302(B)(4) was inapplicable to plaintiff's discovery request. We disagree.

MCR 2.302(B)(4) sets forth the rules governing pretrial discovery and " 'facts known and opinions held

by experts.'" *Spine Specialists of Mich, PC v State Farm Mut Auto Ins Co*, 317 Mich App 497, 501; 894 NW2d 749 (2016), quoting MCR 2.302(B)(4). In relevant part, MCR 2.302(B)(4)(a) states:

> (4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (a)(i) A party may through interrogatories require another party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter about which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (ii) A party may take the deposition of a person whom the other party expects to call as an expert witness at trial. The party taking the deposition may notice that the deposition is to be taken for the purpose of discovery only and that it shall not be admissible at trial except for the purpose of impeachment, without the necessity of obtaining a protective order as set forth in MCR 2.302(C)(7).
>
> (iii) On motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions (pursuant to subrule [B][4][c]) concerning fees and expenses as the court deems appropriate.

Nonparty appellants argue that MCR 2.302(B)(4) applies to any discovery request made to a nonparty expert regardless of whether the information sought is about the expert or is known to the expert. Plaintiff argues that MCR 2.302(B)(4) applies only when a party seeks "facts known" or "opinions held" by a nonparty expert and that plaintiff here was not seeking to discover Dr. Kneiser's opinion or facts known to Dr. Kneiser. Plaintiff also argues that MCR 2.302(B)(4) applies only when the facts known or opinions held by

an expert were acquired or developed in anticipation of litigation, which the requested records here were not.

As an initial matter, nonparty appellants argue that Dr. Kneiser and Ability Assessments are one and the same, so plaintiff's subpoena to Ability Assessments was really a subpoena to Dr. Kneiser. We find this reasoning questionable. Subject to exceptions for malpractice, principles of respecting the corporate form generally apply to professional corporations. See *Nugent v Weed*, 183 Mich App 791, 794-796; 455 NW2d 409 (1990); *Craig v Oakwood Hosp*, 471 Mich 67, 93-99; 684 NW2d 296 (2004). It appears that Dr. Kneiser wishes to "have it both ways," at least to some extent. Nevertheless, as a practical matter, any fact known to Ability Assessments is necessarily known to Dr. Kneiser, and vice versa. Furthermore, the exception for malpractice does slightly blur the distinction between Dr. Kneiser and her professional corporation. Ultimately, we need not resolve this question.

In *Spine Specialists*, this Court noted that MCR 2.302(B)(4) applies only to facts known or opinions held by an expert that were " '*acquired or developed in anticipation of litigation*' "—not to any and all information possessed by an expert. *Spine Specialists*, 317 Mich App at 501-502, quoting MCR 2.302(B)(4). This Court has similarly held that to the extent an expert witness acquired information as a factual witness "or as a result or consequence of his or her normal business activities and duties," the expert is "treated just as if they were any other potential witness, and the scope of discovery as to them is limited only by the provisions of [MCR] 2.302(B)(1)." *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 345; 497 NW2d 585 (1993) (quotation marks, citation, and emphasis omitted). This Court in *Spine Specialists* con-

cluded that a doctor who acquired facts about his patient while treating him could not be said to have acquired those facts in anticipation of litigation under MCR 2.302(B)(4). *Spine Specialists*, 317 Mich App at 502.

Nonparty appellants and Citizens cite several unpublished opinions of this Court. Unpublished opinions are not binding, although they may be persuasive. *Eddington v Torrez*, 311 Mich App 198, 203; 874 NW2d 394 (2015). Nonparty appellants argue that in *Smith v Goenka*, unpublished per curiam opinion of the Court of Appeals, issued January 7, 2021 (Docket No. 347127), pp 3-5, this Court held that MCR 2.302(B)(4) applies when a party seeks an expert witness's financial information. Although *Smith* did involve a party that requested financial information from an expert witness, no party contended that MCR 2.302(B)(4) was inapplicable, as plaintiff does here. *Id*. at 3-5. Therefore, the applicability of MCR 2.302(B)(4) was not at issue in *Smith*, and *Smith* has no persuasive value in this matter.

Citizens cites two additional unpublished cases, but Citizens presents no argument in support of those cases' potential applicability. We therefore decline to consider those cases. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Citizens also points out, correctly, that discovery should not be abused as a weapon of gamesmanship. *Rock v Crocker*, 499 Mich 247, 267 n 15; 884 NW2d 227 (2016). We would wholeheartedly agree with that proposition even if we were not bound to do so, which is why, as we discuss later in this opinion, the trial court has a duty to consider the propriety of the scope of a subpoena and balance the various parties' competing interests. However, to the extent Citizens argues that certain information should

not be discoverable based on considerations beyond the facts of this case, Citizens presents a policy argument that is the exclusive province of the Legislature or our Supreme Court.

Therefore, by its plain language, MCR 2.302(B)(4) does not apply here. Plaintiff requested nonparty appellants to produce records from 2017 through 2020 showing Dr. Kneiser's earnings for performing medicolegal work and showing the number of patient examinations Dr. Kneiser performed. In other words, plaintiff sought records kept in the ordinary course of business. Plaintiff did not seek facts or opinions acquired or developed in anticipation of litigation or trial. Accordingly, regardless of the trial court's reasoning, the trial court reached the correct result here: MCR 2.302(B)(4) was inapplicable to plaintiff's request.

IV. SCOPE OF SUBPOENA

Nonparty appellants also argue that the trial court still abused its discretion by declining to quash plaintiff's subpoena because plaintiff's subpoena was unreasonable and oppressive under MCR 2.305(A)(4)(a) and because her request was beyond the scope of discovery under MCR 2.302(B)(1). We agree in part.

"Michigan follows an open, broad discovery policy that permits liberal discovery . . . ." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). "However, Michigan's commitment to open and far-reaching discovery does not encompass fishing expeditions." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011) (quotation marks, brackets, and citation omitted).

MCR 2.302(B)(1) addresses the general scope of discovery:

> In General. Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

"[A] trial court should protect parties from excessive, abusive, or irrelevant discovery requests." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 260-261; 833 NW2d 331 (2013).

MCR 2.305(A)(1) allows a party to subpoena a nonparty to produce documents in the nonparty's possession. MCR 2.305(A) states, in relevant part:

> (1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). An unrepresented party may move the court for issuance of non-party discovery subpoenas. . . .
>
> * * *
>
> (4) A subpoena issued under this rule is subject to the provisions of MCR 2.302(C), and the court in which the action is pending or in which the subpoena is served, on timely motion made by a party or the subpoenaed

> non-party before the time specified in the subpoena for compliance, may:
>
> (a) quash or modify the subpoena if it is unreasonable or oppressive;
>
> (b) enter an order permitted by MCR 2.302(C); or
>
> (c) conditionally deny the motion on prepayment by the party on whose behalf the subpoena is issued of the reasonable cost of producing documents or other tangible things.

Nonparty appellants argue that the information sought by plaintiff is, at most, only marginally relevant. Therefore, they contend that the trial court should have concluded that the expense of having nonparty appellants produce these records outweighs the likely benefit. For mostly the same reasons, nonparty appellants argue that plaintiff's subpoena was unreasonable and oppressive under MCR 2.305(A)(4)(a), and therefore the trial court should have quashed the subpoena.

We disagree with nonparty appellants regarding relevance. Although the records were unrelated to the substantive legal issues in this case, they were related to Dr. Kneiser's credibility, and information that bears on witness credibility or bias is never irrelevant. *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003). To show that an expert witness is potentially biased, one may show that an expert has a pattern of testifying for a particular category of defendants, see *Wilson v Stilwill*, 411 Mich 587, 599-600; 309 NW2d 898 (1981), and one may show that an expert has a pecuniary interest in the outcome, *US Fire Ins Co v Citizens Ins Co of America*, 156 Mich App 588, 592; 402 NW2d 11 (1986). Whether nonparty appellants have a history of serving as experts for insurance companies,

and their compensation for doing so, bears on Dr. Kneiser's credibility, and it is therefore relevant.[4]

Nonparty appellants alternatively argue that even if MCR 2.302(B)(4) is inapplicable, the trial court erred by failing to quash the subpoena as being "unreasonable or oppressive" under MCR 2.305(A)(4)(a). MCR 2.305(A)(4)(a) uses the word "may." Although the word "may" can impose a mandate, it usually connotes a grant of discretion. See *People v Arnold*, 502 Mich 438, 466-467; 918 NW2d 164 (2018). In contrast, the plain language of MCR 2.302(B)(1) clearly obligates the trial court to balance the burden of the proposed discovery against the value of the proposed discovery. The trial court dispensed with this obligation by merely stating that Citizens had "not argued how compliance with the subpoenas would cause any hardship to the Doctors." We decline to make a determination of whether the subpoena should be quashed. However, we conclude that the trial court's analysis was inadequate.

In fact, Citizens did argue that compliance with the subpoena would be time-consuming and expensive and that doing so would constitute an unfair invasion of Dr. Kneiser's privacy.[5] Citizens also implicitly argued that

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[4] Plaintiff also argues that the requested records are relevant to establishing whether Dr. Kneiser was *qualified* to conduct a mental or physical examination under MCL 500.3151. In relevant part, MCL 500.3151(2)(b) imposes certain requirements on examining physicians for "*the year* immediately preceding the examination . . . ." (Emphasis added.) Even if plaintiff's request were relevant to whether Dr. Kneiser met the requirements under this statute, only one year of records would be relevant. In other words, records from 2017, 2018, and most of 2019 would be irrelevant.

[5] Individuals have a privacy interest in their personal tax returns. See *Fassihi v St Mary Hosp of Livonia*, 121 Mich App 11, 15-16; 328 NW2d 132 (1982). However, we find persuasive the observation of the United States Court of Appeals for the Sixth Circuit that corporate financial records give rise to somewhat lessened (albeit not nonexistent) privacy

to the extent plaintiff sought discoverable information, there were less-intrusive means of obtaining that information. See generally *Alberto v Toyota Motor Corp*, 289 Mich App 328, 336-339; 796 NW2d 490 (2010); *Hamed v Wayne Co*, 271 Mich App 106, 109-111; 719 NW2d 612 (2006); *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-618; 440 NW2d 45 (1989). The trial court's failure to explicitly balance these considerations as required by MCR 2.302(B)(1) hampers our review. See *Ronnisch Constr Group, Inc*, 499 Mich at 552.

Because the decision whether to quash a subpoena is discretionary, we will not make that decision on behalf of the trial court. However, for remand, we note that Citizens attached to its motion for reconsideration an affidavit of Dr. Kneiser that appears to have provided at least some of the information plaintiff sought.[6] On

concerns. *Doe v United States*, 253 F3d 256, 269 (CA 6, 2001). Federal caselaw is not binding, but we may consider it persuasive. *Sharp v Lansing*, 464 Mich 792, 802-803; 629 NW2d 873 (2001). As discussed, Dr. Kneiser chose to avail herself of the corporate form, and the subpoena was addressed to her professional corporation. Conversely, MCL 600.2169(5)(a) is plainly inapplicable because this is not a medical malpractice claim and plaintiff is not seeking nonparty appellants' tax returns to show that Dr. Kneiser is unqualified.

[6] Additionally, in its late-filed brief, Citizens contends that nonparty appellants have withdrawn their services and that this case is now moot. That contention is not a fact of record. Nevertheless, it is well established that courts may review a technically moot issue if the issue is of public significance and the underlying conduct is likely to recur yet evade judicial review. See, e.g., *Detroit v Ambassador Bridge Co*, 481 Mich 29, 50-51; 748 NW2d 221 (2008). Citizens contends that insurance companies will never be able to retain their own hired doctors if those doctors may be subjected to discovery intended to show that those doctors are biased. The ability of insurance companies to conduct their own medical examinations is certainly one of public significance. Furthermore, if all doctors choose to withdraw their services when served with a discovery request, the propriety of those discovery requests may never come to appellate review. Citizens' own arguments demonstrate a

remand, the trial court shall proceed to balance the value of plaintiff's proposed discovery, particularly in light of the disclosures already provided in Dr. Kneiser's affidavit, against the burden of the discovery, including addressing nonparty appellants' privacy concerns and the practically available alternative means for plaintiff to discover the information.

Vacated and remanded for proceedings that are consistent with this opinion. We do not retain jurisdiction.

BORRELLO, J., concurred with RONAYNE KRAUSE, J.

GLEICHER, C.J. (*concurring*). The majority holds that the circuit court did not abuse its discretion by refusing to quash the third-party subpoena issued to Dr. Kneiser. I concur and write separately to expand on the majority's analysis.

The issue presented is whether plaintiff should have been permitted to serve a nonparty subpoena seeking the production of documents on defendant Citizens Insurance Company's expert witness, Dr. Mary Kneiser. The subpoena requested information regarding the percentage of Dr. Kneiser's time devoted to "independent medical examinations" during the preceding four years and copies of financial records reflecting Dr. Kneiser's earnings for performing "independent medical examinations" during the same period. The circuit court refused to quash the sub-

high likelihood that, unless we consider this case now, a similar situation will recur yet evade appellate review. We therefore choose to review this matter.

poena. I agree with the majority that the information sought was discoverable and that the case is not moot.

I. MOOTNESS

Whether a case is justiciable is a court's initial consideration. Here, mootness did not surface as an issue until after the case was submitted to a panel for decision—telling timing, in my view.

One week before oral argument, Ability Assessments' counsel filed an "emergency" motion to withdraw this appeal on the ground of mootness. Counsel's motion included a letter from Dr. Kneiser dated December 23, 2021, stating simply: "I withdraw as an expert witness in the above listed case." We denied this "emergency" motion a few days later. On January 4, 2022—the day before oral argument—Citizens filed a brief on appeal, a request for oral argument, and a motion for immediate consideration. During the nine months that the case awaited hearing in this Court, Citizens had not filed a single appellate pleading, despite having strenuously objected to the subpoena in the circuit court.

Citizens' late-filed appellate brief beseeched us to refrain from issuing a "published decision . . . affirming the trial court's decision . . . ." During oral argument, counsel for Ability Assessments echoed this plea, adding a mootness argument based on Dr. Kneiser's last-minute withdrawal.

The majority properly holds that the issue presented by the parties' briefing is publicly significant, capable of repetition, and yet likely to evade review. An additional legal ground defeats the mootness claim and justifies publication of this opinion.

The circumstances surrounding Dr. Kneiser's withdrawal as an expert smack of gamesmanship. The United States Supreme Court has declared that "post-certiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox v Serv Employees Int'l Union, Local 1000*, 567 US 298, 307; 132 S Ct 2277; 183 L Ed 2d 281 (2012). This permutation of mootness principles, known as the voluntary-cessation doctrine, has not yet been adopted in Michigan, but it applies here.

In *Knox*, the petitioner had "defended the decision below on the merits," but after certiorari was granted, took an action designed to render the case moot. *Id*. The Supreme Court held that the petitioner's action—refunding union dues—would not justify a dismissal for mootness because the petitioner could simply resume the challenged conduct after dismissal. *Id*. Here, Citizens and Ability Assessments waited until the eleventh hour to decide that they did not want this panel to review the validity of a third-party subpoena seeking an expert's financial records. The legal issue presented in this appeal could arise again on remand and is likely to recur in other cases.

Citizens vigorously contested the subpoena served on Ability Assessments in the circuit court. Ability Assessments and Dr. Kneiser filed an emergency application to appeal the circuit court's denial of Citizens' motion to quash the subpoena. We granted the application on March 25, 2021, and the briefs on appeal were filed by Ability Assessments and plaintiff by July 14, 2021. On December 3, 2021, this Court notified the parties of the names of the panel members assigned to the case. Suddenly, on December 23, 2021, Dr. Kneiser announced her withdrawal as an expert

and moved to dismiss the appeal as moot. And Citizens waited until the day before oral argument to join Dr. Kneiser's motion.

It is difficult to view this turn of events as anything other than a ploy to avoid review by this Court of Appeals panel. Dr. Kneiser's one-sentence letter to her counsel offers no reason for her decision to withdraw her services. Apparently, Dr. Kneiser had no interest in doing so until the identities of the three judges hearing this case were revealed. I regard this procedural posturing "with a critical eye," as directed by *Knox*. And in my view, there is no explanation for this sudden change of mind other than forum-shopping, which defeats mootness.

Ability Assessments has not explained why this Court should now simply pass on an issue it persuasively argued was legally significant. Nor has it addressed a well-recognized exception to mootness involving issues capable of repetition and yet evading review. A narrow exception to the voluntary-cessation doctrine provides that a case *is* moot when "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v Concentrated Phosphate Export Ass'n, Inc*, 393 US 199, 203; 89 S Ct 361; 21 L Ed 2d 344 (1968). The party asserting mootness bears a "heavy burden" of persuasion. *Friends of the Earth, Inc v Laidlaw Environmental Servs (TOC), Inc*, 528 US 167, 189; 120 S Ct 693; 145 L Ed 2d 610 (2000) (quotation marks and citation omitted). Ability Assessments has not carried this burden. To the contrary, the facts support that today's "mootness" argument is nothing more than a calculated diversionary tactic intended to avoid a decision by the three judges randomly assigned to hear this case, and that had Ability

Assessments drawn a different panel, the legal issue would have been joined without protest.

The voluntary-cessation rule prohibits a party from evading judicial review by ceasing challenged conduct to avoid judicial scrutiny. Here, the record strongly suggests blatant judge-shopping. Ability Assessments went to an unusual and costly length—filing an interlocutory application for leave to appeal—to seek redress for a judicial ruling it characterized as clearly wrong and a flagrant abuse of discretion. This Court granted that application because it raised an issue worthy of plenary consideration. Because the situation presented here is likely to recur the next time a party seeks similar information from an expert witness, the public interest is served by addressing the fully briefed and well-argued legal issue here.

II. AN OVERVIEW OF THE PERTINENT COURT RULES

Ability Assessments raises three substantive arguments: a nonparty subpoena may not be used to discover information possessed by an expert witness without leave of the court, an expert's financial information is beyond the permissible scope of discovery, and the circuit court abused its discretion by failing to quash the subpoena based on its "oppressiveness." I would approach these arguments somewhat differently than the majority, but I reach the same ultimate conclusions. My analysis begins with the general principles underlying the court rules governing discovery.

The Michigan Court Rules declare at their outset that the rules "are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." MCR

1.105. A "just, speedy, and economical determination" of the case at hand is served by discovery that fulfills the central purpose of pretrial discovery: preparation of a lawsuit for trial. That purpose necessarily includes gathering the groundwork for effective cross-examination of the other side's witnesses.

The scope of discovery authorized by the court rules is broad and explicitly recognizes that information relevant to a party's "defenses" is discoverable and need not be admissible at trial:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable. [MCR 2.302(B)(1).]

A matter is "relevant" to a party's defense when it has a practical bearing on that defense or is "pertinent" to it. *McClellan v Collar (On Remand)*, 240 Mich App 403, 410; 613 NW2d 729 (2000) (quotation marks and citation omitted). "Relevance" is broadly defined in Michigan to include evidence that has "*any* tendency" to make a fact of consequence more or less probable. MRE 401 (emphasis added). Our Supreme Court has explained, "The threshold is minimal: 'any' tendency is sufficient . . . ." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998), citing MRE 401.

Evidence of a witness's bias readily qualifies as relevant and discoverable.

Bias is a common-law term describing "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001) (quotation marks and citation omitted). A "witness'[s] like, dislike, or fear of a party, or by the witness'[s] self-interest" may demonstrate bias. *Id*. (quotation marks and citation omitted). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness'[s] testimony." *Id*. (quotation marks and citation omitted). In *Layher*, our Supreme Court expressly advanced a "traditionally liberal view of cross-examination regarding witness bias." *Id*. at 768. See also *Hayes v Coleman*, 338 Mich 371, 381; 61 NW2d 634 (1953) ("It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may disclose a motive to injure the one party or to befriend or favor the other. The party producing a witness may not shield him from such proper cross-examination for the reason that the facts thus elicited may not be competent upon the merits of the cause.") (quotation marks and citation omitted).

The next question is whether an expert's financial relationship to a party provides relevant and discoverable evidence of bias.

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 595; 113 S Ct 2786; 125 L Ed 2d 469 (1993) (quotation

marks and citation omitted). For that reason, cross-examination may help a jury to sort out which experts are more credible than others. An expert witness's credibility is critical to that inquiry.

More than 40 years ago, our Supreme Court acknowledged that "[a]n expert witness's experience testifying in court may influence the manner in which he or she testifies. The same is true for experience in evaluating cases which may come to court. It is thus proper to bring out on cross-examination the number of times a witness testifies in court, or is involved in particular types of cases." *Wilson v Stilwill*, 411 Mich 587, 599-600; 309 NW2d 898 (1981). Today, that is an unremarkable proposition. Routinely, experts are extensively questioned at deposition and trial regarding their testimonial track records. This Court has recognized the importance and the legitimacy of such evidence:

> While there is nothing improper about doctors choosing to spend a large amount of time reviewing cases and testifying on behalf of injured persons, this does not mean that a reasonable person, made aware of how often such doctors give depositions, and the noteworthy fees such services command, might not, without pejorative intent, describe such practitioners as "litigation doctors" who "were paid a large amount of money." [*Hunt v Freeman*, 217 Mich App 92, 98; 550 NW2d 817 (1996) (citation omitted).]

Indeed, counsel may properly refer to an opponent's expert as a "professional witness" when the proofs showed the doctor's practice was "limited to evaluations." *Heins v Detroit Osteopathic Hosp Corp*, 150 Mich App 641, 644-645; 389 NW2d 141 (1986).

Equally unremarkable is the notion that an expert who regularly testifies for one particular attorney or client may be biased in a party's favor. *Wilson*, 411

Mich at 600-601. And because experts are compensated for their services, inquiry into the amount of compensation received is also standard practice on cross-examination. It is no stretch to conclude that an expert who is well compensated by a particular party, or who has a continuing and close financial relationship with a party, may be biased in that party's favor. It is well accepted that "[a] showing of a pattern of compensation in past cases raises an inference of the possibility that the witness has slanted his testimony in those cases so he would be hired to testify in future cases." *Collins v Wayne Corp*, 621 F2d 777, 784 (CA 5, 1980).

> [T]he fact that an expert witness may have a 20 year history of earning significant income testifying primarily as a witness for defendants, and an ongoing economic relationship with certain insurance companies, certainly fits within recognized examples of bias/prejudice impeachment, making such facts relevant both to the subject matter of the litigation, and the claims and defenses raised, and placing it squarely within the scope of discovery authorized by [Federal Rule of Civil Procedure] 26(b)(1) . . . . [*Behler v Hanlon*, 199 FRD 553, 557 (D Md, 2001).]

That said, an expert's tax returns and other financial details may constitute private and confidential information, or may require time-consuming efforts to pull together. In medical malpractice cases, the Legislature has decreed that an expert's tax returns are simply off-limits. MCL 600.2169(5)(a). In all other cases, the court rules permit the trial judge to issue a protective order to protect an expert "from annoyance, embarrassment, oppression, or undue burden or expense . . . ." MCR 2.302(C).

Michigan's discovery rules authorize comprehensive inquiry into relevant subjects, including a witness's credibility, provided that the inquiry is "propor-

tional to the needs of the case." MCR 2.302(B)(1). The information at issue here *is* relevant to Dr. Kneiser's possible bias in favor of insurance companies, specifically, Citizens. Relevant information is discoverable. The more complicated questions are whether plaintiff's subpoena seeking that information conformed with the court rules, and whether the burden or expense of the discovery of this information outweighs its likely benefits.

III. MCR 2.302(B)(4) VERSUS MCR 2.305

Two court rules are at play in this case: one governing discovery from expert witnesses, MCR 2.302(B)(4), and the other allowing a party to subpoena a nonparty for documents, MCR 2.305(A)(1). Ability Assessments contends that the expert-discovery rule trumps the nonparty-subpoena rule. In my view, these two rules should be read individually and then harmonized. This approach has been applied in countless cases. For example, in *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 584; 689 NW2d 712 (2004), we explained that where "the plain terms of the rules do not conflict with each other, we interpret them individually by their unambiguous terms. If we can construct two rules so that they do not conflict, that construction should control." (Quotation marks and citations omitted.) More recently, we highlighted the importance of focusing on the "plain language" of the rules and discerning their intent based on that language and the "structure" of the court rules as a whole. *Decker v Trux R Us, Inc*, 307 Mich App 472, 479; 861 NW2d 59 (2014) (quotation marks and citation omitted). When a potential conflict is not "irreconcilable," the two rules should be read as a "harmonious whole." *Id*. at 481. Doing so here yields the conclusion that the

discovery of evidence relevant to an expert's *credibility* may be pursued in several different ways.

The catchline of MCR 2.302(B)(4) is "Trial Preparation; Experts." The rule's first sentence provides that it covers "[d]iscovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and acquired or developed in anticipation of litigation or for trial . . . ." Information meeting that description may be discovered "only" in accordance with the methods described in the balance of the rule. The rule does not offer the option of serving a third-party subpoena on a designated expert. The rule does, however, allow a court "[o]n motion" to "order further discovery by other means," subject to payment of the expert of a reasonable fee for time spent in complying with a discovery request. MCR 2.302(B)(4)(a)(iii).

The majority correctly concludes that MCR 2.302(B)(4) applies only to facts and opinions "acquired or developed" by an expert "in anticipation of litigation." Information relevant to Dr. Kneiser's credibility does not fit that description. The most natural construction of the term "acquired or developed in anticipation of litigation" suggests that the rules' drafters anticipated that other subjects would arise during discovery. But even if MCR 2.302(B)(4) is broadly and nontextually construed to include the information sought in the subpoena, any error in permitting the discovery is entirely harmless.

MCR 2.302(B)(4)(a)(iii) empowers the circuit court to "order further discovery" on motion. Plaintiff did not bring the motion leading to the order from which this appeal flows—Ability Assessments and Dr. Kneiser did. This is a distinction without a difference, as the rule contemplates that a judge may order discovery of

an expert beyond the limits described in MCR 2.302(B)(4)—and a judge did.

And there is another reason that plaintiff's failure to move for permission to serve the subpoena on Dr. Kneiser and her professional corporation is much ado about nothing. The rule permits a party to take an expert's deposition. MCR 2.302(B)(4)(a)(ii). The rule governing depositions on oral examination, MCR 2.306, allows a party's notice of deposition to include "a request for the production of documents and tangible things at the taking of the deposition. MCR 2.310 applies to the request." MCR 2.306(B)(2). Ability Assessments and Dr. Kneiser concede that an expert's "bias and credibility" are "relevant," but contend that "such matters may be inquired into on cross examination" rather than being the subject of subpoenas. MCR 2.306(B)(2) directly refutes that argument. The rule permitted plaintiff to seek information at issue by way of a notice of deposition accompanied by a request for production, which serves precisely the same function as a subpoena. Plaintiff apparently decided to forgo the deposition (in the time of COVID-19, not an unreasonable choice). Once again, any deviation from the strict letter of the rules was harmless.

"[T]he purpose of discovery is to simplify and clarify issues." *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). "Thus, the rules should be construed in an effort to facilitate trial preparation and to further the ends of justice." *Id*. And the rules are intended to promote "the just, speedy, and economical determination of every action," which requires overlooking errors that "do[] not affect the substantial rights of the parties." MCR 1.105. Here, Ability Assessments and Dr. Kneiser decry plaintiff's failure to notice Dr. Kneiser's deposition and to request the infor-

mation contained in the third-party subpoena via a deposition notice. They have yet to explain what possible difference this could have made. Had the deposition notice been served with a request for production, Ability Assessments and Dr. Kneiser would have filed an objection. And exactly the same result would have been obtained.

Finally, MCR 2.305(A)(1) and (2) permit a party to "issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land" and to state in the subpoena that "it is solely for producing documents . . . for inspection and copying, and that the party does not intend to examine the deponent." The nonparty may move to quash the subpoena or to request prepayment of the reasonable cost of producing the documents. MCR 2.305(A)(4). MCR 2.305 is not limited to nonexperts. Reading this rule in conjunction with MCR 2.306(B) leads to the inescapable conclusion that MCR 2.305 offers an alternative pathway for discovering facts relevant to an expert's credibility and evidence pertinent to MCL 500.3151(2)(b), which requires that "[d]uring the year immediately preceding [an] examination" related to a claim for personal protection insurance benefits, a physician "must have devoted a majority of his or her professional time" to the "active clinical practice of medicine" or to the instruction of medical students. Facts germane to this statute are most easily garnered in precisely the manner that plaintiff employed.

The court rules under scrutiny do not conflict. Rather, they are part of a comprehensive approach to discovery embodied by rules designed to open doors to

information rather than to make the process onerous and unreasonably complex.

IV. PROTECTIVE ORDERS

In its motion to quash the subpoena, Citizens argued that it was overly burdensome, expensive, and would "serve[] only to annoy and disturb" Dr. Kneiser. Citizens alleged that it would take Dr. Kneiser "a significant amount of time" to comply but produced no evidence to that effect, such as an affidavit from Dr. Kneiser shedding light on her record-keeping practices. After the circuit court refused to quash the subpoena, Citizens filed a motion for reconsideration and attached an affidavit signed by Dr. Kneiser that partially addressed the subjects of the nonparty subpoena. But the affidavit provided no information relevant to Citizens' argument that the subpoena was unduly burdensome.

The circuit court admitted in its opinion denying reconsideration that it had not initially addressed Citizens' argument that the subpoena was oppressive or burdensome, noting that Citizens "still has not provided the Court with any information regarding the burden or expense of the proposed discovery in order for this Court to determine whether such outweighs its likely benefit." The circuit court continued:

> Similarly, Citizens has not made a cogent argument that the subpoenas issued by Plaintiff were intended to harass, embarrass, and dissuade the Doctors from participating in the litigation process. Merely citing to a case where the Court of Appeals determined that it was not an abuse of discretion to deny a discovery request does not show that any discovery regarding an expert witness'[s] potential bias is intended to harass, embarrass, or intimidate them.

In my view, Citizens and Dr. Kneiser have been afforded ample opportunity to support that alleged burden imposed by the subpoena or that it was the product of improper motives. I would hold that the circuit court did not abuse its discretion in finding the discovery proportional. Nevertheless, in its opinion on reconsideration the circuit court generously afforded Citizens the option of filing a "separate motion requesting a protective order." Given that concession, I agree that remand regarding that question alone is appropriate.

CITY OF SOUTHFIELD v SHEFA, LLC

Docket No. 350885. Submitted August 4, 2021, at Detroit. Decided February 10, 2022, at 9:05 a.m. Leave to appeal denied 509 Mich 1055 (2022).

The city of Southfield brought an action against Shefa, LLC, in the Oakland Circuit Court, seeking, among other relief, a declaratory judgment that a vacant hotel defendant owned was a dangerous building and a nuisance under MCL 125.539 and MCL 125.402. Defendant had filed for federal bankruptcy protection in 2014, at which point it owed the Oakland County Treasurer nearly $3.8 million in unpaid taxes and utility bills. In early 2016, the bankruptcy judge confirmed a plan under Chapter 11 of the federal bankruptcy code requiring defendant to execute a deed to the property in plaintiff's favor that would be held in escrow by a title company and execute a first-priority mortgage in favor of plaintiff. Under this plan, the deed documents would be released from escrow and returned to defendant, and the city's mortgage would be discharged, upon confirmation that at least $2,100,000 had been used on physical improvements to the property. The plan provided that the bankruptcy court would retain jurisdiction until the plan was fully consummated. Defendant executed a mortgage in favor of plaintiff in March 2016. The bankruptcy judge closed the case in February 2017, but several months later, the judge briefly reopened the case after plaintiff moved for default, alleging, among other things, that defendant had failed to make sufficient progress on renovating the property. The bankruptcy judge ruled that the court had subject-matter jurisdiction to decide the city's motion under 28 USC 1334(b) because the city's motion qualified as a "core proceeding" under 28 USC 157, it affected the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship under 28 USC 157(b)(2)(O), and it was a proceeding "arising in" a case under Title 11 under 28 USC 1334(b). Plaintiff appealed the bankruptcy judge's order in the federal district court, which affirmed the order. In July 2019, plaintiff brought this action against defendant and Elbaz/Building, LLC, which was later dismissed and is not a party to this appeal. In Count I, plaintiff sought a declaration that the property was a dangerous building and a nuisance

under Michigan statutory law. In Count II, plaintiff sought the appointment of a receiver because defendant had failed to timely pay various taxes, which entitled plaintiff to the appointment of a receiver under the terms of the parties' mortgage. Plaintiff further alleged that defendant had violated the terms of the mortgage and the confirmed plan and order by failing to comply with various ordinances and environmental laws and allowing Elbaz/Building to record a construction lien against the property. In Count III, plaintiff sought judicial foreclosure of the mortgage, alleging that defendant had defaulted on its obligations under both the mortgage and the confirmed plan and order. Defendant moved for summary disposition under MCR 2.116(C)(4), (7), (8), and (10), and it also sought sanctions under MCR 2.109. After a hearing, the circuit court, Hala Jarbou, J., granted defendant's motion for summary disposition under MCR 2.116(C)(4) and (10). The court concluded that because the relief plaintiff requested, if granted, would thwart the implementation of the bankruptcy plan, the court did not have subject-matter jurisdiction. Despite this conclusion, the court proceeded to reach the merits of plaintiff's claims for declaratory relief and appointment of a receiver, concluding that summary disposition should be granted on these two claims under MCR 2.116(C)(10). The court also denied defendant's request for sanctions. Plaintiff appealed.

The Court of Appeals *held*:

1. The circuit court erred by concluding that it lacked subject-matter jurisdiction over this case. Const 1963, art 6, § 13 gives state circuit courts original jurisdiction in all matters not prohibited by law. Under MCL 600.605, circuit courts have jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the Constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the Constitution or state statutes. Jurisdiction over bankruptcy matters is governed in part by 28 USC 1334, which provides that federal district courts have exclusive jurisdiction over all cases under Title 11, meaning cases brought by petition under 11 USC 301, 302, or 303. Under 28 USC 1334(e)(1), the district court where the bankruptcy case is commenced or pending has exclusive in rem jurisdiction over the res of the debtor and the estate. The district court also has exclusive jurisdiction over any claim involving the construction of 11 USC 327 pursuant to 28 USC 1334(e)(2). However, for matters that merely arise under, arise in, or are otherwise related to a bankruptcy case, federal and state courts have concurrent jurisdiction under 28 USC 1334. The circuit court erred by focusing on whether the state-law claims were related to

defendant's bankruptcy case because, even if they were, it would not have divested the circuit court of subject-matter jurisdiction over those claims unless and until the district court decided to take jurisdiction over those claims. Similarly, the circuit court's analysis of "core" versus "noncore" proceedings was not relevant to the jurisdictional analysis. Plaintiff's claims were not causes of action created by Title 11 or pursued as part of defendant's bankruptcy case; rather, they involved the terms and conditions of a mortgage, which are matters of state contract law, and allegations of a nuisance and a dangerous building, which are governed by state statutes. The fact that the parties entered into the mortgage in accordance with the bankruptcy court's confirmed plan and order did not mean that causes of action for breach of that contract had to be pursued as part of defendant's now-closed bankruptcy case. Although the bankruptcy court took jurisdiction over the city's motion to reopen the bankruptcy case, it did so under the original-but-not-exclusive provision of 28 USC 1334(b), not the original-and-exclusive provision of 28 USC 1334(a). Moreover, this case did not involve the same allegations or causes of action pursued before the bankruptcy judge, who recognized that the city might have state-law claims outside of the confirmed plan and order. Therefore, this was not a case "under title 11" for purposes of 28 USC 1334(a), nor did any of the city's claims involve the construction of 11 USC 327, so the grant of exclusive jurisdiction under 28 USC 1334(e)(2) was not relevant. While the district court might have had exclusive jurisdiction over claims involving foreclosure and appointment of a receiver over real property under 28 USC 1334(e)(1) had those claims been pursued during defendant's bankruptcy case because such claims are considered in rem, not in personam, under Michigan law, it was not necessary to decide that issue. The circuit court's grant of summary disposition to defendant under MCR 2.116(C)(4) was reversed.

2. The circuit court erred by reaching the merits of plaintiff's claims after concluding that it lacked subject-matter jurisdiction. Because the erroneous ruling occurred at the very outset of the lawsuit, the record was insufficient to determine whether there was a reasonable chance that further discovery would result in factual support for one or more of plaintiff's claims. Accordingly, the grant of summary disposition was reversed as premature.

3. Defendant's arguments that plaintiff's claims were precluded under the doctrines of res judicata and collateral estoppel were not addressed because they were raised for the first time on appeal.

Reversed.

BANKRUPTCY – JURISDICTION – STATE-LAW CLAIMS.

Under 28 USC 1334, federal district courts have exclusive jurisdiction over all cases under Title 11 of the United States Code; however, for matters that merely arise under, arise in, or are otherwise related to a bankruptcy case, federal and state courts have concurrent jurisdiction; a state court may exercise subject-matter jurisdiction over cases involving state-law matters such as the terms and conditions of a mortgage entered into pursuant to a confirmed plan and order entered by a bankruptcy court unless a federal district court exercised its discretion to take jurisdiction over those claims (Const 1963, art 6, § 13).

Plunkett Cooney (by *Jeffrey C. Gerish* and *Douglas C. Bernstein*) for plaintiff.

Wood, Kull, Herschfus, Obee & Kull, PC (by *Brian H. Herschfus*) for defendant.

Before: RIORDAN, P.J., and MARKEY and SWARTZLE, JJ.

SWARTZLE, J. "Who decides?" is a question asked recently by prominent jurists,[1] though it is a question as timeless as it is timely. The question arises whenever there is a dispute involving the separation of powers between branches of the same sovereign, and it similarly arises whenever there is a dispute involving the jurisdiction of different sovereigns. In this appeal, the question arises in a dispute involving a hotel whose owner entered and exited federal bankruptcy proceedings, and now the city where the hotel is located seeks relief from that owner for alleged violations of state law.

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[1] See, e.g., *Nat'l Federation of Indep Business v Dep't of Labor, Occupational Safety & Health Admin*, 595 US ___, ___; 142 S Ct 661, 667; 211 L Ed 2d 448 (2022) (Gorsuch, J., concurring); *id*. at ___; 142 S Ct at 670 (Breyer, Sotomayor, and Kagan, JJ., jointly dissenting); Sutton, *Who Decides?: States as Laboratories of Constitutional Experimentation* (New York: Oxford University Press, 2022).

In this lawsuit for declaratory relief, appointment of receiver, and judicial foreclosure, plaintiff, the city of Southfield, appeals as of right the circuit court's order granting summary disposition in favor of defendant Shefa, LLC. The circuit court concluded that a federal district court had exclusive jurisdiction over the city's claims because the claims related to defendant's now-closed bankruptcy case. In so holding, however, the circuit court misstated and misapplied federal law. We conclude that the circuit court has subject-matter jurisdiction over, at least, several of the city's claims and, therefore, the circuit erred by dismissing the entire case under MCR 2.116(C)(4). Moreover, the circuit court erred by dismissing the city's claims under MCR 2.116(C)(10) when discovery was still in its infancy. Accordingly, we reverse.

I. BACKGROUND

A. PROCEEDINGS IN BANKRUPTCY COURT

This appeal concerns real property owned by defendant and located at 16400 J. L. Hudson Drive, in Southfield, Michigan. The property is a 14-story, 427-room hotel built in 1974 on nine acres. See *In re Shefa, LLC*, 524 BR 717, 721 (Bankr ED Mich, 2015), aff'd 535 BR 165 (ED Mich, 2015). In 2014, defendant filed for Chapter 11 bankruptcy protection under the federal bankruptcy code, 11 USC 101 *et seq*., in the United States Bankruptcy Court for the Eastern District of Michigan. During preconfirmation proceedings, the bankruptcy judge described the case as a "single asset real estate Chapter 11 bankruptcy case involving a vacant hotel," in which the Oakland County Treasurer was the largest creditor. *Id*. at 720. When the petition was filed, taxes on the property had not been paid since 2005, while water and sewerage charges had not been

paid since 2009, resulting in defendant's indebtedness to the Oakland County Treasurer in the approximate amount of $3,787,000. *Id*. at 723.

During preconfirmation proceedings in 2015, the bankruptcy judge described the condition of the property as follows:

> The Hotel is in poor condition. It has deteriorated greatly over the last several years, especially since it closed. The Appraisal indicates that there is extensive damage to the Hotel's plumbing and electrical systems caused by building scrappers and scavengers, and that there has been extensive theft of copper wire and pipes from the Hotel. The Appraisal also notes that there are significant water leaks in the roof, and there are many broken skylights and window walls on the first floor to contribute to those leaks. Even before the Hotel was shut down in 2010, there were already several items of deferred maintenance, all of which have only gotten worse since that time. Overall, the Hotel has a solid building structure, but it is in very poor shape internally and needs extensive repair. [*Id*. at 723-724.]

As reiterated by the federal district court (sitting as an appellate court to review the decisions of the bankruptcy judge), the hotel's value had decreased significantly "due to its deteriorating condition and location in a declining area." *In re Shefa*, 535 BR at 170.

In early 2016, the bankruptcy judge confirmed a consensual Chapter 11 plan. See *In re Shefa, LLC*, unpublished order of the United States Bankruptcy Court for the Eastern District of Michigan, entered February 19, 2016 (Case No. 14-42812). The order contained several provisions relevant to the current dispute: (1) defendant must execute a deed to the property in favor of the city, to be held in escrow by a title company, and the city had the right (but not the obligation) to release the deed from escrow under

certain circumstances; (2) defendant must execute a limited power of attorney in favor of the city's mayor and clerk, authorizing them to execute a deed to the property in favor of the city under certain circumstances; (3) defendant must execute and deliver a first priority mortgage in favor of the city; (4) the deed documents would be released from escrow and returned to defendant, and the city's mortgage would be discharged, upon confirmation that at least $2,100,000 had been used on physical improvements to the property; and (5) defendant must obtain approval for its improvements within 180 days of the effective date of the plan. *Id*. at 4-6.

The plan included the following retention-of-jurisdiction provisions:

> "This Court shall retain jurisdiction in this matter until the Plan has been fully consummated including, but not limited to, the following reasons and purposes:
>
> * * *
>
> B. The determination of all questions and disputes regarding title to the assets of the estate or Debtor, . . .
>
> * * *
>
> E. The enforcement and interpretation of the terms and conditions of this Plan and the entry of orders in support of confirmation of this Plan.
>
> F. The entry of any order, including injunctions, necessary to enforce the title, rights, and powers of Debtor, the Reorganized Debtor or any party-in-interest . . . ." [*In re Shefa, LLC*, 579 BR 438, 441 (Bankr ED Mich, 2017), aff'd by *In re Shefa, LLC*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 25, 2019 (Case No. 18-10073).]

The order stated that the court "shall retain jurisdiction for the enforcement of the foregoing terms [stated in the order], the confirmed Plan and this Order" and stated that, to "the extent inconsistent, the provisions of this Order shall control over" the plan. *In re Shefa, LLC*, unpub order at 6.

Defendant executed a mortgage in favor of the city in March 2016. Defendant covenanted in that mortgage that it would "pay when due, prior to the imposition of penalties and interest, all taxes, assessments, and governmental charges levied" upon the property. The mortgage included a paragraph addressing waste and appointment of a receiver:

> 17. Waste. Grantor's failure, refusal or neglect to pay any taxes or assessments levied against the Property or any insurance premiums due upon policies insurance covering the Property will constitute waste under Michigan Compiled Laws 600.2927, and the Mortgagee shall have a right to appointment of a receiver of the Property and of the rents and income from the Property, with such powers as the Court making such appointment confers. Grantor hereby irrevocably consents to such appointment in such event, and agrees that Mortgagee's costs and expenses, including reasonable attorney fees, incurred in such proceeding shall be added to the Liabilities secured by this Mortgage. Payment by the Mortgagee for and on behalf of Grantor of any delinquent taxes, assessments, or insurance premiums payable by Grantor under the terms of this Mortgage will not cure the default herein described nor in any manner impair the Mortgagee's right to appointment of a receiver as set forth herein.

The mortgage also contained a paragraph regarding remedies for default. This paragraph granted the city the right to foreclose the mortgage and sell the property at public auction or judicially foreclose the mortgage under MCL 600.3101 *et seq*., "upon the occurrence of an event of default under any of the Liabilities, as

defined in the Confirmation Order, or any default in the performance of any of the covenants, conditions and agreements contained in this Mortgage." Finally, the mortgage provided that, if any lien was recorded against the property, the city had the authority, "at its option and without notice, [to] declare the entire Liabilities to be immediately due and payable and [to] institute all such proceedings, including foreclosure of this Mortgage," as the city deemed necessary to protect its interest in the property.

The bankruptcy judge closed the case in February 2017, but several months later, the judge briefly reopened the case to rule on a motion of default filed by the city. See *In re Shefa, LLC*, 579 BR at 440. The city alleged that defendant had defaulted under the confirmed plan and order in several ways: defendant had failed to make sufficient progress on renovating the subject property; the city had issued letters of default to defendant on five occasions for defendant's various failures to meet its obligations under the confirmed plan and order; and the site plan obtained by defendant had expired without being renewed or extended. *Id*.

The bankruptcy judge held that the court had subject-matter jurisdiction to decide the city's motion under 28 USC 1334(b). *Id*. The bankruptcy judge further held that the city's motion qualified as a "core proceeding" for two reasons: it was a proceeding " 'affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor . . . relationship' " under 28 USC 157(b)(2)(O), and it was a proceeding "arising in" a case under Title 11, within the meaning of 28 USC 1334(b). *Id*. The bankruptcy judge concluded that the city's motion presented a dispute over which the court had retained jurisdiction under the confirmed plan and order. *Id*. at 441.

In addressing the city's arguments, the bankruptcy judge held open the possibility that the city had potential recourse against defendant, outside the remedies provided in the confirmed plan and order:

> It is clear that [defendant] is not guilty of "doing nothing," even though the City is not satisfied with [defendant's] progress. Nor has the City demonstrated that it would be without any recourse *outside the confirmed Plan*, under applicable *nonbankruptcy law*, to address such an extreme situation of [defendant] doing nothing to renovate the Property after obtaining site plan approval. To the contrary, during the hearing, for example, the City's counsel alluded to the possible actions of (1) *foreclosing on the City's mortgage* on the Property; and (2) declaring the building on the Property *a nuisance and demolishing it*. [*Id*. at 446 (emphasis added).]

The bankruptcy judge denied the city's motion because the city had failed to demonstrate that an event of default had occurred, as described under the confirmed plan and order; the bankruptcy judge further concluded that, even if an event of default had occurred, the city was not entitled to the relief that it sought. *Id*. at 445.

The city appealed the bankruptcy judge's order to the federal district court. *In re Shefa, LLC*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued February 25, 2019 (Case No. 18-10073). The district court affirmed, concluding that the bankruptcy judge did not abuse his discretion by finding that the city had failed to identify an event of default. *Id*. at 16.

B. PROCEEDINGS IN STATE CIRCUIT COURT

While the federal proceedings were taking place, Elbaz/Building, LLC filed a construction lien for un-

paid labor and materials against the property, in the amount of $215,766. Later in March 2019, a fire started by an intruder damaged the property. The local fire department estimated that the fire damage was relatively modest (approximately $3,200).

In July 2019, the city sued defendant in the Oakland Circuit Court. (The city also sued Elbaz/Building, LLC, but the company was later dismissed and is not a party to this appeal.) In Count I, the city sought a declaration that the property was a "dangerous building" as defined in MCL 125.539(b), (g), (i), and (j), and a "nuisance" as defined in MCL 125.402(18). In Count II, the city sought the appointment of a receiver because defendant had failed to timely pay various taxes, which qualified as waste and entitled the city to the appointment of a receiver under the terms of the parties' mortgage. The city further alleged that defendant had violated the mortgage and confirmed plan and order by failing to comply with various ordinances and environmental laws and allowing a lien to be recorded against the property. Finally, in Count III, the city sought judicial foreclosure of the mortgage, alleging that defendant had defaulted on its obligations under both the mortgage and the confirmed plan and order. Shortly after filing its complaint, the city moved for appointment of a receiver, relying on statute, court rule, and the parties' mortgage agreement. The circuit court held a hearing on the city's motion and denied the motion that same day without explanation.

In lieu of answering the city's complaint, defendant moved for summary disposition under MCR 2.116(C)(4) (subject-matter jurisdiction), (7) (prior judgment), (8) (state a claim), and (10) (genuine issue of material fact) in August 2019. As part of the motion, defendant sought sanctions under MCR 2.109 (frivo-

lous claims). The city opposed the motion, and defendant replied in support of its motion. The circuit court held a hearing on the motion in September 2019, and the parties argued consistently with their respective briefs. With respect to the alleged code violations, the city offered to provide documentary evidence in support, but the circuit court declined, explaining: "Listen, I'm not—right now, I'm not addressing what the state of the building is or isn't. It—in the sense that I—I just want to know what jurisdiction I have [']cause it seems like the bankruptcy court either has addressed these issues or maybe still is. But you're telling me that's not the case." At the conclusion of the hearing, the circuit court took the matter under advisement.

The circuit court subsequently issued a written opinion and order granting defendant's motion for summary disposition under MCR 2.116(C)(4) and (10). The circuit court first explained its understanding of federal bankruptcy jurisdiction:

> This case is somewhat unusual because Plaintiff, at least in part, is petitioning a state trial court to enforce an order of the United States Bankruptcy Court arising out of Defendant Shefa LLC's chapter 11 bankruptcy. Under 28 USC §1334 the US District Courts have exclusive and original jurisdiction over all cases under or related to title 11 involving "all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. . . ." The US District Courts also have original but not exclusive jurisdiction over "all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327." *Id*.
>
> Furthermore, 28 USC §157(b)(1) allows bankruptcy judges to hear and determine all cases under title 11 and all core proceedings arising under title 11, which includes in §157(b)(2)(N), "orders approving the sale of property other than property resulting from claims brought by the

> estate against persons who have not filed claims against the estate." Proceedings which affect the "liquidation of the assets of the estate or the adjustment of debtor-creditor . . . relationship" are deemed core proceedings and are within the exclusive jurisdiction of the Bankruptcy Court. 28 USC §157(b)(2)(O).
>
> When the potential resolution of issues requires the interpretation of Plans and Orders issued by the Bankruptcy Court or concerns the disposition of a debtor's property that was subject to bankruptcy proceedings, the Bankruptcy Court likely retains jurisdiction. *Matter of Delaware & Hudson Ry Co*, 122 BR 887, 891[,] 895; 21 Bank Ct Dec 437 (Bankr CA 3, 1991). Even where a claim is asserted on the basis of State law, that claim may still be subject to the jurisdiction of the Bankruptcy Court. 28 USC §157(b)(3). *Matter of Delaware*, 122 BR at 895.
>
> This is true even when the bankruptcy case has been closed. "[W]here there is a close nexus to the bankruptcy plan or proceeding, as when a matter affects the interpretation, implementation, consummation, execution, or administration of a confirmed plan . . . retention of post-confirmation bankruptcy court jurisdiction is normally appropriate." *In Re Resorts Intern Inc*, 372 F3d 154, 168-169; 43 Bank Ct Dec 46 (Bankr CA 3, 2004), *In Re Thickstun Bros Equipment Co Inc*, 344 BR 515, 521; 46 Bankr Ct Dec 158 (Bankr CA 6, 2006). "[T]he 'close nexus' test is applicable to 'related to' jurisdiction over any claim or cause of action filed post-confirmation, regardless of when the conduct giving rise to the claim or cause of action occurred." *In Re Seven Fields Development Corp*, 505 F3d 237, 264-265; 48 Bankr Ct Dec 276 (Bankr CA 3, 2007). The Bankruptcy Court's jurisdiction over these issues can extend decades after a Plan was confirmed. *Travelers Indem Co v Bailey*, 557 US 137, 151; 129 S Ct 2195; 174 L Ed 2d (2009). It is these jurisdictional considerations that this Court finds dispositive in this case.

In its analysis of bankruptcy jurisdiction, the circuit court focused on whether the city's requested relief "could be granted without preventing the consumma-

tion, implementation, or execution of the bankruptcy plan." The circuit court concluded that each component of the city's requested relief, if granted, would thwart the implementation of the bankruptcy plan. On this basis, the circuit court concluded that it did not have subject-matter jurisdiction and granted summary disposition to defendant under MCR 2.116(C)(4).

Despite finding that it did not have subject-matter jurisdiction, the circuit court also reached the merits of the city's claims for declaratory relief and appointment of a receiver. The circuit court concluded that summary disposition should be granted on these two claims for lack of a genuine issue of material fact under MCR 2.116(C)(10). On defendant's request for sanctions, the circuit court denied any relief, finding that it "cannot say that Plaintiff's argument was devoid of legal merit and frivolous."

C. NEW FEDERAL COURT PROCEEDING

In April 2020, defendant sued the city and others in the United States District Court for the Eastern District of Michigan. Defendant made several claims in that federal case that mirrored those made by the city here, including breach of contract, inverse condemnation, conspiracy, and constitutional violations. In its complaint, defendant invoked the district court's general jurisdiction under 28 USC 1331 and supplemental jurisdiction under 28 USC 1367(a); it did not invoke jurisdiction under the bankruptcy code. In September 2021, the district court dismissed all of defendant's claims under Federal Rule of Civil Procedure 12(b)(6), with the exception of defendant's state-law claim for inverse condemnation. The district court recognized that the city's appeal was before this Court, and with respect to matters of federal-court abstention, the

district court noted that "the issue may be revisited at the request of the parties" once this appeal was resolved. *Shefa, LLC v City of Southfield*, unpublished order of the United States District Court for the Eastern District of Michigan, issued September 28, 2021 (Case No. 2:20-cv-11038).

II. ANALYSIS

On appeal, the city argues that the circuit court erred in holding that the court lacked subject-matter jurisdiction to adjudicate the claims in this case. The city also argues that the circuit court erred in reaching and granting summary disposition under MCR 2.116(C)(10) on several of its claims. The city is correct on both fronts.

Before proceeding further, a brief note on nomenclature is helpful. Article III federal district courts have jurisdiction over bankruptcy cases. 28 USC 1334(a). Congress has authorized district courts to refer bankruptcy cases and related matters to Article I bankruptcy judges, 28 USC 157, and the United States District Court for the Eastern District of Michigan has done this via local rule, ED Mich LR 83.50. When we discuss the jurisdiction of federal district courts with respect to bankruptcy cases and related matters, we sometimes refer to the "bankruptcy court" or "bankruptcy judge" in this opinion. These and similar references should be understood to mean the bankruptcy judge working by reference under the jurisdiction of the federal district court.

A. STANDARD OF REVIEW

The circuit court granted defendant's motion for summary disposition under MCR 2.116(C)(4) and

(C)(10). Jurisdictional questions under MCR 2.116(C)(4) are questions of law that are reviewed de novo. See *Frederick v Federal-Mogul Corp*, 273 Mich App 334, 336; 733 NW2d 57 (2006). "MCR 2.116(C)(4) permits a trial court to dismiss a complaint when the court lacks jurisdiction of the subject matter." *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 714; 909 NW2d 890 (2017) (cleaned up). This Court likewise reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *McLean v Dearborn*, 302 Mich App 68, 72; 836 NW2d 916 (2013).

B. SUBJECT-MATTER JURISDICTION

We begin with the circuit court's subject-matter jurisdiction. "Subject-matter jurisdiction is the right of the court to exercise judicial power over a class of cases, not the particular case before it." *In re Warshefski*, 331 Mich App 83, 88; 951 NW2d 90 (2020) (cleaned up). "A trial court is duty-bound to recognize the limits of its subject-matter jurisdiction, and it must dismiss an action when subject-matter jurisdiction is not present." *Meisner*, 321 Mich App at 714. A challenge to a court's subject-matter jurisdiction is determined by allegations in the pleadings. *Trost v Buckstop Lure Co, Inc*, 249 Mich App 580, 587-588; 644 NW2d 54 (2002).

Circuit courts of this state have subject-matter jurisdiction over a broad swath of cases. As set forth in Article 6, § 13 of our 1963 Constitution, circuit courts "have original jurisdiction in all matters not prohibited by law." Following this constitutional grant, the Legislature set forth the circuit court's jurisdiction as follows: "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except

where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." MCL 600.605. "It is presumed that circuit courts have subject-matter jurisdiction unless jurisdiction is expressly prohibited or given to another court by constitution or statute." *In re Warshefski*, 331 Mich App at 88 (cleaned up).

With respect to the claims raised by the city, there is no serious question whether, *absent the bankruptcy proceedings*, the circuit court has subject-matter jurisdiction over the claims—it does. Generally speaking, claims of breach of a mortgage agreement, nuisance, and dangerous building can be brought in circuit court, as can requests for a receivership or foreclosure. See MCL 554.1016; MCL 600.2926; MCL 600.2927; MCL 600.2940; MCL 125.542; MCL 600.3101; MCL 600.601; MCL 600.605; and *Eaton Co Bd of Co Rd Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). The parties have not identified, and we are not aware of, any state statute that would divest the circuit court of subject-matter jurisdiction over the city's claims. Nor have the parties identified any federal statute outside the bankruptcy context that is relevant to the circuit court's subject-matter jurisdiction, and similarly, we are not aware of any such federal statute. Having narrowed the inquiry, we turn now to the federal bankruptcy code.

C. JURISDICTION OF FEDERAL DISTRICT COURTS OVER BANKRUPTCY MATTERS

In contrast to our state's circuit courts, federal district courts have jurisdiction over what can be characterized as a narrower swath of cases, understood in terms of subject matter if not geographical reach.

Our federal system of government is one of limited sovereignty, *Nat'l Federation of Indep Business v Sebelius*, 567 US 519, 533; 132 S Ct 2566; 183 L Ed 2d 450 (2012), and that limited sovereignty is reflected in the narrower subject-matter jurisdiction of its courts, *Kokkonen v Guardian Life Ins Co of America*, 511 US 375, 377; 114 S Ct 1673; 128 L Ed 2d 391 (1994). Doctrines of abstention, including that described as "Our Federalism," inform how federal and state courts interact when presented with competing arguments about which court should take jurisdiction over a particular cause of action. *Younger v Harris*, 401 US 37, 43-45; 91 S Ct 746; 27 L Ed 2d 669 (1971); see also 17B Wright & Miller, Federal Practice & Procedure, *Younger v Harris* (3d ed), § 4251.

The question here involves federal bankruptcy law, and as described by commentators, "[b]ankruptcy is a highly specialized subspecies of federal jurisdiction." 13D Wright & Miller, Federal Practice & Procedure, Bankruptcy (3d ed), § 3570. Until 1978, the jurisdiction of federal district courts over bankruptcy cases and matters was exclusive and complete. *Id*.

In 1984, Congress overhauled the bankruptcy code, including jurisdiction. Bankruptcy Amendments and Federal Judgeship Act, PL 98-353, 98 Stat 333 (1984). With respect to the jurisdiction of federal district courts, § 1334 of the code provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive

> jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> * * *
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—
>
> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327. [28 USC 1334.]

Based on this section, courts have identified four distinct categories of bankruptcy matters over which federal district courts have subject-matter jurisdiction under § 1334(a) and (b). These are: "(1) 'cases under title 11,' (2) 'proceedings arising under title 11,' (3) proceedings 'arising in' a case under title 11, and (4) proceedings 'related to' a case under title 11." *In re Wolverine Radio Co*, 930 F2d 1132, 1141 (CA 6, 1991), quoting 28 USC 1334. "The first category refers merely to the bankruptcy petition itself, filed pursuant to 11 U.S.C. §§ 301, 302, or 303," *In re Wolverine Radio Co*, 930 F2d at 1141, or, as explained by the United States Court of Appeals for the Sixth Circuit in *Robinson v Mich Consol Gas Co Inc*, 918 F2d 579, 583 (CA 6, 1990), the phrase " 'cases under title 11' as used in section 1334(a) is a term of art signifying an action commenced in a federal district court or bankruptcy court with the filing of a petition pursuant to 11 U.S.C. §§ 301, 302, or 303." With respect to the other three categories, the Sixth Circuit streamlined the jurisdictional analysis in *In re Wolverine*:

> For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between the second, third, and fourth categories (proceedings "arising under," "arising in," and "related to" a case under title 11). These references operate conjunctively to define the scope of jurisdiction. Therefore, for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least "related to" the bankruptcy. [*In re Wolverine*, 930 F2d at 1141 (citations omitted).]

In its opinion and order in this case, the circuit court set forth the following with respect to bankruptcy jurisdiction: "Under 28 USC § 1334 the US District Courts have *exclusive and original jurisdiction* over all cases *under or related to* title 11 involving 'all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate. . . .' " As can be seen from the above excerpt of the bankruptcy code, the circuit court misstated federal law. Pursuant to § 1334, federal district courts have exclusive jurisdiction over "all cases under title 11," i.e., cases brought by petition under 11 USC 301, 302, or 303. Moreover, the district court where the bankruptcy case is commenced or pending has exclusive in rem jurisdiction over the res of the debtor and estate. 28 USC 1334(e)(1). Finally, that district court also has exclusive jurisdiction over any claim involving the construction of 11 USC 327. 28 USC 1334(e)(2). But, for those matters that merely arise under, arise in, or are otherwise related to a bankruptcy case, the district court has original jurisdiction, but such jurisdiction is *not* exclusive. 28 USC 1334(b); *Delphi Auto Sys, LLC v Segway Inc*, 519 F Supp 2d 662, 665 (ED Mich, 2007). Rather, the federal and state courts have concurrent jurisdiction, and the matters can be heard by either one. 13D Wright & Miller, Federal Practice &

Procedure, Bankruptcy (3d ed), § 3570. The circuit court erred by stating otherwise.

This error undermined the circuit court's jurisdictional analysis. The circuit court did not focus, for example, on whether the city's claims are part of defendant's bankruptcy case or involved construction of 11 USC 327, either one of which would have placed exclusive jurisdiction over the claims in the district court and divested the circuit court of jurisdiction. Instead, the circuit court focused its attention on whether the claims are "related to" defendant's bankruptcy case.

It might well be the case that the district court has original jurisdiction over the city's claims under the "related to" component of 28 USC 1334(b), but this would not mean that such jurisdiction is also exclusive. Even if the state-law claims are related to defendant's bankruptcy case, this would not divest the circuit court of subject-matter jurisdiction over those claims unless and until the district court decided in its discretion to take jurisdiction over those claims. In instances where its jurisdiction is concurrent, not exclusive, the district court can abstain from taking jurisdiction over matters involving Title 11 "in the interest of justice, or in the interest of comity with State courts or respect for State law." 28 USC 1334(c)(1); see also 28 USC 1334(c)(2) (outlining where abstention is required).

Similarly, as with its focus on "related to" proceedings, the circuit court's analysis of "core" versus "noncore" proceedings strayed from the relevant jurisdictional analysis. Whether a matter is "core" or not has relevance to whether a bankruptcy judge has the authority to adjudicate one of the types of proceedings listed in 28 USC 157(b) or, instead, must make proposed findings of fact and conclusions of law to the

district court. *Wellness Int'l Network, Ltd v Sharif*, 575 US 665, 670-671; 135 S Ct 1932; 191 L Ed 2d 911 (2015); *Exec Benefits Ins Agency v Arkison*, 573 US 25, 33-34; 134 S Ct 2165; 189 L Ed 2d 83 (2014). Section 157 does not, however, enlarge the jurisdiction of federal courts; the provision merely allocates the jurisdiction created by 28 USC 1334. *In re Holly's, Inc*, 172 BR 545, 556 (Bankr WD Mich, 1994). Thus, for our purposes, the focus must remain on whether 28 USC 1334 itself grants exclusive jurisdiction to the district court.

The city's claims are not causes of action created by Title 11 or pursued as part of defendant's bankruptcy case. Rather, the city has asserted claims in a state civil lawsuit involving the terms and conditions of a mortgage, which fall under state contract law. Simply because the parties entered into the mortgage in accordance with the bankruptcy court's confirmed plan and order does not mean that any and all causes of action for breach of that contract must be pursued as part of defendant's now-closed bankruptcy case. Likewise, the city maintains that defendant has created a public nuisance and dangerous building, both of which are governed by state statute, not the bankruptcy code.

Defendant emphasizes that the city previously alleged a default of the confirmed plan and order before the bankruptcy judge, the judge exercised jurisdiction, and the district court affirmed that bankruptcy judge's decision. Although accurate, defendant's argument is incomplete—the bankruptcy judge did, indeed, take jurisdiction over the city's motion to reopen the bankruptcy case, but the judge did so under the original-but-not-exclusive provision of 28 USC 1334(b), *not* the original-and-exclusive provision of 28 USC 1334(a). Moreover, this case does not involve the same allega-

tions or causes of action pursued before the bankruptcy judge. In fact, the bankruptcy judge expressly recognized that the city might have state-law claims outside of the confirmed plan and order.

Thus, this is not a case "under title 11" for purposes of 28 USC 1334(a). See *In re Wolverine*, 930 F2d at 1141; see also *In re Eastland Partners Ltd Partnership v Brown*, 199 BR 917, 919 (Bankr ED Mich, 1996) (holding that cases "under title 11" involve a cause of action "created by title 11"). Nor do any of the city's claims involve the construction of 11 USC 327, so the grant of exclusive jurisdiction under 28 USC 1334(e)(2) is not relevant here.

The district court's exclusive in rem jurisdiction under 28 USC 1134(e)(1) raises a more interesting question. Under Michigan law, claims of breach of contract and nuisance are considered as claims in personam. *Specialties Distribution Co v Whitehead*, 313 Mich 696, 699-700; 21 NW2d 926 (1946) (contract); *Fraser Twp v Haney*, 327 Mich App 1, 12-13; 932 NW2d 239 (2018), vacated 504 Mich 968 (2019) (nuisance); *Fraser Twp v Haney (On Remand)*, 331 Mich App 96, 101; 951 NW2d 97 (2020) ("The matter is again reversed and remanded to the trial court for further proceedings consistent with this opinion and our original opinion.").[2] A party to the mortgage can breach that contract, but it makes little sense to speak of real property breaching a mortgage. Similarly, a party can develop or use real property in such a way as to create a public nuisance or dangerous building, meaning that the cause of action is really one in personam against the party who wrongfully developed or used the prop-

[2] Although not relevant here, certain claims of nuisance could be characterized as in rem or quasi in rem. See, e.g., *State ex rel Bailes v Guardian Realty Co*, 237 Ala 201, 205; 186 So 168 (1939).

erty, rather than against the real property itself. Thus, for these claims of the city, 28 USC 1334(e)(1) does not vest exclusive jurisdiction in the district court.

But, under Michigan law, causes of action involving foreclosure and appointment of a receiver over real property are considered in rem, not in personam. *Lansing Drop Forge Co v American State Savings Bank*, 273 Mich 124, 128; 262 NW 756 (1935) (receiver); *Detroit v 19675 Hasse*, 258 Mich App 438, 448-452; 671 NW2d 150 (2003) (foreclosure). Had a party pursued similar claims during the pendency of defendant's bankruptcy case, it appears that the district court would have had exclusive jurisdiction over the claims under 28 USC 1334(e)(1). It is unclear, however, how long (if at all) the district court retains exclusive jurisdiction over the res of the bankruptcy case and estate once the plan is confirmed and the case is closed.

On the one hand, "[s]ection 1334 does not expressly limit the bankruptcy court's jurisdiction following plan confirmation. Nevertheless, all courts that have addressed the question have ruled that once confirmation occurs, the bankruptcy court's jurisdiction shrinks." *In re General Media, Inc*, 335 BR 66, 73 (SD NY, 2005) (citation omitted).

> "Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the protection of the bankruptcy court. It may not come running to the bankruptcy judge every time something unpleasant happens." [*Id*., quoting *Pettibone Corp v Easley*, 935 F2d 120, 122 (CA 7, 1991); see also *Eastland*, 199 BR at 921.]

In fact, "[a] bankruptcy estate usually ceases to exist after a reorganization plan is confirmed." *In re Celeb-*

rity Home Entertainment, Inc, 210 F3d 995, 998 (CA 9, 2000); see also 11 USC 1142 (effect of confirmation). And when the estate ceases to exist, exclusive jurisdiction does not appear to follow the property. See 9 Am Jur 2d, Bankruptcy, § 730, p 879 ("Jurisdiction does not follow the property; it lapses when property leaves the estate.").

On the other hand, there are instances when a bankruptcy estate survives postconfirmation. 11 USC 1142; see also *Hillis Motors, Inc v Hawaii Auto Dealers' Ass'n*, 997 F2d 581, 589-590 (CA 9, 1993). The bankruptcy judge in defendant's case retained jurisdiction over certain postconfirmation matters, and the judge had reopened the case long enough to resolve the city's postconfirmation motion. But, as explained by the United States Court of Appeals for the First Circuit, "a bankruptcy court may not 'retain' jurisdiction it never had—i.e., over matters that do not fall within § 1334's statutory grant." *Gupta v Quincy Med Ctr*, 858 F3d 657, 663 (CA 1, 2017).

We are mindful that a court has an ongoing obligation "to question sua sponte its own jurisdiction over a person, the subject matter of an action, or the limits of the relief it may afford." *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 399; 651 NW2d 756 (2002). With that said, we are also mindful that neither the parties nor the circuit court raised or addressed the district court's exclusive jurisdiction over real property under 28 USC 1334(e)(1). Finally, we are mindful that, as a state court, we are not often called upon to interpret and apply bankruptcy law, a specialized and complex subset of federal law. Although a plain reading of the statutory language as well as the weight of judicial authority appear to favor the lapse of any exclusive jurisdiction over the property under 28 USC

1334(e)(1), we need not definitely resolve the matter today. As explained above, the circuit court is not divested by 28 USC 1334(a) or (e)(2) of subject-matter jurisdiction over at least some of the city's claims, and we will leave to future development whether the circuit court is restricted by 28 USC 1334(e)(1) from granting relief in the form of forfeiture or receivership.

To sum, we hold that the circuit court erred in concluding that, by application of 28 USC 1334, the circuit court did not have subject-matter jurisdiction over any of the city's claims. The federal district court does not have, by application of 28 USC 1334(a), exclusive jurisdiction over the city's claims, and it was reversible error for the circuit court to conclude otherwise. Moreover, the district court does not have exclusive jurisdiction under 28 USC 1334(e)(2) over any of the city's claims. We leave open the question on the effect, if any, of 28 USC 1334(e)(1) with respect to any of the city's claims or relief sought. Accordingly, we reverse the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(4).

D. SUMMARY DISPOSITION ON OTHER GROUNDS

Despite the fact that the circuit court concluded that it lacked subject-matter jurisdiction over any of the city's claims, it proceeded to reach the merits of the claims for declaratory relief and appointment of a receiver, dismissing them for lack of a genuine issue of material fact under MCR 2.116(C)(10). In this respect, the circuit court also erred.

The circuit court's ruling occurred at the very outset of the lawsuit, even though discovery had hardly commenced. "Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed."

Colista v Thomas, 241 Mich App 529, 537; 616 NW2d 249 (2000). To bolster its position opposing defendant's motion for summary disposition, the city offered to provide the circuit court with evidence to supports its allegations, but the circuit court declined: "Listen, I'm not—right now, I'm not addressing what the state of the building is or isn't. It—in the sense that I—I just want to know what jurisdiction I have 'cause it seems like the bankruptcy court either has addressed these issues or maybe still is. But you're telling me that's not the case." But then the circuit court went beyond the jurisdictional question and addressed the merits of the city's claims in its subsequent opinion and order.

The current record is not sufficient for us to conclude that "there is no reasonable chance that further discovery will result in factual support for" one or more of the city's causes of action. *Id*. at 538. We reverse the circuit court's grant of summary disposition to defendant under MCR 2.116(C)(10) as premature on this record. If, once discovery has closed, there is a basis for a party to seek summary disposition under MCR 2.116(C)(10), then the party can move for such relief in accordance with the appropriate court rules.

Defendant also argues on appeal that the city's claims fail on the grounds of res judicata and collateral estoppel. For this alternate reason, defendant asks that we affirm the circuit court's grant of summary disposition under MCR 2.116(C)(7). The circuit court did not, however, address whether one or more of the city's claims were precluded by the doctrines of res judicata and collateral estoppel, and we will not do so for the first time on appeal. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 210; 920 NW2d 148 (2018).

Finally, as we previously noted, there is ongoing litigation between these parties in federal district court. The federal lawsuit was filed after the present lawsuit, and, as a consequence, the parties could not explore with the circuit court how that federal lawsuit impacts the present one, if at all. Nor was the matter of the courts' concurrent jurisdictions developed by the parties on appeal; in fact, neither party alerted this Court to the district court's recent order entered on September 28, 2021. In that order, the district court declined the city's request to abstain based, in part, on the circuit court's erroneous dismissal of the city's lawsuit on grounds of subject-matter jurisdiction and lack of a genuine issue of material fact. The district court explained that the question of abstention could be revisited if the circuit court's dismissal was reversed. Given our ruling today, we expect that the matter of which trial court is the best forum for resolving the parties' various claims will be explored further by the parties and trial courts.

III. CONCLUSION

Our ruling on appeal is a narrow one. The circuit court erred when it concluded that the federal district court had exclusive jurisdiction under 28 USC 1334 over all of the city's claims. The circuit court likewise erred when it dismissed several of the city's claims under MCR 2.116(C)(10). For the reasons stated in this opinion, we reverse the circuit court's ruling granting defendant's motion for summary disposition in its entirety, and we remand to the circuit court for further proceedings consistent with this opinion. We decline to address the parties' additional arguments, which can be addressed by the circuit court in the first instance.

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

RIORDAN, P.J., and MARKEY, J., concurred with SWARTZLE, J.

BOWMAN v WALKER

Docket No. 355561. Submitted February 1, 2022, at Grand Rapids. Decided February 10, 2022, at 9:10 a.m.

Derek and Brenda Bowman brought an action in the Kent Circuit Court against Larry Walker and Rodney Lauderdale, asserting claims of negligence, premises liability, violation of MCL 554.139, and loss of consortium. Larry Walker owned the apartment complex in which plaintiffs lived, and Rodney Lauderdale was the property manager of the complex. In February 2019, Brenda injured her knees and one hip when she slipped and fell on snow-covered ice as she was exiting her apartment on her way to work. Bowman exited through her front door because the area around the back door of her apartment was covered with snow; however, the area outside her front door was also covered in snow. Plaintiffs filed their complaint, and defendants moved for summary disposition. The court, Mark A. Trusock, J., granted defendants' motion and dismissed plaintiffs' claims. In granting the motion, the court concluded (1) that the ordinary negligence claim failed because Brenda's injury was caused by an allegedly dangerous condition of the land, which sounded in premises liability, not ordinary negligence, (2) that the premises-liability claim failed because the alleged hazard was open and obvious and was not effectively unavoidable, (3) that the claim under MCL 554.139 failed because the accumulation of snow and ice on the walkway was merely inconvenient and did not render the walkway unfit for its intended purpose, and (4) that the loss-of-consortium claim failed because it was derivative of the other claims, all of which were dismissed. Plaintiffs appealed. Brenda Bowman passed away while the appeal was pending, and her estate was substituted as a party.

The Court of Appeals *held*:

1. Premises liability arises from defendant's duty as an owner, possessor, or occupier of land. If a plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability, rather than in ordinary negligence, even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. Relevant

here, because plaintiffs alleged that Brenda was injured after encountering a dangerous condition on the premises, plaintiffs' claim sounded in premises liability, not in ordinary negligence. As a result, the trial court correctly dismissed plaintiffs' claim of ordinary negligence. Further, Lauderdale could not have been held liable on a premises-liability theory because he was the property manager for the apartment complex; he was not the owner, possessor, or occupier of land.

2. In general, a premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land. The duty of the premises owner generally does not extend to open and obvious dangers. Whether a danger is open and obvious depends on whether an average person with ordinary intelligence would have discovered it upon casual inspection. This is an objective standard in which the objective nature of the condition of the premises at issue must be examined. By its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery. Black ice, however, is not an open and obvious danger unless there is evidence that the black ice in question would have been visible on casual inspection before the fall or without other indicia of a potentially hazardous condition. There are two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is unreasonably dangerous or when the danger is effectively unavoidable. The hazard is effectively unavoidable when a person, for all practical purposes, is required or compelled to confront the dangerous hazard. Under the open and obvious danger doctrine, a hazard can also be deemed effectively unavoidable if the plaintiff confronted it to enter their place of employment for purposes of work. The analysis centers on whether a reasonable premises possessor in the defendant's circumstances could reasonably foresee that the employee would confront the hazard despite its obviousness; the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances. Stated differently, courts addressing this issue should consider whether a reasonable person in the plaintiff's circumstances would have used any available alternatives to avoid the hazard. However, a hazard is not avoidable simply because the employee could have elected to skip work or breach other requirements of their employment. These principles that apply to circumstances in which an employee is injured by a hazard they confront while entering their place of work, also apply to a tenant injured while encountering a hazard when leaving their place of residence in

order to travel to work. In this case, although the ice on which Brenda slipped was covered by snow—i.e., it was not visible upon casual inspection—the fact that it was covered by snow indicated that it was a potentially hazardous condition so as to render it open and obvious. However, Brenda presented evidence that she was leaving her apartment to go to work when she slipped and fell, and both exits from her home led to snow-covered pathways. Because plaintiffs presented sufficient evidence to show that Brenda confronted the snow and ice to travel from her residence to her workplace for purposes of her employment, and because defendants did not show as a matter of law that any reasonable alternative would have allowed Brenda to avoid the hazard, there is a genuine question of material fact as to whether the condition was effectively unavoidable. Accordingly, the trial court erred by dismissing plaintiffs' premises-liability claim.

3. MCL 554.139(1) provides, in part, that in every lease or license of residential premises, the lessor or licensor covenants that the premises and all common areas are fit for the use intended by the parties and to keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located; liability under the statute cannot be negated by the open and obvious danger doctrine. A common area need not be in ideal condition to be rendered fit for its intended purpose. A sidewalk is a common area for purposes of MCL 554.139(1)(a). Because the intended use of a sidewalk is walking on it, a sidewalk completely covered with ice is not fit for that purpose; however, a sidewalk covered only in patches of ice does not render the sidewalk unfit for its intended purpose. Similarly, while the primary purpose of a parking lot is a place to store vehicles, tenants must have reasonable access to their parked vehicles, which includes being able to walk across the parking lot to access their vehicles. With regard to snow and ice in a common area, a plaintiff must present more evidence than simply the presence of ice or snow and someone falling. Plaintiffs in this case only presented evidence that the sidewalk had some ice and snow on it, which indicated, at most, that access was inconvenient or that the patio was not in peak condition. Thus, plaintiffs failed to demonstrate that there was a genuine issue of material fact regarding whether the patio, which the trial court concluded was like a sidewalk, was fit for its intended purpose. The trial court therefore correctly dismissed plaintiff's claims that defendants violated MCL 554.139(1).

4. A claim of loss of consortium is derivative, and recovery is contingent on the injured spouse's recovery of damages for the injury. Because the trial court erred by dismissing plaintiff's premises-liability claim, it erred by dismissing plaintiffs' claim for loss of consortium.

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

NEGLIGENCE – PREMISES LIABILITY – OPEN AND OBVIOUS DANGERS – SPECIAL ASPECTS – EFFECTIVELY UNAVOIDABLE DANGERS – TENANT TRAVELING TO WORK.

A premises possessor generally owes no duty to protect invitees from dangerous conditions on the land that are open and obvious, but if special aspects of a condition make an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk; special aspects of an open and obvious hazard can give rise to liability when the danger is unreasonably dangerous or when the danger is effectively unavoidable; a hazard may be deemed effectively unavoidable if (1) a plaintiff confronted the hazard to enter their workplace for work purposes or (2) a plaintiff-tenant confronted the hazard when leaving their residence to travel to work and no reasonable alternatives were available.

Johnson Law, PLC (by *Christopher Patrick Desmond*) for plaintiffs.

Wheeler Upham, PC (by *Jeffrey D. DenBraber* and *Jon J. Schrotenboer*) for defendants.

Before: BORRELLO, P.J., and M. J. KELLY and REDFORD, JJ.

M. J. KELLY, J. Derick Bowman, individually and as personal representative of the estate of Brenda Bowman,[1] appeals as of right an order granting summary disposition to defendants, Larry Walker and Rodney Lauderdale, under MCR 2.116(C)(10). We affirm in

[1] Brenda Bowman passed away while this appeal was pending, and her estate was substituted as a party.

part, reverse in part, and remand to the trial court for further proceedings.

I. BASIC FACTS

On February 8, 2019, Brenda Bowman exited her apartment on her way to work. Because the area around the back door of her apartment was covered with snow, Bowman decided to leave through the front door. That area, however, was also covered in snow. Just outside her front door, she slipped on ice that was covered by snow and fell. As a result of her fall, she sustained injuries to her knees and her hip.

On July 17, 2019, Bowman and her husband filed a complaint against Walker, the owner of the apartment complex, and Lauderdale, the property manager, raising counts of negligence, premises liability, and loss of consortium. In an amended complaint, they added an allegation that defendants had violated MCL 554.139. Defendants moved for summary disposition under MCR 2.116(C)(10), asserting that the snow and ice accumulation was an open and obvious hazard and that they did not breach any duty owed to Bowman under MCL 554.139. They also argued that the loss-of-consortium claim should be dismissed because it was derivative of the other claims. In response, Bowman and her husband asserted that the ice was not open and obvious because it was covered by snow, and, even if it were open and obvious, it was effectively unavoidable because Bowman had to confront the hazard to go to work. They also argued that their claim against Lauderdale was one for ordinary negligence, not premises liability, so the open and obvious danger doctrine did not apply to bar that claim. Finally, they asserted that the walkway was not fit for its intended purpose because it was covered in snow and ice, and they noted

that the open and obvious danger doctrine does not apply to violations of MCL 554.139. In a reply brief, defendants asserted that because the claim was based on an alleged defective condition on the land, it was a premises-liability claim, not an ordinary-negligence claim. Further, defendants contended that Bowman's lease had been terminated prior to the accident, so she was not a tenant owed a duty under MCL 554.139.

Following oral argument, the court entered an order dismissing plaintiffs' claims under MCR 2.116(C)(10). The court held that the hazard causing Bowman's injury was open and obvious and was not effectively unavoidable. Recognizing that the injury was caused by an allegedly dangerous condition on the land, the court rejected the argument that part of the complaint sounded in ordinary negligence. With respect to the claimed violation of MCL 554.139, the trial court concluded that the accumulation of ice and snow on the walkway was "merely inconvenient" and did not render the walkway unfit for its intended purpose. The loss-of-consortium claim was dismissed because it was derivative of the other claims, all of which had been dismissed. This appeal follows.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition. A trial court's decision 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). "De-novo review means that we review the legal issue independently, without deference to the lower court." *Swanzy v Kryshak*, 336 Mich

App 370, 377; 970 NW2d 407 (2021) (quotation marks and citation omitted).

B. ANALYSIS

1. NATURE OF THE CLAIM

Plaintiffs argue that the trial court erred by dismissing their claim against Lauderdale because that claim sounds in ordinary negligence, not premises liability. However, "[i]f the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Here, Bowman alleges that she slipped and fell on snow-covered ice. That is, she alleges that she was injured after encountering a dangerous condition on the premises. As a result, her claim sounds in premises liability rather than ordinary negligence. See *id*. And because Lauderdale is not an owner, possessor, or occupier of the premises, he cannot be held liable on a premises-liability theory. See *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005) ("In a premises liability claim, liability emanates merely from the defendant's duty as an owner, possessor, or occupier of land."). Consequently, the trial court did not err by rejecting plaintiffs' claim that they had brought a claim sounding in ordinary negligence.

2. PREMISES LIABILITY

A premises owner generally "owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dan-

gerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty generally does not extend to open and obvious dangers. *Id*. " 'Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.' " *Id*. (brackets omitted), quoting *Riddle v McLouth Steel Prod Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).

"Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012). "This is an *objective standard*, calling for an examination of 'the objective nature of the condition of the premises at issue.' " *Id*., quoting *Lugo*, 464 Mich at 523-524. The hazard in this case was snow-covered ice. Although plaintiffs contend that the danger posed by the ice was hidden by the accumulation of snow, that fact does not negate the open and obvious nature of the hazard. Instead, as explained by this Court in *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61, 67; 718 NW2d 382 (2006), "as a matter of law that, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery." Contrary to plaintiffs' argument on appeal, the ice in this case is not akin to black ice. Black ice, by definition, is either invisible or nearly invisible. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008). In *Slaughter*, this Court explained that, as a result, black ice is not an open and obvious danger unless there is evidence "that the black ice in question would have been visible on

casual inspection before the fall or without other indicia of a potentially hazardous condition." *Id*. Although plaintiffs presented evidence indicating that the ice in this case was not visible upon casual inspection prior to her fall, the fact that it was covered in snow is nevertheless an indicium "of a potentially hazardous condition," so as to render the hazard open and obvious. *Id*. See also *Ververis*, 271 Mich App at 67.

Plaintiffs next argue that, even if the hazard were open and obvious, special aspects of the open and obvious hazard give rise to liability. There are "two instances in which the special aspects of an open and obvious hazard could give rise to liability: when the danger is *unreasonably dangerous* or when the danger is *effectively unavoidable*." *Hoffner*, 492 Mich at 463. In *Hoffner*, the Supreme Court explained that "the standard for 'effective unavoidability' is that a person, for all practical purposes, must be *required* or *compelled* to confront a dangerous hazard." *Id*. at 469.

Plaintiffs argue that the hazard in this case was effectively unavoidable because both exits from the apartment were covered in snow and because Bowman had to leave to go to work. The question, therefore, is whether a hazard that one must confront in order to get to his or her place of employment for work purposes is effectively unavoidable. The trial court concluded that, although Bowman was effectively trapped in her apartment, the hazard was not effectively unavoidable. In doing so, the court relied on *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11; 643 NW2d 212 (2002), for the proposition that a hazard is not effectively unavoidable simply because an employee must confront it as part of his or her employment. The trial court issued its Opinion and Order granting summary disposition on November 6, 2020. Our Su-

preme Court decided *Livings Estate v Sage's Investment Group, LLC*, 507 Mich 328, 346 n 13; 968 NW2d 397 (2021), on June 30, 2021, and in it stated, "*Perkoviq* did not discuss whether compulsion to confront a hazard for purposes of employment can render that hazard effectively unavoidable." As a result, when it decided the matter below, the trial court did not have the benefit of the Supreme Court's opinion in *Livings Estate*, which held:

> Given that our state is prone to winter, it is reasonable to anticipate that many businesses will remain open even during bleak winter conditions. A landlord cannot expect that every one of its tenant's employees will be permitted to stay home on snowy days. Therefore, it is reasonable to anticipate that a person will proceed to encounter a known or obvious danger for purposes of his or her work. Accordingly, an open and obvious hazard can become effectively unavoidable if the employee confronted it to enter his or her workplace for work purposes. [*Livings Estate*, 507 Mich at 345.]

The required analysis "centers on whether a reasonable premises possessor in the defendant's circumstances could reasonably foresee that the employee would confront the hazard despite its obviousness." *Id*. at 346. Although application of the standard depends on the facts of the case, "the key is whether alternatives were available and would have been used by a reasonable person in the employee's circumstances." *Id*. at 347. An example of an alternative is using a different path when going to work. *Id*. However, a hazard is not avoidable "simply because the employee could have elected to skip work or breach other requirements of his or her employment." *Id*.[2]

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[2] In explaining that skipping work was not a reasonable alternative, our Supreme Court stressed that "requiring courts to sit in judgment of

Although *Livings Estate* addressed the circumstance in which an employee is injured by a hazard he or she confronts while entering his or her place of work, the same principles apply to a tenant injured while encountering a hazard when leaving his or her place of residence in order to travel to work. Here, plaintiffs presented evidence that Bowman was leaving her apartment in order to go to work. Both exits from her home led to snow-covered pathways. From this evidence, a fact-finder could reasonably conclude that Bowman confronted the condition in order to go to her place of employment for work purposes. Because plaintiffs have presented sufficient evidence to show that Bowman confronted the snow and ice to travel from her residence to her workplace for purposes of her employment, and because defendants have not shown as a matter of law that any reasonable alternative would have allowed Bowman to avoid the hazard, there is a genuine question of material fact as to whether the condition was effectively unavoidable. Summary disposition of plaintiffs' premises-liability claim, therefore, was improper.

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the social value of various jobs, is not a task suited to the judiciary." *Livings Estate*, 507 Mich at 348 n 16. However, "courts can consider the consequences of failing to attend work or breaching other employment requirements, and those consequences may differ depending on the urgency of the work." *Id*. In order to prevail, the plaintiff need not show that he or she would have been terminated from his or her employment. *Id*. at 347 n 15. This is because "an employee has other natural inducements to show up for work, such as remaining in good standing and earning a day's pay." *Id*. Given the complexities related to the reasons why an employee might choose to confront a hazard as opposed to skipping work, this inquiry is inherently fact-intensive and is not well suited to resolution on a motion for summary disposition under MCR 2.116(C)(10).

3. VIOLATION OF MCL 554.139

MCL 554.139(1) provides as follows:

> In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.
>
> (b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants willful or irresponsible conduct or lack of conduct.

"The open and obvious danger doctrine is not available to deny liability" for a statutory violation under MCL 554.139(1). *Benton v Dart Props Inc*, 270 Mich App 437, 441; 715 NW2d 335 (2006) (quotation marks and citation omitted). A common area need not be in ideal condition to be rendered fit for its intended purpose. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 430; 751 NW2d 8 (2008).

The trial court concluded that the patio area just outside her door that Bowman slipped on was akin to a sidewalk. In *Benton*, 270 Mich App at 438-439, the plaintiff slipped and fell on an icy sidewalk while walking from his apartment to the parking lot. This Court held that the sidewalk was a common area under MCL 554.139(1)(a) and that "[b]ecause the intended use of a sidewalk is walking on it, a sidewalk covered with ice is not fit for this purpose." *Id*. at 444. Thereafter, our Supreme Court addressed the issue of a snow and ice accumulation in a parking lot of an apartment complex. *Allison*, 481 Mich at 424. The Supreme Court identified the primary purpose of a parking lot as a place to store vehicles, but it also noted

that tenants must have reasonable access to their parked vehicles, which required tenants to walk across the parking lot in order to access their vehicles. *Id*. at 429-430. In *Allison*, the Court concluded that the plaintiff did not show that the condition of the parking lot precluded access to his vehicle. In doing so, the Court noted:

> Plaintiff's allegation of unfitness was supported only by two facts: that the lot was covered with one to two inches of snow and that plaintiff fell. Under the facts presented in this record, we believe that there could not be reasonable differences of opinion regarding the fact that tenants were able to enter and exit the parking lot, to park their vehicles therein, and to access those vehicles. Accordingly, plaintiff has not established that tenants were unable to use the parking lot for its intended purpose, and his claim fails as a matter of law. [*Id*. at 430.]

On appeal, plaintiffs argue that the trial court erred by relying on *Allison*, which specifically addressed parking lots, instead of *Benson*, which specifically addressed sidewalks. The rationale in *Allison* has, however, been applied to sidewalks. See *Trueblood Estate v P&G Apartments, LLC*, 327 Mich App 275, 289-290; 933 NW2d 732 (2019), and *Jeffrey-Moise v Williamsburg Towne Houses Coop, Inc*, 336 Mich App 616, 637-638; 971 NW2d 716 (2021). In doing so, the Court in *Trueblood Estate* explained that "*Allison* stands for the proposition that a plaintiff must present more evidence than simply the presence of ice or snow and someone falling." *Trueblood Estate*, 327 Mich App at 291-292. In *Trueblood Estate*, the plaintiff presented more evidence than the fact that she fell while there was snow and ice on the sidewalk, and that evidence created a question of fact as to whether the sidewalk was *completely* covered in ice. *Id*. at 290-291. The Court then concluded "that a sidewalk completely

covered in ice is not fit for its intended use because it does not present a mere inconvenience of access; anyone walking on a sidewalk completely covered in ice would be forced to walk on ice, and there is no way to simply walk around it." *Id*. at 291 (quotation marks, citations, and brackets omitted). In contrast, in *Jeffrey-Moise*, this Court concluded:

> [P]laintiff did not establish that a genuine issue of material fact existed regarding whether the sidewalk was fit for its intended use. Plaintiff testified that the walkway was clear of snow and that the lighting where she fell was good. She testified that after she fell, she noticed patches of ice on the sidewalk. Plaintiff's neighbor similarly testified that she noticed patches of ice on the sidewalk. Accordingly, plaintiff demonstrated only that the sidewalk had patches of ice, which at most indicated inconvenience of access or that the sidewalk was not in peak condition but did not render the sidewalk unfit for its intended purpose. See *Allison*, 481 Mich at 430. [*Jeffrey-Moise*, 336 Mich App at 637-638.]

In sum, although a sidewalk completely covered in ice is unfit for its intended purpose, a sidewalk covered only in patches of ice does not render the sidewalk unfit for its intended purpose. In this case, plaintiffs have only presented evidence that snow and ice were present and that Bowman fell. Even viewing the evidence in the light most favorable to plaintiffs, they have only shown that the sidewalk had some ice and snow on it, which at most indicated that there was inconvenience of access or that the patio was not in peak condition. They have not shown, however, that there is a genuine issue of material fact regarding whether the patio was fit for its intended purpose. The trial court, therefore,

did not err by summarily dismissing plaintiff's claim that defendants violated MCL 554.139.[3]

4. LOSS OF CONSORTIUM

The trial court only dismissed plaintiffs' claim for loss of consortium because it was derivative of the claims that the court dismissed. See *Berryman v K Mart Corp*, 193 Mich App 88, 94; 483 NW2d 642 (1992) ("A claim of loss of consortium is derivative and recovery is contingent upon the injured spouse's recovery of damages for the injury."). We conclude that because the trial court erred by dismissing plaintiffs' premises-liability claim, it necessarily erred by dismissing plaintiffs' claim for loss of consortium.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction. Neither party having prevailed in full, no taxable costs are awarded. MCR 7.219(A).

BORRELLO, P.J., and REDFORD, J., concurred with M. J. KELLY, J.

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[3] Defendants argue that they were not liable for Bowman's injuries under MCL 554.139 because that liability stems from a valid lease agreement, which defendants argue Bowman did not have at the time of the incident. Because we have concluded that the trial court did not err by dismissing plaintiffs' claim under MCL 554.139, we need not address this alternative argument in favor of affirmance. Nevertheless, we note that defendants raised this issue for the first time in their reply brief. Because reply briefs "must be confined to rebuttal of the arguments in the nonmoving party or parties' response brief," MCR 2.116(G)(1)(a)(iii), the issue was not properly raised in the trial court, and it was not addressed by the trial court.

ELIZABETH TRACE CONDOMINIUM
ASSOCIATION v AMERICAN GLOBAL ENTERPRISES INC

Docket No. 355243. Submitted February 1, 2022, at Detroit. Decided February 10, 2022, at 9:15 a.m. Leave to appeal sought.

Elizabeth Trace Condominium Association filed an action to quiet title in the Oakland Circuit Court against American Global Enterprises Inc., pursuant to MCL 559.167(3), as amended by 2002 PA 283. Plaintiff was a condominium development established in 2004 with an original development plan to construct 46 units. Units 42 through 46 were designated as "must be built" in the master deed, while the other 41 units were designated as "need not be built." Nineteen of the 46 units were eventually built, and in 2009, plaintiff conveyed the remaining 27 units (the "unbuilt units") to defendant's predecessor in interest, who conveyed them to defendant in 2012. Plaintiff filed its action in 2018, claiming that ownership of the unbuilt units had reverted to it by the end of 2014 pursuant to MCL 559.167(3). Both plaintiff and defendant moved for summary disposition, and the court, Shalina D. Kumar, J., granted plaintiff's motion. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 559.167(3), if the developer of a condominium project has not completed development and construction of units that are identified as "need not be built" in the master deed during a period ending 10 years after the date that construction of the project commenced, the developer or its successors or assigns have the right to withdraw the undeveloped "need not be built" units from the project within the specified 10-year period. The statute further provides that if the developer does not withdraw the "need not be built" units during the statutory time period, the land comprising those units remains part of the project as "general common elements" and all rights to construction on that land shall cease. In this case, it was undisputed that no one withdrew the unbuilt units from the project within the specified 10-year period. Therefore, after the expiration of the statutory period, the unbuilt units were part of the project as general common elements and defendant's right to construct upon that land ceased. Contrary to defendant's argument that

MCL 559.167(3) was not applicable because defendant was not a "developer" within the meaning of the statute, whether defendant was a developer was not relevant to the operation of MCL 559.167(3). The language of MCL 559.167(3) does not limit its applicability to only those units that are owned by the original developer or its successor when the 10-year period elapses. Rather, the statute provides that the developer has the right to withdraw units from the project without the consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project.

2. According to defendant, MCL 559.167(3) was unconstitutional as applied in this case because it resulted in the taking of defendant's property without due process of law in violation of the Fifth Amendment. However, the record showed that defendant received sufficient notice that the units it purchased in 2012 were subject to expiration in 2014. In *Cove Creek Condo Ass'n v Visual Land & Home Dev, LLC*, 330 Mich App 679 (2019), the Court of Appeals held that the lapse of the title to unbuilt "need not be built" condominium units by the defendants-owners did not deny them due process because the 10-year period in the 2016 amendment of MCL 559.167(3) was a reasonable provision that allowed them sufficient notice. The same was true in this case, and defendant's right to due process was not violated.

Affirmed.

CONSTITUTIONAL LAW – DUE PROCESS – CONDOMINIUM ACT – "NEED NOT BE BUILT" UNITS – RIGHT OF DEVELOPER TO WITHDRAW DURING THE STATUTORY PERIOD.

Under MCL 559.167(3), as amended by 2002 PA 283, if the developer has not built condominium units designated as "need not be built" in the master deed during a period ending 10 years after construction of the condominium project commenced, the developer, its successors, or assigns have the right to withdraw the units from the project; if the developer does not withdraw the "need not be built" units from the project before the expiration of the 10-year period, those undeveloped lands shall remain part of the project as general common elements and all rights to construct on that land shall cease; the statute does not violate due-process rights because the 10-year period is a reasonable provision that provides sufficient notice to those with a property interest in the undeveloped units.

Makower Abbate Guerra Wegner Vollmer PLLC (by *Todd J. Skowronski*) for Elizabeth Trace Condominium Association.

The Meisner Law Group, PC (by *Daniel P. Feinberg* and *Robert M. Meisner*) for American Global Enterprises Inc.

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

BOONSTRA, P.J. Defendant appeals by right the trial court's judgment entered in accordance with its earlier order granting summary disposition in favor of plaintiff and requiring defendant to release all claims of legal and equitable title to the property at issue. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The pertinent facts in this case are undisputed and are set forth in the trial court's opinion and order:

> [Plaintiff] is a 46-unit condominium development located in White Lake Township[, Michigan]. It was established on May 25, 2004 pursuant to a Master Deed . . . . The original development plan was to develop 46 units across 10 buildings; units 42 through 46 were designated in the Master Deed as "must be built," while the other 41 units were designated as "need not be built." The original developer, Elizabeth Trace Development, LLC, ultimately completed 19 of the 46 units and conveyed them to an entity called Homes For Living, Inc. (those being units 1 through 14 and 42 through 46). The remaining 27 units—units 15 to 41 ("the Unbuilt Units")—were never built.
>
> On December 18, 2009, as a result of the recession, Elizabeth Trace Development, LLC conveyed the Unbuilt Units to Main Street Bank via deed in lieu of foreclosure. On October 2, 2012, Main Street Bank conveyed the

> Unbuilt Units to [defendant]. To this day, the Unbuilt Units remain unconstructed.

Plaintiff filed suit on December 14, 2018, claiming that ownership of the Unbuilt Units had reverted to it by operation of law by the end of 2014, as provided in MCL 559.167(3),[1] because development and construction of those units had not been completed within 10 years of the commencement of construction and the units had not been withdrawn from the project. Both parties moved for summary disposition: plaintiff did so under MCR 2.116(C)(10), and defendant did so under MCR 2.116(C)(8) and (10). Plaintiff argued that there was no genuine issue of material fact that the Unbuilt Units—and defendant's right to develop them—had ceased to exist after 2014 under MCL 559.167(3) and the Master Deed. Defendant argued that MCL 559.167(3) and the portions of the Master Deed cited by plaintiff did not apply because it was not a developer.

The trial court granted plaintiff's motion for summary disposition and denied defendant's motion for summary disposition, finding, in relevant part:

> [B]ecause [defendant] did not withdraw the Unbuilt Units within the ten-year timeframe required by MCL 559.167(3), the Unbuilt Units ceased to exist on May 25, 2014, and all undeveloped lands became general common elements of [plaintiff] at that time.
>
> Because the Court finds this to be a necessary outcome based on the language of MCL 559.167(3), it is not necessary for the Court to reach the parties' separate arguments based on the language of the Master Deed.

This appeal followed.

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[1] MCL 559.167 was amended by 2016 PA 233, effective September 21, 2016. The amendment does not apply retroactively, *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 697-701; 950 NW2d 502 (2019), and defendant presents no serious argument to the contrary. This opinion's references to MCL 559.167, except where otherwise specified, are to the preamendment version. See 2002 PA 283.

II. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 16; 831 NW2d 897 (2013). Summary disposition under MCR 2.116(C)(10) is appropriately granted when the evidence, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue as to any material fact and the moving party is therefore entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party can satisfy its burden of showing the absence of a genuine issue of material fact by submitting evidence that negates an essential element of the nonmoving party's claim or by demonstrating that the evidence cannot establish an essential element of the nonmoving party's claim or defense. *Id*. at 361-362. Once the moving party meets this burden, the burden shifts to the nonmoving party to submit evidence establishing that there is a genuine issue of material fact. *Id*. at 362, citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

"When reviewing a motion under MCR 2.116(C)(10), this Court 'must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in favor of the party opposing the motion.' " *Williamstown Twp v Sandalwood Ranch, LLC*, 325 Mich App 541, 547 n 4; 927 NW2d 262 (2018), quoting *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996).

We review de novo questions of statutory interpretation, the interpretation of court rules, and the interpretation of contracts. *State Farm Fire & Cas Co v Corby Energy Servs, Inc*, 271 Mich App 480, 483; 722

NW2d 906 (2006); *In re Moukalled Estate*, 269 Mich App 708, 713; 714 NW2d 400 (2006); *Sands Appliance Servs v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Condominium-project documents, including master deeds, are to be interpreted and enforced like contracts. See MCL 559.153; *Tuscany Grove Ass'n v Peraino*, 311 Mich App 389, 393; 875 NW2d 234 (2015). We also review de novo issues of constitutional law. *Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC*, 330 Mich App 679, 696; 950 NW2d 502 (2019).

III. ANALYSIS

Defendant argues that the trial court erred by granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. Specifically, defendant argues that the trial court failed to correctly interpret MCL 559.167(3) or to consider certain terms of the Master Deed. We disagree.

"[T]he plaintiff in a quiet-title action has the initial burden of establishing a prima facie case of title, and . . . summary disposition in favor of the defendant is properly entered if the plaintiff fails to carry this burden." *Special Prop VI LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007) (citations omitted). "If the plaintiffs make out a prima facie case, the defendants then have the burden of proving superior right or title in themselves." *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

When interpreting a statute, the goal is to determine the legislative intent by giving the statutory language its ordinary and plain meaning. *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012). Plain, unambiguous statutory lan-

guage will be enforced as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). To the extent possible, a court should avoid any construction that would render any part of a statute nugatory or absurd. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). "A court must look to the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes the purpose of the statute. Statutory language should be construed reasonably, keeping in mind the purpose of the act." *Watson v Bureau of State Lottery*, 224 Mich App 639, 645; 569 NW2d 878 (1997) (citations omitted).

MCL 559.167(3) states, in relevant part:

> [*I*]*f the developer has not completed development and construction of units or improvements in the condominium project that are identified as "need not be built" during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as "must be built" without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project*. If the master deed contains provisions permitting the expansion, contraction, or rights of convertibility of units or common elements in the condominium project, then the time period is 6 years after the date the developer exercised its rights with respect to either expansion, contraction, or rights of convertibility, whichever right was exercised last. The undeveloped portions of the project withdrawn shall also automatically be granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped portions of the project. *If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease*. [Emphasis added.]

The language of MCL 559.167(3) is clear and unambiguous. *Sun Valley Foods*, 460 Mich at 236. If the developer of a condominium project (or its successors or assigns) does not withdraw the undeveloped "need not be built" units from the project within the specified 10-year time period, the land comprising those units becomes part of the project "as general common elements" and all rights to construction on that land cease. It is undisputed that no one withdrew the Unbuilt Units from the project within the specified 10-year period. Therefore, after the expiration of that period, by operation of law, the Unbuilt Units remained part of the project as general common elements, and all rights to construct upon that land ceased. MCL 559.167(3); see also *Cove Creek*, 330 Mich App 679.

In *Cove Creek*, this Court affirmed a trial court's holding that the defendants-owners of unbuilt "need not be built" units had lost all rights to develop those units because of the expiration of the time period outlined in MCL 559.167(3). *Id*. at 703-704. This case involves facts almost identical with those in *Cove Creek*, which compels us to reach the same result. Although *Cove Creek* dealt with the amended version of MCL 559.167, the amended version retains the same 10-year deadline as the preamendment version by which the developer or its successors or assigns must either build, withdraw, or convert "need not be built" units. The amended statute provides a different procedural mechanism by which the unbuilt units may revert to general common elements if the developer has not withdrawn or converted them within the deadline:

> [T]he association of co-owners, by an affirmative 2/3 majority vote of the members in good standing, may declare that the undeveloped land shall remain part of the project but shall revert to general common elements and

> that all rights to construct condominium units upon that undeveloped land shall cease. When such a declaration is made, the association of co-owners shall provide written notice of the declaration to the developer or any successor developer by first-class mail at its last known address. Within 60 days after receipt of the notice, the developer or any successor developer may withdraw the undeveloped land or convert the undeveloped condominium units to "must be built". However, if the undeveloped land is not withdrawn or the undeveloped condominium units are not converted within 60 days, the association of co-owners may file the notice of the declaration with the register of deeds. The declaration takes effect upon recording by the register of deeds. [MCL 559.167(4), as amended by 233 PA 2016; see also MCL 559.167(3).]

In other words, while the amended version of MCL 559.167 provides additional steps that must be taken to convert unbuilt units to general common elements after the 10-year deadline, it does not differ from the preamendment version with regard to determining whether the deadline has in fact passed. Therefore, the rationale of *Cove Creek* dictates that defendant has lost its right to develop the Unbuilt Units.

Defendant argues that MCL 559.167(3) does not apply to this case because defendant is not a "developer" within the statutory definition of the term. In defendant's view, the Legislature intended for MCL 559.167(3) to apply only to developers or those who stand in the legal shoes of the developer. However, there is no statutory language limiting the applicability of MCL 559.167(3) to only those units that are owned by the original developer or its successor at the time the 10-year time period elapses. In fact, MCL 559.167(3) states that the developer of a condominium project has the right to withdraw units from the project without the consent of "any co-owners, mortgagees of units in the project, or any other party having an

interest in the project." In other words, the language at least arguably contemplates a scenario in which the developer of a condominium project is not the same legal entity as the owner of unbuilt units or is not the sole possessor of a legal interest in those units. Regardless, the statute unequivocally states that if the developer has not timely withdrawn the unbuilt units from the project, "*all* rights to construct units upon that land shall cease." MCL 559.167(3) (emphasis added). The statutory language of MCL 559.167(3) is clear, and we will enforce it as written. Whether defendant is a developer is not relevant to the operation of MCL 559.167(3).

Defendant also argues that the trial court erred by relying on *Wellesley Gardens Condo Ass'n v Manek*, unpublished per curiam opinion of the Court of Appeals, issued January 9, 2020 (Docket No. 344190). Defendant correctly observes that unpublished opinions are "not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). But that unpublished decision, regardless of its precedential value, applied substantially the same analysis that we have applied in this case, and it reached a similar result. Unpublished opinions may be considered persuasive, even if they are not binding. See, e.g., *Tomiak v Hamtramck Sch Dist*, 426 Mich 678, 698-699; 397 NW2d 770 (1986); *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 51; 821 NW2d 1 (2012). Like the trial court, we find *Wellesley Gardens Condo Ass'n* persuasive. The trial court's reasoning was sound.

In addition to arguing that it is not a developer or a successor of a developer, defendant argues that it is not a "successor developer" under MCL 559.235(1). MCL 559.235(1) defines "successor developer" as "a person

who acquires title to the lesser of 10 units or 75% of the units in a condominium project . . . by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction." MCL 559.235(1). Relatedly, defendant argues that the trial court erred by not considering certain terms of the Master Deed, which defines a "successor" to exclude a "successor developer." Defendant's argument simply has no application here. The trial court did not determine that defendant was a successor developer, nor would such a determination be relevant to the application of MCL 559.167. The trial court based its decision, as we do ours, on the plain language of MCL 559.167(3). The language of the Master Deed could not have altered the analysis. Because the Unbuilt Units were not withdrawn from the project within the applicable time period, any rights to develop them ceased.

Defendant also makes a brief public-policy argument that plaintiff's interpretation of MCL 559.167(3) would create absurd practical results because it would mean that a nondeveloper could lose its land because of the developer's failure to withdraw it from the condominium project within the applicable time frame. Defendant does not elaborate or provide examples; it merely offers a hypothetical claim and leaves this Court to guess at its reasoning. We decline to do so, as this issue is more appropriately directed to the Legislature. See *Slis v Michigan*, 332 Mich App 312, 378; 956 NW2d 569 (2020) (BOONSTRA, J., concurring). In any event, although statutes should be construed to avoid absurd or unjust results, the courts may only engage in statutory construction when the language of a statute is ambiguous. *Hill v City of Warren*, 276 Mich App 299, 305; 740 NW2d 706 (2007). The language of MCL 559.167(3) is not ambiguous, so our role is simply to apply that language as written. See *Hill*, 276 Mich App at 305.

Defendant also argues that the liens recorded by two different construction companies indicate that construction had commenced on all units. Defendant essentially contends that construction of general common elements supporting the units equates to commencement of construction of the units themselves, such that the units were not "undeveloped," could no longer be withdrawn from the project, and the rights to develop them could not have ceased. We disagree. The record shows only that construction had begun, to some extent, on roads, sidewalks, water systems, and other general common elements within the project. MCL 559.167(3) contemplates that construction and improvements on "need not be built" units be *completed* within 10 years, absent withdrawal of those units during that time. Defendant's interpretation would allow developers to indefinitely avoid the statutory time frame simply by starting construction of a single general common element, like a road. This would render MCL 559.167(3) nugatory and meaningless. *Altman*, 439 Mich at 635.

Defendant also argues that MCL 559.167(3) is unconstitutional as applied to defendant because it would result in a taking of its property without due process of law in violation of the Fifth Amendment of the United States Constitution. We disagree. The Fifth Amendment's Due Process Clause provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law[.]" US Const, Am V. The record shows that defendant received sufficient notice that the units it purchased in 2012 were subject to expiration by 2014. Therefore, its interest in Units 15 through 41 was conditional from the start. Again, *Cove Creek* is instructive. In *Cove Creek*, we held that the lapse of the defendants' title to the project did not deny them due process of law because the 10-year time

frame of MCL 559.167(3) was a reasonable provision that allowed them sufficient notice. *Cove Creek*, 330 Mich App at 704-705. The same is true in this case. In addition, our Supreme Court has held that "the state has the authority to condition the retention of certain property rights on the performance of an affirmative act within a reasonable statutory period." *Kentwood v Sommerdyke Estate*, 458 Mich 642, 646; 581 NW2d 670 (1998). In *Cove Creek*, we noted that MCL 559.167(3) also "conditioned the retention of a property right on the performance of reasonable conditions that indicate a present intention to retain that property interest." *Cove Creek*, 330 Mich at 703. Defendant's constitutional right to due process of law was not violated.

Affirmed.

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

ZWIKER v LAKE SUPERIOR STATE UNIVERSITY
HORRIGAN v EASTERN MICHIGAN UNIVERSITY
DALKE v CENTRAL MICHIGAN UNIVERSITY

Docket Nos. 355128, 355377, and 357275. Submitted January 4, 2022, at Lansing. Decided February 10, 2022, at 9:20 a.m. Leave to appeal sought. Oral argument ordered on the application 510 Mich 937 (2023).

In Docket No. 355128, Katelyn Zwiker, individually and on behalf of all others similarly situated, brought an action in the Court of Claims against Lake Superior State University and the Lake Superior State University Board of Trustees (the LSSU defendants), alleging that the LSSU defendants breached their agreements with students by imposing on them remote learning environments—termed "emergency remote teaching" (ERT)—during the Spring 2020 semester as a result of the COVID-19 pandemic and seeking reimbursement for tuition, fees, and room and board. Zwiker alleged that she did not receive the full benefit of the tuition she paid before the pandemic began as a result of the transition to ERT, which she claimed was of lesser value than in-person instruction. The LSSU defendants moved for summary disposition, and the Court of Claims, MICHAEL J. KELLY, J., granted the motion, finding first that the tuition contract did not guarantee live, in-person learning. The court also concluded that Zwiker had not established that she had specifically selected traditional campus instructional methods or that the course catalog was incorporated into the contract. The court determined that the LSSU defendants were entitled to summary disposition on Zwiker's claim for breach of contract related to fees because the tuition contract assessed fees as the result of registration, not as the result of receiving services, and the contract did not provide that a refund would be issued if the services were not utilized. The court held that the LSSU defendants established through documentary evidence that students were permitted to remain in student housing and receive meal services, and Zwiker did not establish that the LSSU defendants failed to provide housing and meals for the entire semester. Additionally, the housing contract provided that a student's move to a private home or other housing did not terminate the residency or financial conditions of the

housing contract and explicitly provided that there was no refund for unused meals. Finally, the court dismissed Zwiker's unjust-enrichment claims, reasoning that the existence of the tuition and housing contracts prevented her from proceeding on an unjust-enrichment theory.

In Docket No. 355377, Kevin Horrigan brought an action in the Court of Claims against Eastern Michigan University and the Eastern Michigan University Board of Regents (the Eastern defendants), similarly alleging that the Eastern defendants breached their agreements with Horrigan by imposing ERT on him during the Spring 2020 semester and also seeking reimbursement for tuition, fees, and room and board. The Eastern defendants moved for summary disposition, and the Court of Claims, MICHAEL J. KELLY, J., granted the motion, concluding that the plain language of the contracts precluded Horrigan's claims. The court concluded that under the tuition contract, Horrigan had accepted responsibility to pay for all services and fees as a result of registering or receiving services. The contract did not contain any language about the mode of instruction, and because the contract was not ambiguous and did not promise in-person instruction, it did not require that Horrigan receive a specific mode of instruction. The court also held that the Eastern defendants' housing contract expressly reserved the right to remove students from university housing for health and safety reasons and provided that refunds would not be given for missed or unused meals. Accordingly, Horrigan was not entitled to a refund for meals or housing. With respect to fees, the court explained that the tuition agreement governed both tuition and fees, and Horrigan had agreed to pay all fees that resulted from registering or receiving services. Horrigan admitted that he registered for classes; therefore, he had agreed to pay the fees. Finally, the court concluded that Horrigan's claims for unjust enrichment failed because there were express agreements between the parties covering the same subject matter.

In Docket No. 357275, Jael Dalke, individually and on behalf of all others similarly situated, brought an action in the Court of Claims against Central Michigan University and the Central Michigan University Board of Trustees (the Central defendants), alleging that the Central defendants breached their agreements with students by imposing ERT on them during the Spring 2020 semester and also seeking reimbursement for tuition, fees, and room and board. The Central defendants moved for summary disposition, and the Court of Claims, CHRISTOPHER M. MURRAY, J., granted the motion as to Dalke's breach-of-contract claims re-

garding tuition, room and board, and fees. With regard to tuition, Dalke failed to establish a breach or damages because the Central defendants provided instruction, she completed her courses, and she received credit toward her graduation requirements. However, the court denied the motion with respect to unjust enrichment for the tuition. With regard to room and board, the court determined that a contract had existed but that the contract provided that the times of performance were subject to change on the basis of "circumstances beyond the university's control that may affect the health or safety of students." The court reasoned that the COVID-19 pandemic was a circumstance beyond the Central defendants' control that allowed the contract to be altered. The court also granted summary disposition in favor of the Central defendants with respect to Dalke's unjust-enrichment claim regarding room and board because an express written contract precluded the claim. With regard to the fee claim, the court granted summary disposition in favor of the Central defendants as to breach of contract because Dalke did not attach an alleged contract to the complaint and failed to identify the amount of fees each student paid, what services they were to receive in return, or what services she did not receive for the second half of the semester. However, the court concluded that Dalke had sufficiently pleaded an unjust-enrichment claim related to fees to survive summary disposition. The Central defendants then moved for summary disposition regarding the unjust-enrichment claim related to tuition, and the court granted the motion in their favor, holding that they did not receive a windfall as a result of the transition to ERT. Finally, the Central defendants moved for summary disposition on Dalke's contractual and unjust-enrichment claims for her fees, and the court granted the motion, determining that Dalke failed to respond to the motion with evidence and had instead cited her complaint, which was not a sufficient response. Dalke moved to amend her complaint, which the court denied.

All plaintiffs appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Courts will enforce unambiguous contracts as written. A contract is not ambiguous solely because the parties may interpret a term differently, and failure to define a word does not make a contract ambiguous. With respect to the tuition contracts from Eastern Michigan University and Lake Superior State University, the trial court determined that the tuition contracts provided that by registering for a class, the student agreed to pay all

tuition, fees, and associated costs. Additionally, the tuition contracts assessed fees as the result of registration, not as the result of receiving services. Both tuition contracts stated that financial responsibility was incurred at registration or receipt of service. The trial court did not err by concluding that the unambiguous terms of the tuition contracts rendered the students liable for paying tuition once they registered for classes.

2. When a contract contains an express integration or merger clause, it is conclusive evidence that the agreement is the entire agreement, and parol evidence is not admissible. With respect to both Eastern Michigan University and Lake Superior State University, the tuition contracts contained merger and integration clauses stating that the contract constituted the entire agreement between the parties. Zwiker and Horrigan agreed to pay "all tuition, fees and other associated costs assessed at any time as a result of my registration and/or receipt of services . . . ." There was no missing term, and the agreement was not incomplete. Accordingly, Zwiker and Horrigan's argument that the trial court erred because it should have considered parol evidence failed.

3. No plaintiff in these consolidated cases pointed to contractual language in which defendants promised to provide live, in-person instruction. Plaintiffs had the burden to show that a contract existed. To the extent that plaintiffs claimed that the trial court erred because it failed to recognize their noncontractual expectation to live, in-person instruction, such a claim failed as a matter of law. A party's expectations do not supersede the language of an unambiguous contract. The trial court did not prematurely grant summary disposition, and no further factual development in discovery would have stood a fair change of uncovering additional support for plaintiffs' arguments.

4. Horrigan's claim that the tuition contract between him and the Eastern defendants violated public policy because it provided for false advertising was without merit. Contracts that are injurious to the public or against the public good are illegal and void. But the Eastern defendants' tuition contract did not violate public policy; the Eastern defendants had to adapt in the face of a global pandemic and successfully offered their students instruction in a manner that was safe to the students, faculty, and staff.

5. For a contractual frustration of purpose to exist, (1) the contract must be at least partially executory, (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract was made, and (3) this purpose must have been basically frustrated by an event not reasonably

foreseeable at the time the contract was made, the occurrence of which was not due to the fault of the frustrated party and the risk of which was not assumed by it. With respect to Eastern Michigan University, in the parties' housing contract, the Eastern defendants "reserve[d] the right to reassign or remove a resident from university housing for reasons of health, safety, welfare, failure to remain actively enrolled, or if the student poses a significant disruption to the on-campus housing community." The housing contract also stated that "[r]efunds are not given for missed or unused meals." Likewise, with respect to Central Michigan University, the housing contract specifically stated that "times set for performance of this contract are subject to change because of . . . circumstances beyond the university's control that may affect the health or safety of students or affect the educational function of the institution." And with respect to Lake Superior State University, the contract did contain a force-majeure clause, in which the parties agreed that defendants' performance would be excused for an "act of nature" or an "act of God" beyond the control of the parties. These contracts expressly contemplated circumstances under which it would be necessary to remove students from housing for reasons of health, safety, and welfare. Horrigan could not establish that the parties failed to contemplate an outbreak of illness that might discontinue access to food and housing. Nor could he establish that the possibility that he might be removed from university housing and miss meals because of a pandemic was not reasonably foreseeable when the parties' contract expressly provided that students might be removed from housing for health and safety reasons. Additionally, Zwiker failed to show that the LSSU defendants breached the housing contract by preventing her from participating in it; the LSSU defendants submitted documentary evidence showing that the residence halls remained open and that deactivation of card access for students who were not actively on campus could be reversed by request.

6. Unjust enrichment is an equitable theory that allows the trial court to imply a contract in order to prevent the unjust enrichment of a party. To show that a benefit would unjustly enrich the defendant, the plaintiff must establish that the defendant received a benefit from the plaintiff and that it would be inequitable for the defendant to keep the benefit. Courts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter. In each case, defendants' housing contracts addressed the possibility of circumstances affecting the health and welfare of students. Similarly, defendants' tuition contracts specifically addressed

student payment obligations when registering for courses. The parties agreed to these terms. Thus, the express agreements between the parties governed the same subject matter as their equitable claims regarding tuition and room and board. While Dalke claimed that summary disposition was premature, the trial court properly held that further discovery would not stand a fair chance to uncover support for her claims. Finally, Dalke's argument that the trial court erred when it granted summary disposition with respect to parking and student-service fees was rejected. The Central defendants established that her parking permit was active during the Spring 2020 semester and that she was allowed to park on campus. The Central defendants also established that the programs that received support from the student-services fee continued during the Spring 2020 semester. Dalke also argued that retention of the student-services fee unjustly enriched the Central defendants because she paid the fee with the understanding that services would occur on campus. However, Dalke merely relied on an unsupported allegation. The trial court did not err by granting summary disposition.

7. A proposed amendment of a complaint is futile if summary disposition would be appropriately granted regarding the new claims, either when a party has not established a genuine issue of material fact regarding an element or when the undisputed facts establish that summary disposition would be appropriate. The trial court properly denied Dalke's motion for leave to amend her complaint because her proposed amendment was based on documents that the trial court had already considered and with which Dalke had already attempted to support her position. Thus, the trial court's decision to deny her motion for leave to amend did not fall outside the range of reasonable outcomes because the trial court would have granted summary disposition on the amended claims for the same reasons it had originally granted summary disposition.

Affirmed.

SWARTZLE, P.J., concurring in part and dissenting in part, concurred with the majority's opinion affirming summary disposition on all plaintiffs' claims except for the claims for breach of contract involving tuition. First, the parties' tuition agreements centered on the exchange of educational services for tuition payments. Defendants did not fulfill their end of the bargain merely by providing the opportunity for plaintiffs to register for Spring 2020 courses or merely by awarding credits to plaintiffs. Thus, to hold up their end of a valid bargain, defendants had to offer the bargained-for educational services to plaintiffs separate

> and apart from the offering of registration or the awarding of credits. Second, unlike with the room-and-board claims, defendants did not point to any force-majeure provisions relevant to the tuition claims. Third and finally, the provision of educational services can be conceptualized along a spectrum, and it was unclear where along this spectrum the provision of ERT fell. At this early stage of the lawsuits, plaintiffs should have been given the opportunity to make their case. There remained a genuine issue of material fact on plaintiffs' tuition claims.

Fink Bressack (by *David H. Fink*, *Darryl Bressack*, and *Nathan J. Fink*) for Katelyn Zwiker, Kevin Horrigan, Jael Dalke, and proposed classes.

Bodman PLC (by *Gary S. Fealk*, *Thomas J. Rheaume, Jr.*, and *Rebecca Seguin-Skrabucha*) for Lake Superior State University and the Lake Superior State University Board of Trustees.

Miller, Canfield, Paddock and Stone, PLC (by *Paul D. Hudson*, *Brian M. Schwartz*, and *Ashley N. Higginson*) for Eastern Michigan University and the Eastern Michigan University Board of Regents.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael E. Cavanaugh* and *Ryan K. Kauffman*) for Central Michigan University and the Central Michigan University Board of Trustees.

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

K. F. KELLY, J. These consolidated cases[1] present the question whether Michigan's constitutionally created institutions of higher education are liable to their

[1] These cases were consolidated on the Court's own motion to "advance the efficient administration of the appellate process." *Zwiker v Lake Superior State Univ*, unpublished order of the Court of Appeals, entered December 14, 2021 (Docket Nos. 355128, 355377, and 357275).

students for reimbursements for tuition and room and board as a result of the COVID-19 pandemic. In each case, plaintiffs contend that the defendant universities breached their agreements with their students by imposing upon them remote learning environments—termed "emergency remote teaching" (ERT) by plaintiffs—as opposed to traditional in-person classroom instruction, which plaintiffs contend was inferior. Plaintiffs also seek reimbursements from the defendant universities for the period of time in which they did not remain on campus during the COVID-19 pandemic. In each case, we conclude that the trial court did not err by granting summary disposition in favor of the defendant universities because plaintiffs failed to demonstrate that the defendant universities breached any contractual agreement with them.[2]

In Docket No. 357275, plaintiff Jael Dalke (Dalke), individually and on behalf of all others similarly situated, appeals by right the trial court's opinion and order granting summary disposition under MCR 2.116(C)(10) in favor of defendants Central Michigan University and Central Michigan University Board of Trustees (the Central defendants). In Docket No. 355128, plaintiff Katelyn Zwiker (Zwiker), individually and on behalf of all others similarly situated, appeals by right the trial court's opinion and order granting summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10) in favor of defendants Lake Superior State University and Lake Superior State University Board of Trustees (the LSS defendants). And, in Docket No. 355377, plaintiff Kevin Horrigan (Horrigan) ap-

[2] This Court recognizes the very difficult situation the COVID-19 pandemic presented for Michigan's students, families, faculty, and administrators. The result from our opinion today in no way diminishes these very difficult challenges faced by all during these uncertain times.

peals by right the trial court's opinion and order granting summary disposition under MCR 2.116(C)(8) in favor of defendants Eastern Michigan University and Eastern Michigan University Board of Regents (the Eastern defendants).

Finding no errors warranting reversal, we affirm.

I. THE CONTRACTS

A. CENTRAL MICHIGAN UNIVERSITY

Dalke registered for classes at Central Michigan University on December 27, 2019. Concurrent with her registration, Dalke was charged $6,255 for "Tuition and/or Fees" and was also charged a "Student Services Fee" of $225. The Financial Terms and Conditions associated with her registration stated that "[b]y completing registration at Central Michigan University for this semester, you agree to financial responsibility for all charges, including tuition and fees on your student account."

Dalke also signed a document providing that, in exchange for living in the on-campus residence hall, she agreed to the terms in the Central defendants' housing contract. Under the housing contract, the Central defendants agreed to provide Dalke with the use of residence facilities and food services. The contract stated that "times set for performance of this contract are subject to change because of . . . circumstances beyond the university's control that may affect the health or safety of students or affect the educational function of the institution." The housing contract did not terminate if a student moved to a private home, and a student who broke the contract without prior approval would remain liable for room and board. The contract, however, gave the Central defendants the

discretion to refund room and board. Dalke was charged for housing and an unlimited meal plan.

B. LAKE SUPERIOR STATE UNIVERSITY

The LSS defendants' rates for the Spring 2020 semester provided for a $6,000 flat "One-Rate Tuition" fee for students taking 12 to 17 credits. The fees included, among other things, an athletic fee for access to all regular-season athletic events, program fees related to "laboratory courses and equipment," student-activity fees for student government and student activities, and special course fees to offset the costs of supplies, equipment, maintenance, and transportation for specified courses. The LSS defendants allowed students to select from online, regional, or traditional in-person instructional methods.

Zwiker agreed to the LSS defendants' financial-responsibility agreement, which stated that Zwiker "understand[s] that when I register for any class at Lake Superior State University, or receive any service from Lake Superior State University, I accept full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of my registration and/or receipt of services, notwithstanding any anticipated third-party resource . . . ." The agreement also stated that it "supersedes all prior understandings, representations, negotiations and correspondence between the student and Lake Superior State University, constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified," subject to exceptions.

Zwiker also signed a residence-hall and dining-services contract. In doing so, she "agree[d] to abide by all provisions of this contract as well as any rules,

regulations, and procedures governing University Housing as may be published and amended from time to time by the University . . . .” The LSS defendants agreed to provide students in residences with “living space, facilities, furnishings, and meals (as applicable) in accordance with the terms of this contract and University policies.” In exchange, Zwiker agreed to pay “a housing fee in accordance with the terms of this contract.” The contract separately stated that any unused meals would not transfer from week to week and that no refunds would be issued for unused meals. Moving to private housing did not terminate Zwiker’s financial obligations. Specifically, the housing resident handbook stated that students were required to complete check-out procedures before leaving the residence halls. To move out before the end of the academic year, a student was required to “[f]ill out Intent to Leave Form in the Campus Life and Housing Office” and required to remove all personal belongings out of the room.

The agreement was subject to change for, among other reasons, “disorders which may affect the health or safety of students or affect the educational function of the institution.” The parties also agreed that “[i]n the event that the University shall be prevented from completing performance of any obligations hereunder by act of God or other occurrences whatsoever which are beyond the control of the parties hereto, then the University shall be excused from any further performance of obligations and undertakings hereunder, to the full extent allowed by law.”

C. EASTERN MICHIGAN UNIVERSITY

Horrigan signed a financial-responsibility statement in November 2019, which stated, in relevant part:

> I understand that when I register for any class at Eastern Michigan University (EMU) or receive any service from Eastern Michigan University I accept full responsibility to pay all tuition, fees and other associated costs assessed as a result of my registration and/or receipt of services.

Horrigan also agreed to the Eastern defendants' housing contract, which provided that the contract would not terminate if the resident moved off campus. The housing contract also stated that if a resident chose to move out of the housing without a release, the resident would remain financially responsible. The Eastern defendants "reserve[d] the right to reassign or remove a resident from university housing for reasons of health, safety, welfare, failure to remain actively enrolled, or if the student poses a significant disruption to the on-campus housing community." The housing contract also stated that "[r]efunds are not given for missed or unused meals."

II. COVID-19 PANDEMIC

On March 10, 2020, Governor Whitmer declared a statewide state of emergency related to the COVID-19 pandemic. Executive Order No. 2020-4, which has since been rescinded, stated, in relevant part:

> 1. A state of emergency is declared across the State of Michigan.
>
> 2. The Emergency Management and Homeland Security Division of the Department of State Police must coordinate and maximize all state efforts that may be

activated to state service to assist local governments and officials and may call upon all state departments to utilize available resources to assist.

3. The state of emergency is terminated when emergency conditions no longer exist and appropriate programs have been implemented to recover from any effects of the emergency conditions, consistent with the legal authorities upon which this declaration is based and any limits on duration imposed by those authorities.

Subsequently, on March 23, 2020, Governor Gretchen Whitmer issued an executive order requiring "all individuals currently living within the State of Michigan . . . to stay at home or at their place of residence," subject to exceptions to sustain or protect life. Executive Order No. 2020-21. The order was necessary "[t]o suppress the spread of COVID-19, to prevent the state's health care system from being overwhelmed, to allow time for the production of critical test kits, ventilators, and personal protective equipment, and to avoid needless deaths . . . ." *Id*.

A. CENTRAL MICHIGAN UNIVERSITY

On March 11, 2020, Central Michigan University president, Bob Davies, stated that classes would be moved to an online environment and that "students should not return to campus following spring break." The Central defendants' residence halls were closed to everyone but international students and student athletes, and limited food service was provided.

The Central defendants subsequently extended online-only classes until April 6, 2020. Residence halls were open for residents who needed housing, but the Central defendants "continue[d] to recommend that students with permanent residences off campus remain there at this time." (Emphasis omitted.) On

March 19, 2020, the Central defendants e-mailed students, stating that students with a housing contract could remain on campus until May 9, 2020, but students who chose to move out would receive a credit.

On March 23, 2020, Davies stated that, in response to the Governor's stay-home order, residence halls and apartments would remain open for students; however, he stated that students who were currently residing off campus should not return. On March 30, 2020, defendants stated that they "continue[d] to recommend that all students return to their permanent residence if possible." However, housing and dining services remained open for students who continued to reside on campus. The deadline to withdraw from classes or choose to use a credit/no-credit option for grades was extended until the end of May 2020.

B. LAKE SUPERIOR STATE UNIVERSITY

In response to Governor Whitmer's March 10, 2020 emergency declaration, the LSS defendants suspended face-to-face instruction and moved classes to a virtual format. In a March 11, 2020 e-mail, the LSS defendants notified students that residence halls and dining services would remain open. They also notified students that the university's Campus Life Office would communicate with students about virtual organizations and events.

On March 20, 2020, Lake Superior State University president, Rodney Hanley, stated that faculty members had successfully transitioned to virtual teaching and that students would be permitted to drop classes through the end of the semester. Hanley further emphasized that residence halls and dining services remained open. On April 7, 2020, the LSS defendants reiterated in an e-mail that residence halls and dining

services remained open but stated that, to maintain safety for students still living on campus, they were deactivating swipe-card access to residence halls for those students who were not then living on campus. The e-mail stated that the card's deactivation was reversible on request or in response to an appointment to remove belongings. And on April 8, 2020, Hanley requested that students planning to travel during the Easter holiday "abandon[]" such plans and "stay in-place." However, if a student insisted on leaving, he requested that they not return to campus.

C. EASTERN MICHIGAN UNIVERSITY

On March 11, 2020, James Smith, Eastern Michigan University's president, stated by e-mail that face-to-face instruction was suspended and that classes would be moved to a virtual, online format. Residence halls and dining facilities would remain open, but Smith encouraged students to return to their permanent places of residence "due to public health recommendations for social distancing." After Governor Whitmer issued the executive order requiring all individuals to stay at home or in their place of residence, the Eastern defendants closed their residence halls on March 31, 2020, and announced that housing and meal-plan credits would be issued effective March 31, 2020.

III. PROCEDURAL HISTORY

In each of the consolidated cases, Dalke, Zwiker, and Horrigan (collectively, the University plaintiffs) asserted causes of action based on breach of contract and unjust enrichment against the Central defendants, the LSS defendants, and the Eastern defendants (collectively, the University defendants). The University plaintiffs each alleged that they did not receive the full

benefit of the tuition they paid before the pandemic began as a result of the transition to an online learning environment, which they claim is of lesser value than in-person instruction. In each case, the University plaintiffs alleged that the University defendants breached the parties' contracts, which provided that students would pay tuition in exchange for live, in-person instruction. As a result of the transition to online instruction in the Spring 2020 semester, the University plaintiffs seek a reduction or refund in tuition.

The University plaintiffs also alleged that they did not receive reimbursements for their unused portions of room and board during the time they were in off-campus housing. According to the University plaintiffs, the University defendants breached their housing contracts by not housing the University plaintiffs for the entire semester or otherwise offering a refund for unused room and board. Lastly, the University plaintiffs each alleged that the University defendants failed to reimburse them for unused portions of student and other fees paid for services that were not provided. In addition to the breach-of-contract claims, the University plaintiffs alleged that the University defendants were unjustly enriched by retaining the tuition, room and board, and fees described.

A. CENTRAL MICHIGAN UNIVERSITY

The Central defendants initially moved for summary disposition under MCR 2.116(C)(8). They asserted a constitutional right to control the university's affairs and claimed that their academic decisions were not subject to judicial review. Alternatively, the Central defendants argued that the trial court should dismiss Dalke's claim for breach of the tuition contract

because she failed to identify a contractual provision under which the Central defendants promised to provide the live, in-person instruction that formed the basis of her claim. Similarly, Dalke had not sufficiently identified which fees she had paid or what services the Central defendants had agreed to provide. Moreover, the Central defendants argued that Dalke could not establish damages because she could not establish the value of the educational instruction she received.

With respect to the claim regarding room and board, the Central defendants claimed Dalke failed to state a claim for breach of contract because she had not identified any terms or conditions of the parties' contract that had been breached. Additionally, Dalke voluntarily moved out of her residence hall and accepted a refund in lieu of remaining in university housing. Finally, the Central defendants argued that Dalke failed to state claims for unjust enrichment because her housing-related claim concerned the same subject matter as her room-and-board contract, and she could not establish that the Central defendants obtained a windfall by retaining the fees it had been paid.

The trial court granted the Central defendants' motion in part and denied it in part. The trial court rejected the argument that the Michigan Constitution and federal caselaw prevented Dalke from asserting claims for breach of contract and unjust enrichment. However, concerning her breach-of-contract claims related to tuition, the trial court previously ordered Dalke to provide all documents supporting her tuition-based claim for breach of contract. In response, she produced marketing information and excerpts from the Central Michigan University registration portal and course catalog. According to the trial court, none of the documents promised that if Dalke paid tuition, the

Central defendants "would exclusively provide in-person instruction." The trial court also noted that Dalke failed to establish a breach or damages because the Central defendants provided instruction, she completed her courses, and she received credit toward her graduation requirements. Because Dalke had not established the required elements of breach of contract, the trial court granted summary disposition under MCR 2.116(C)(10) in favor of the Central defendants on the breach-of-contract claim but denied summary disposition with respect to unjust enrichment.

Addressing Dalke's breach-of-contract claim based on room and board, the trial court determined that she had established that a housing contract existed. However, she had not established that the Central defendants breached the contract because the contract provided that the times of performance were subject to change on the basis of " '*circumstances beyond the university's control that may affect the health or safety of students* . . . .' " The trial court reasoned that the COVID-19 pandemic was a circumstance beyond the Central defendants' control that allowed the contract to be altered. Additionally, while the Central defendants encouraged students to move out, the halls and dining rooms remained open to students who could not. Thus, the trial court granted summary disposition under MCR 2.116(C)(10) in favor of the Central defendants with respect to this breach-of-contract claim. The trial court also granted summary disposition under MCR 2.116(C)(8) in favor of the Central defendants with respect to Dalke's unjust-enrichment claim because an express written contract precluded the claim.

With respect to Dalke's fee claim, the trial court granted summary disposition in favor of the Central defendants, finding that Dalke did not attach an al-

leged contract to the complaint and that Dalke failed to identify the amount of fees each student paid, what services they were to receive in return, or what services she did not receive for the second half of the semester. Dalke's account statement was not a contract because it provided no promises in exchange for the fees. However, the trial court concluded that she had sufficiently pleaded an unjust-enrichment claim related to fees to survive summary disposition.

The Central defendants subsequently moved for partial summary disposition under MCR 2.116(C)(10) regarding plaintiff's unjust-enrichment claim related to tuition, explaining that they did not charge more for online classes than for in-person classes and that Dalke could not establish that they received a windfall from retaining plaintiff's tuition. Dalke responded that ERT, which she characterizes as the "[t]he rapid transfer of some portion of a course to the online environment to ensure continuity of instruction during unpredictable emergent situations that threaten the ability to teach on-campus," was not equivalent to regular online classes because the value of online classes was higher. (Quotation marks and citation omitted.) According to Dalke, this was the case because the Central defendants had ample time to prepare traditional online course materials, in contrast with the short amount of time in reaction to the pandemic. In support of her arguments, Dalke relied on a report prepared by Ted Tatos, an economist and statistician, who opined that ERT was different from standard online learning, "which requires substantial preparation and involves courses designed for online delivery." (Quotation marks and citation omitted.) Tatos concluded that ERT was not the equivalent of online instruction and opined that students did not receive the same educational

benefit from ERT as they would have from in-person instruction or regular online education.[3]

The trial court granted the Central defendants' motion for partial summary disposition under MCR 2.116(C)(10). It found that the documentary evidence supported the claim that the Central defendants did not receive a windfall as a result of the transition to remote learning. The Central defendants charged the same for in-person and online credit hours, and the parties did not dispute that students who successfully completed courses were awarded the same credit toward graduation as they would have without the pandemic.

In March 2021, the Central defendants moved for summary disposition under MCR 2.116(C)(10) on Dalke's contractual and unjust-enrichment claims for her fees. The Central defendants argued that the credit Dalke received to her student account and the money she received under the Coronavirus Economic Stabilization (CARES) Act, 15 USC 9001 *et seq*., compensated her for the amount of fees she had paid during the Spring 2020 semester. Additionally, with respect to parking fees, Dalke's parking permit remained active,

[3] Although Dalke relied on Tatos's findings in the trial court, neither Zwiker nor Horrigan relied on or otherwise presented Tatos's findings to the trial court. Nevertheless, in their briefs to this Court, Zwiker and Horrigan have presented Tatos's findings as support for reversal of the trial court's decisions. On motion by the LSS defendants, this Court struck Tatos's declaration and any arguments discussing it. *Zwiker v Lake Superior State Univ*, unpublished order of the Court of Appeals, entered April 5, 2021 (Docket No. 355128). Additionally, because the declaration was not presented to the trial court by Horrigan, we decline to consider it in connection with his claims as well. See *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 165; 761 NW2d 784 (2008) ("This Court's review is limited to the record of the trial court."). Moreover, and regardless of whether the declaration was properly preserved, we find Tatos's findings unpersuasive in the context of these cases.

and she was allowed to park on campus the entire time. Regarding the student-services fee, the Central defendants argued that the fee did not fund any particular service. It funded a variety of functions, such as academic advising, counseling, and student success coaching, which the Central defendants provided for the entire semester.

Dalke responded that a genuine issue of material fact existed regarding whether the Central defendants continued to provide services related to the parking fee by citing her complaint, in which she alleged that the Central defendants had not continued providing a parking service. She also argued that "the Student Services Fee was paid with the understanding that the benefits would occur on-campus," but the Central defendants had canceled all on-campus events. Dalke also moved for leave to amend her complaint.

The trial court ultimately granted the Central defendants' motion for summary disposition under MCR 2.116(C)(10). Dalke failed to respond to the motion with evidence and had instead cited her complaint, which was not a sufficient response. The trial court also determined that Dalke's proposed amended complaint would be futile.

B. LAKE SUPERIOR STATE UNIVERSITY

The LSS defendants moved for summary disposition under MCR 2.116(C)(8) and (10). The LSS defendants argued that they had a constitutional right to craft their response to the COVID-19 pandemic. They also argued that they did not breach the tuition contract because the contract did not guarantee live, in-person instruction. Concerning Zwiker's housing contract, the LSS defendants claimed that the contract's force-majeure clause excused them from further perfor-

mance because of circumstances beyond their control. Moreover, Zwiker was provided housing for the entire semester because students were free to remain on campus. According to the LSS defendants, the contract provided that moving to private housing did not terminate residency and that students were not eligible for prorated room and board if they did not complete the check-out process, which Zwiker had not done. The housing contract also stated that there was no refund for unused meals. Finally, the LSS defendants argued that Zwiker's unjust-enrichment claims failed as a matter of law because the contracts expressly covered the subject matter of the claims.

Zwiker responded that she had established damages that were not speculative because she did not receive the benefit of the live, in-person instruction she had paid for and that she would be able to quantify her damages during discovery. She additionally argued that the LSS defendants' claim that fee-related services had been provided was a factual claim and that students were not able to make substantial use of the services. With respect to the force-majeure clause, Zwiker argued that the clause applied equally to students and, because Zwiker's performance was impossible, she was excused from performing under the contract. She claimed that her decision to leave campus was not voluntary as a result of the LSS defendants' strongly worded letters to students and the LSS defendants' deactivation of card access to the residence halls.

The trial court granted the LSS defendants' motion for summary disposition under MCR 2.116(C)(8) and (10), finding first that the tuition contract did not guarantee live, in-person learning. According to the trial court, the unambiguous terms of the tuition

contract rendered Zwiker liable for paying tuition after she registered for classes and received instruction services. The trial court concluded that Zwiker had not established that she had specifically selected traditional campus instructional methods or that the class catalog was incorporated into the contract.

The trial court also determined that the LSS defendants were entitled to summary disposition on Zwiker's claim for breach of contract related to fees because the tuition contract assessed fees as the result of registration, not as the result of receiving services, and the contract did not provide that a refund would be issued if the services were not utilized. The trial court held that the LSS defendants established through documentary evidence that students were permitted to remain in student housing and receive meal services, and Zwiker did not establish that the LSS defendants failed to provide housing and meals for the entire semester. While students were encouraged to leave or not to return if they had already left, the LSS defendants did not prevent students from returning or fail to make housing and meals available. Additionally, the housing contract provided that a student's move to a private home or other housing did not terminate the residency or financial conditions of the housing contract and explicitly provided that there was no refund for unused meals.

Lastly, the trial court dismissed Zwiker's unjust-enrichment claims under MCR 2.116(C)(8). The trial court reasoned that the existence of the tuition and housing contracts prevented her from proceeding on an unjust-enrichment theory.

C. EASTERN MICHIGAN UNIVERSITY

The Eastern defendants moved for summary disposition under MCR 2.116(C)(8). The Eastern defendants argued that they had a constitutional right to craft their response to COVID-19 because responding to the pandemic by moving instruction to an online format constituted an academic judgment. They also argued, similar to the other defendants, that they did not breach the tuition contract because the contract did not guarantee live, in-person instruction. Under the Eastern defendants' agreement, Horrigan was required to pay all tuition, fees, and other associated costs that occurred as a result of his registration, and his expectations did not alter the contract's language.

With respect to the housing contract, the Eastern defendants argued that the contractual language explicitly contemplated that students might be asked to leave before the end of the term and stated that the relationship was subject to change on the basis of conditions that affected the health or safety of students. The contract also provided no refund for unused meals. Finally, the Eastern defendants argued that Horrigan's unjust-enrichment claims failed as a matter of law because the tuition and housing contracts expressly covered the subject matter of the claims.

Horrigan responded that the Eastern defendants' arguments concerning breach of the tuition contract were meritless because they had not demonstrated that any contractual language applied to the parties' dispute. Horrigan also argued that if the Eastern defendants were entitled to terminate the housing contract for public-health reasons, he was entitled to a refund. Horrigan clarified that the fees the Eastern defendants failed to provide services for were a general fee, a technology fee, and a student-center fee. When

the Eastern defendants closed the majority of campus buildings, Horrigan was unable to use the services with which the fees were associated. Finally, Horrigan argued that he was entitled to argue unjust enrichment in the alternative because the contract was ambiguous regarding mode of instruction. He denied that the Eastern defendants benefited students after retaining the funds because course credits were not the only benefit of university enrollment.

The trial court granted the Eastern defendants' motion for summary disposition under MCR 2.116(C)(8), concluding that the plain language of the contracts precluded Horrigan's claims. The trial court concluded that under the tuition contract, Horrigan accepted responsibility to pay for all services and pay fees as a result of registering or receiving services. The contract did not contain any language about the mode of instruction. Because the contract was not ambiguous and did not promise live, in-person instruction, it did not require that Horrigan receive a specific mode of instruction.

The trial court also held that the Eastern defendants' housing contract expressly reserved the right to remove students from university housing for health and safety reasons and provided that refunds would not be given for missed or unused meals. The language was not ambiguous and did not contain qualifications. Accordingly, Horrigan was not entitled to a refund for meals or housing. With respect to fees, the trial court explained that the tuition agreement governed both tuition and fees, and Horrigan had agreed to pay all fees that resulted from registering or receiving services. Horrigan admitted that he registered for classes; therefore, he had agreed to pay the fees. As in the other cases, the trial court also concluded that Horrigan's

claims for unjust enrichment failed because there were express agreements between the parties covering the same subject matter.

These appeals followed.

IV. ANALYSIS

A. STANDARDS OF REVIEW

In the proceedings below, the trial courts granted defendants' motions for summary disposition under MCR 2.116(C)(8) and MCR 2.116(C)(10). "We review de novo a decision by the Court of Claims on a motion for summary disposition . . . ." *Brunswick Bowling & Billiards Corp v Dep't of Treasury*, 267 Mich App 682, 684; 706 NW2d 30 (2005).

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015) (quotation marks and citation omitted). We accept all well-pleaded factual allegations as true, and we construe them in the light most favorable to the nonmoving party. *Id*. "Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Dell*, 312 Mich App at 739 (quotation marks and citation omitted).

When reviewing a decision under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d

238 (2012). Summary disposition is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

We also review de novo the proper interpretation of a contractual provision. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005). "Whether a contract is ambiguous is a question of law, while determining the meaning of ambiguous contract language becomes a question of fact." *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220; 933 NW2d 363 (2019).

A decision by the trial court to deny a motion to amend a pleading is reviewed for an abuse of discretion. *Aguirre v Michigan*, 315 Mich App 706, 713; 891 NW2d 516 (2016). "The determination that a trial court abused its discretion involves far more than a difference in judicial opinion." *In re Kostin Estate*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "Rather, an abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Id*.

B. TUITION, FEES, AND IN-PERSON INSTRUCTION

Zwiker and Horrigan argue that the term "services" in their respective tuition contracts is ambiguous and, therefore, the trial court erred because there are genuine issues of material fact and parol evidence is necessary to determine the parties' intent.[4] In each case, the

[4] Plaintiffs failed to preserve the argument that parol evidence was necessary by failing to raise it first in response to defendants' dispositive motions. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Nevertheless, we exercise our inherent power to address unpreserved issues where, as here, the issue is a legal one for which all facts have been presented and resolution is required to

tuition contracts from Lake Superior State University and Eastern Michigan University stated that students "accept full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of [the student's] registration and/or receipt of services . . . ."

This Court will enforce unambiguous contracts as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). It is not this Court's role to undermine the parties' freedom to contract by rewriting clear contractual language to comply with what the Court perceives as the parties' intent. *Id*. at 468-469. Rather, this Court construes contractual terms in context, according to their commonly used meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). A contract is ambiguous when its provisions are capable of conflicting interpretations. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999). A contract is not ambiguous solely because the parties may interpret a term differently. *Id*. at 567. Failure to define a word does not make a contract ambiguous. *Henderson*, 460 Mich at 354.

With respect to the tuition contracts from Eastern Michigan University and Lake Superior State University, the trial court determined that the tuition contracts provided that by registering for a class, the student agreed to pay all tuition, fees, and associated costs. The trial court held that the unambiguous terms of the tuition contracts rendered Zwiker and Horrigan liable for paying tuition after registering for classes and receiving instruction services. Additionally, the

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properly decide the case. See *Autodie LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

tuition contracts assessed fees as the result of registration, not as the result of receiving services.

Both tuition contracts state that financial responsibility is incurred at registration or receipt of service. The word "or" is a disjunctive term used to express a choice between alternatives. *Campbell v Mich Dep't of Treasury*, 331 Mich App 312, 320; 952 NW2d 568 (2020). We find no error in the trial court's conclusion that the unambiguous terms of the tuition contract rendered students liable for paying tuition once they registered for classes. Thus, whether the term "services" is ambiguous is irrelevant because the students' financial responsibility began upon registration.

Zwiker and Horrigan also argue that the trial court erred because it should have considered parol evidence to determine the meaning of the contract given that the contract was obviously incomplete when the services to be provided were not defined within it. "[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (quotation marks and citation omitted). If the contract contains an integration clause, parol evidence is only admissible (1) to prove that the clause was fraudulent, (2) to invalidate the entire contract, or (3) if the contract is obviously incomplete on its face. *Id*. at 494-495. When a contract contains an express integration or merger clause, it is conclusive evidence that the agreement is the entire agreement, and parol evidence is not admissible. *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 169; 721 NW2d 233 (2006).

With respect to both Eastern Michigan University and Lake Superior State University, the tuition contracts contained merger and integration clauses stating that the contract constituted the entire agreement between the parties. Zwiker and Horrigan do not claim that the contracts were fraudulent or do not otherwise seek to invalidate the tuition contracts. Thus, whether parol evidence is proper in the face of the merger and integration clauses depends on whether the tuition contracts are obviously incomplete. We reject the suggestion that they are. Zwiker and Horrigan agreed to pay "all tuition, fees and other associated costs assessed at any time as a result of my registration and/or receipt of services . . . ." There is no missing term, and the agreement is not incomplete. That the term "services" is undefined does not render the contracts incomplete. *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002) ("[T]he fact that a contract does not define a relevant term does not render the contract ambiguous.").

In all cases consolidated on appeal, the University plaintiffs claim that the University defendants breached their agreements by failing to provide live, in-person instruction. The University plaintiffs, however, have pointed to no contractual language in which the University defendants promised such method of instruction. The University plaintiffs have the burden to show that a contract exists in order for the contract to be enforced, because "the court cannot make a contract for the parties when none exists." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992) (quotation marks and citation omitted). "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party

claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

To the extent the University plaintiffs claim that the trial court erred because it failed to recognize their noncontractual expectation to live, in-person instruction, such a claim fails as a matter of law. A party's expectations do not supersede the language of an unambiguous contract. See *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 60; 664 NW2d 776 (2003) (rejecting the rule of reasonable expectations related to insurance contracts). "[A] contract requires mutual assent or a meeting of the minds on all the essential terms." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). A court considers the parties' express words and visible acts, and not the parties' subjective states of mind, to determine whether there was mutual assent to a contract. *Id*. at 454. "Where mutual assent does not exist, a contract does not exist." *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003).

Moreover, in none of the cases below did the University plaintiffs provide the trial court with any contractual language in which the University defendants promised live, in-person instruction. Most pertinently, with respect to the Central defendants, the trial court granted their motion for summary disposition because, in response to the trial court's order that Dalke produce the contractual language upon which she based her claim, Dalke provided screenshots and excerpts from the Central defendants' registration portal and course catalog, as well as marketing information. None of the documents promised that if Dalke paid tuition, the Central defendants "would exclusively provide in-person instruction."

Relatedly, Zwiker and Horrigan claim that the trial court granted summary disposition prematurely and that further discovery is needed to determine the meaning of the contract. Summary disposition is premature before discovery is complete when further discovery "stands a fair chance of uncovering factual support for the opposing party's position." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). As already discussed, however, we find no error in the trial courts' conclusions that the financial agreements between the parties were unambiguous and did not promise live, in-person instruction. Thus, further factual development in discovery does not stand a fair chance of uncovering additional support for Zwiker and Horrigan's arguments.

Lastly, Horrigan contends that the tuition contract between him and the Eastern defendants violates public policy because it provides for false advertising. Contracts that "tend to be injurious to the public or against the public good are illegal and void . . . ." *Mahoney v Lincoln Brick Co*, 304 Mich 694, 706; 8 NW2d 883 (1943) (punctuation omitted). We reject the notion that the Eastern defendants' tuition contract violates public policy. The Eastern defendants are part of a constitutionally created university and accredited institution of higher education that, like every other individual and business, had to adapt in the face of a global pandemic. Despite the challenges, the Eastern defendants successfully offered their students instruction in a manner that was safe to the students, faculty, and staff. The fact that Horrigan perceives the contract, in hindsight, to be unfair does not render the contract as against public policy. See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 372-373; 817 NW2d 504 (2012). Horrigan paid for tuition and re-

ceived the corresponding credits. There is nothing so injurious to the public about this arrangement to cause the Court to afford relief under this theory.

C. ROOM AND BOARD

The University plaintiffs further contend that the trial court erred when it granted summary disposition in favor of the University defendants with respect to their claims for breach of contract for room and board because the purpose of the contract was frustrated by the COVID-19 pandemic. The University plaintiffs claim that the pandemic was not reasonably foreseeable and prevented the parties from fulfilling their obligations under the housing contracts. The University plaintiffs failed to raise this issue in the trial court and have, therefore, failed to preserve it for appeal. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Nevertheless, as with the argument concerning parol evidence, we will review the issue because it presents a question of law and a resolution is required to properly decide the case. See *Autodie LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014).

A contractual frustration of purpose exists when "a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract," despite the fact that nothing impedes the party from performing the contract. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 133-134; 676 NW2d 633 (2003) (quotation marks and citation omitted). For a frustration of purpose to exist,

> (1) the contract must be at least partially executory; (2) the frustrated party's purpose in making the contract must have been known to both parties when the contract

> was made; [and] (3) this purpose must have been basically frustrated by an event not reasonably foreseeable at the time the contract was made, the occurrence of which has not been due to the fault of the frustrated party and the risk of which was not assumed by him. [*Id*. at 134-135 (quotation marks and citation omitted).]

With respect to Eastern Michigan University, in the parties' housing contract, the Eastern defendants "reserve[d] the right to reassign or remove a resident from university housing for reasons of health, safety, welfare, failure to remain actively enrolled, or if the student poses a significant disruption to the on-campus housing community." The housing contract also stated that "[r]efunds are not given for missed or unused meals." Likewise, with respect to Central Michigan University, the housing contract specifically stated that "times set for performance of this contract are subject to change because of . . . circumstances beyond the university's control that may affect the health or safety of students or affect the educational function of the institution." And with respect to Lake Superior State University, the contract did contain a force-majeure clause, in which the parties agreed that defendants' performance would be excused for an "act of nature" or an "act of God" beyond the control of the parties.

In other words, these contracts expressly contemplated circumstances under which it is necessary to remove students from housing for reasons of health, safety, and welfare. Horrigan cannot establish that the parties failed to contemplate an outbreak of illness that might discontinue access to food and housing. Nor can he establish that the possibility that he might be removed from university housing and miss meals because of a pandemic was not reasonably foreseeable

when the parties' contract expressly provided that students might be removed from housing for health and safety reasons.

Zwiker also contends that the trial court erred when it granted summary disposition in favor of the LSS defendants because they breached the housing agreement by preventing her from returning to her residence. Aside from the allegation, however, Zwiker provides no documentary proof and, for their part, the LSS defendants submitted documentary evidence showing that while they encouraged students to shelter in place if off campus, the residence halls remained open. And while the LSS defendants did deactivate the card access for students who were not actively on campus, the deactivation could be reversed by request. In short, Zwiker failed to show that the LSS defendants breached the housing contract by preventing her from participating in it.

D. UNJUST ENRICHMENT

Unjust enrichment is an equitable theory that allows the trial court to imply a contract in order to prevent the unjust enrichment of a party. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). To show that a benefit would unjustly enrich the defendant, the plaintiff must establish that the defendant received a benefit from the plaintiff and that it would be inequitable for the defendant to keep the benefit. *Id*. "No person is unjustly enriched unless the retention of the benefit would be unjust." *Tkachik v Mandeville*, 487 Mich 38, 48; 790 NW2d 260 (2010) (quotation marks and citation omitted). Courts may not imply a contract under an unjust-enrichment theory if there is an express agreement covering the same subject matter. *Belle Isle Grill Corp*, 256 Mich App at 478.

In each case, the University plaintiffs argue that the trial court erred when it granted summary disposition with respect to their unjust-enrichment claims because no express contract governed the same subject matter as the claims for tuition and room and board. We disagree. The University defendants' housing contracts addressed the possibility of circumstances affecting the health and welfare of students. Similarly, the University defendants' tuition contracts specifically addressed student payment obligations when registering for courses. The parties agreed to these terms. Thus, the express agreements between the parties governed the same subject matter as their equitable claims regarding tuition and room and board. And while Dalke claims that summary disposition was premature and discovery was needed to develop her claims, we agree with the trial court that further discovery would not stand a fair chance to uncover support for her claims. See *Marilyn Froling Revocable Living Trust*, 283 Mich App at 292.

We also reject Dalke's argument that the trial court erred when it granted summary disposition with respect to parking and student-service fees. The Central defendants established that Dalke's parking permit was active from August 24, 2019 to August 21, 2020, and that she was allowed to park on campus. The Central defendants also established that the programs that received support from the student-services fee continued during the Spring 2020 semester. Dalke did not establish that disputed issues of fact existed. She did not identify any facts to support that she was unable to park on campus; instead, she cited her complaint, which is not permitted under MCR 2.116(G)(4). Dalke also argued that retention of the student-services fee unjustly enriched the Central defendants because she paid the fee with the understand-

ing that services would occur on campus. Again, Dalke merely relied on an unsupported allegation. Because Dalke did not properly contest this issue under MCR 2.116(G)(4), the trial court did not err by granting summary disposition.

E. MOTION TO AMEND

Dalke argues that the trial court abused its discretion when it denied her motion to amend her complaint. A party may move the trial court for leave to amend a complaint, and "[l]eave shall be freely given when justice so requires." MCR 2.118(A)(2). If the trial court grants a party's motion for summary disposition under MCR 2.116(C)(8), (9), or (10), the trial court shall give the parties an opportunity to amend the pleadings "unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). The trial court need not give a party an opportunity to amend a pleading if the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997).

"An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998) (quotation marks and citation omitted). A proposed amendment is also futile if summary disposition would be appropriately granted regarding the new claims, either when a party has not established a genuine issue of material fact regarding an element, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 59-60; 684 NW2d 320 (2004), or when the undisputed facts establish that summary disposition would be appropriate, *Nowacki v State Employees' Retirement Sys*, 485 Mich 1037, 1037 (2010).

The trial court granted summary disposition on Dalke's allegations related to tuition and fees on the basis that none of the documents that she provided promised that if she paid tuition, the Central defendants "would exclusively provide in-person instruction." Regarding Dalke's claim for fees, the account statement that she provided was not a contract because it provided no promises in exchange for the fees. In Dalke's proposed amendment, she based her allegation on a "mutuality of obligation" because "the University was obligated to provide the traditional, live in-person courses" specified in her course schedule. Dalke asserted that intrinsic evidence was necessary to fill in the gaps of her fee statement.

The trial court properly denied Dalke's motion for leave to amend because her proposed amendment was based on documents that the trial court had already considered and with which Dalke had already attempted to support her position. The trial court determined that the documents did not promise live, in-person instruction. Dalke's proposed amendment regarding her fee-related claims is futile because she could not refute the Central defendants' documentary evidence regarding her express or implied contract claims. Thus, the trial court's decision to deny her motion for leave to amend did not fall outside the range of reasonable outcomes because the trial court would have granted summary disposition on the amended claims for the same reasons it originally granted summary disposition.

For similar reasons, we conclude that the trial court did not abuse its discretion by concluding that Dalke's proposed amendments to her room-and-board claims were futile. "[P]arol evidence of contract negotiations, or of prior or contemporaneous agreements that con-

tradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous." *UAW-GM Human Resource Ctr*, 228 Mich App at 492 (quotation marks and citation omitted). A contract is ambiguous when its provisions are capable of conflicting interpretations. *Nikkel*, 460 Mich at 566.

The trial court granted summary disposition in favor of the Central defendants because the trial court did not identify any terms or conditions of the parties' housing contract that the Central defendants had breached. The contract itself provided that there would be no refund for unused meals. Additionally, Dalke voluntarily moved out of her residence hall and accepted a refund in lieu of remaining in university housing. In arguing for leave to amend, Dalke stated that the housing contract was not fully integrated and required parol evidence to interpret. Specifically, she argued that the contract did not specify the amounts that students would be charged for room and board and that it was necessary to consider the student's billing statement to determine the amounts due. Dalke asserted that an implied term of the contract was that the premises would be fit for the intended use by the parties.

The trial court did not abuse its discretion in determining that the proposed amended claims related to the room-and-board contract were futile because they went beyond the plain language of the contract. The decision did not fall outside the range of reasonable and principled outcomes because Dalke's proposed amendment offered parol evidence but did not establish that the contract was ambiguous such that parol evidence was necessary. Similarly, Dalke stated that an implied term of the contract was that the premises

would be fit for their intended use, but she did not establish a basis by which the trial court could consider evidence beyond the contractual language itself.

Lastly, the trial court did not abuse its discretion in denying Dalke's proposed claim regarding the CARES Act. In the context of her unjust-enrichment claim, Dalke's proposed amended complaint alleged that "[e]quity" required the Central defendants to refund a portion of the monies received for tuition, especially since they received "government funds under the CARES Act that could have been used for student refunds." Although the trial court did not specifically address the CARES Act by name, it denied Dalke's motion for leave to amend on the basis that her claims regarding unjust enrichment related to tuition were futile because Dalke could not base her claim on the level or quality of education. This claim was not materially different from the claim made in her original complaint. As discussed above, the trial court did not err when it granted summary disposition in favor of the Central defendants regarding Dalke's unjust-enrichment claim. Accordingly, the trial court did not abuse its discretion when it denied virtually the same claim in her proposed amended complaint.

Affirmed. As these cases present questions of public importance, no costs may be taxed by the University defendants. See MCR 7.219(A).

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

SWARTZLE, P.J. (*concurring in part and dissenting in part*). In these three consolidated appeals, the student plaintiffs allege that they bargained for in-person instruction when they registered for courses and paid tuition for the winter/spring 2020 semester. The uni-

versity defendants counter that they promised nothing of the kind. This is not a dispute about good intentions; rather, this is a dispute about what was promised and what was received. And what was received lacked much, if any, pedagogical value, according to the student plaintiffs.

Although my colleagues have provided a well-reasoned, thoughtful opinion affirming summary disposition on all of the student plaintiffs' claims, I cannot join the opinion in full. With respect to the student plaintiffs' claims apart from those for breach of contract involving tuition, I join my colleagues in affirming summary disposition. On the remaining tuition-based claims, however, I part company for the following reasons:

First, the parties' tuition agreements center on the exchange of educational services for tuition payments. Described broadly, the student plaintiffs had to pay tuition to the university defendants, and, in exchange, the university defendants had to offer educational services to the student plaintiffs. Thus, the question of what constitutes educational services is key here. On this question, neither the offering of registration nor the granting of credits carries the weight that the university defendants suggest; these are more accurately characterized as incidences of educational services rather than the services themselves.

To see this, consider registration. Registration in-and-of itself is not an educational benefit to a student—no one has ever gotten smarter just by registering for a course. Registration is, rather, the means by which the student selects the educational services that best fit the student's needs. For a university, registration serves to aid with allocating resources and sorting students and instructors. Although a student's

obligation to pay tuition might be triggered by that student's registering for a course, the university does not fulfill its contractual obligation to the student solely by offering the registration—the university must then follow-up by actually offering the promised course to that student. Any agreement that purportedly required a student to pay tuition in exchange for the mere opportunity to register for a course without the subsequent offering of that course would fail for lack of consideration. See *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002); *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005). Thus, the university defendants did not fulfill their end of the bargain merely by providing the opportunity for the student plaintiffs to register for winter/spring 2020 courses.

Similarly, the university defendants did not fulfill their end of the bargain merely by awarding credits to the student plaintiffs. Although credits are an important component of educational services, the credits alone are not sufficient to satisfy the provision of such services. I am not yet cynical enough to conclude that students go to university solely to gather credits for a diploma; in any event, there is nothing in the record to suggest that this was the case with any of the student plaintiffs here. Thus, to hold up their end of a valid bargain, the university defendants had to offer the bargained-for educational services to the student plaintiffs separate and apart from the offering of registration or the awarding of credits.

Second, unlike with the room-and-board claims, the university defendants have not pointed to any force-majeure provisions relevant to the tuition claims. Nor have the university defendants fully developed impos-

sibility as a defense on appeal,[1] though even if they had, the argument would raise the matter of which party should properly bear the "risk (i.e., the financial burden)" of the pandemic-related campus closures. *Rosado v Barry Univ Inc*, 499 F Supp 3d 1152, 1158 (SD Fla, 2020). Discovery in these three cases has been quite limited thus far, however, so I do not want to stress these points beyond what the current record permits.

This brings me to my third and final point. It is useful to conceptualize the provision of educational services along a spectrum. At one end, there is the traditional, in-person university course, taught for a full semester by a qualified instructor, with the student earning a grade and receiving a credit at the conclusion of the course. At the other end, there is nothing—the university takes the student's tuition and cancels the course. There is little question that the former would meet the requirements of educational services, and there is likewise little question that the latter would not. Analogous to the traditional, in-person course, I would also place in the category of "educational services" an online/virtual course that was designed, prepared, and marketed to students as an online option from the outset of the semester. Analogous to the outright cancellation of the course, I would place in the category of "no educational services" an audio recording of a textbook, with no further instruction, to be followed by an AI-mediated exam, surely an extreme form of "asynchronous education."

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[1] Only Central Michigan University mentions impossibility in its brief on appeal, and it devotes one paragraph and footnote to the issue within a broader argument. See *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015).

Where along this spectrum do the courses that the student plaintiffs took in the winter/spring 2020 semester fall? The current record appears to show that from the beginning of the semester until mid-March, the courses fell within the category of actual educational services. Yet, when governments across the state imposed pandemic-related public and private restrictions, including lockdowns, the university defendants immediately pivoted from traditional in-person instruction to what the student plaintiffs have labeled "emergency remote teaching." Although the university defendants have resisted the use of this label, I find it useful to differentiate between the transitioned courses at issue in these appeals from those courses offered by the university defendants that were marketed to students as online/virtual courses from the very start of the semester.

Returning to our spectrum outlined above, if the university defendants had simply canceled courses in mid-March for the remainder of the winter/spring 2020 semester, then I would have little trouble concluding that the university defendants breached the parties' tuition agreements. The student plaintiffs paid tuition for a full semester of educational services, and had they been provided with half a semester of educational services, this would have constituted only partial performance by the university defendants, resulting in a breach of the tuition agreements. See *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 251 n 7; 673 NW2d 805 (2003). Did the pivot to emergency remote teaching result in a partial breach analogous to the outright canceling of courses, or was the emergency

remote teaching sufficient under the tuition agreements? Did the student plaintiffs properly understand their agreements with the university defendants to include in-person instruction, not emergency remote teaching?

On this nascent record, I cannot say. Frankly, the answer might depend on the particular course at issue. For example, an in-person course that had met in a large lecture hall with one instructor and 200 students might very well have immediately transitioned to an online environment with little or no loss of benefit to the students. But, what about a physical-education course? How could a student receive any benefit from a weight-training course transitioned immediately to a virtual environment if that student did not have access to the necessary training equipment? Or, similarly, what about a dance student or music major? Few apartment buildings would sanction the robust practicing of an aerial or a marimba in a studio apartment. Or what about a small acting or public-speaking course? Even with respect to more traditional lecture-centered courses, there is evidence in the record suggesting that the rapid transition to emergency remote teaching significantly reduced, if not eliminated altogether, any pedagogical value of the services. Did the student plaintiffs properly understand that their courses would be taught in-person, as described by course catalogs when they registered, or was the emergency remote instruction so clearly deficient as to be, in practical terms, no instruction at all? As a federal district court remarked in a case involving similar breach-of-contract claims: "This is kind of like purchasing a Cadillac at full price and receiving an Oldsmobile. Although both are fine vehicles, surely it is no

consolation to the Cadillac buyer that the 'Olds' can also go from Point A to Point B." *Rosado*, 499 F Supp 3d at 1158.

The student plaintiffs present their claims as breaches of contract, and not as negligence-based claims of educational malpractice. As our Supreme Court explained in *Page v Klein Tools, Inc*, our courts do not recognize a claim for educational malpractice for a host of reasons, including a lack of institutional expertise in evaluating educational choices, uncertainties involving causation, and avoidance of overseeing the day-to-day operation of educational institutions. *Page v Klein Tools, Inc*, 461 Mich 703, 712-716; 610 NW2d 900 (2000). I am mindful of the line between contract and tort here, and it is unclear to me whether the student plaintiffs can ultimately prove their breach-of-contract claims without crossing that line. But at this early stage of the lawsuits, the student plaintiffs should be given the opportunity to make their case. See, e.g., *Metzner v Quinnipiac Univ*, 528 F Supp 3d 15, 28-31 (D Conn, 2021) (distinguishing similar contractual claims from the educational-malpractice doctrine and permitting the contractual claims to move forward).

In the end, there is a growing body of evidence, including evidence in this record, that students of all ages suffered significant educational setbacks during the winter/spring 2020 semester, and possibly beyond. It adds insult to injury for a university student to have to pay full price for emergency remote teaching when that student allegedly bargained for much different educational services. As I review the record, there remains a genuine issue of material fact on plaintiffs'

tuition claims. The parties should have the opportunity for full discovery, followed by a trial if a question of fact remains.

For these reasons, I respectfully concur in part with, and dissent in part from, the majority's opinion.

In re LONDOWSKI

Docket No. 355635. Submitted July 8, 2021, at Lansing. Decided February 17, 2022, at 9:00 a.m.

Arline Londowski filed a petition in the Berrien County Probate Court, requesting an order of involuntary mental health treatment for respondent, her grandson. Petitioner asserted that respondent suffered from bipolar disorder and schizophrenia, that he was likely to injure himself or others in the near future, and that he was unable to care for his own physical health. Petitioner requested that respondent be hospitalized because he was unwilling to participate in voluntary treatment. At the hearing on the petition, a board-certified psychiatrist testified regarding her examination of respondent and her reasons for why respondent should be hospitalized; petitioner did not testify at the hearing, and counsel for respondent never interviewed petitioner. Respondent testified on his own behalf, and counsel for respondent also called respondent's mother to testify. Following the hearing, the court, Jennifer L. Smith, J., granted the petition and ordered respondent to receive combined hospitalization and assisted outpatient treatment for 180 days. Respondent appealed, arguing that he was denied the effective assistance of counsel.

The Court of Appeals *held*:

1. Statutes and court rules in Michigan set forth the duties owed by attorneys representing individuals who are subject to a civil commitment petition. Relevant here, MCL 330.1454 provides that every individual who is the subject of a petition for involuntary mental health treatment is entitled to be represented by legal counsel; the statutory section also mandates the timing regarding counsel's consultation with the respondent and provides steps by which the subject of a petition may waive their right to counsel and may state a preference for counsel other than the one originally appointed. In turn, MCR 5.732 provides that the attorney of record must represent the individual in all probate court proceedings under the Mental Health Code until the attorney is discharged by court order or another attorney has filed an appearance on the individual's behalf, and generally, the attorney must serve as an advocate for the individual's preferred position.

Under MCL 330.1468(2), the probate court may order involuntary mental health treatment—i.e., court-ordered hospitalization, assisted outpatient treatment, or combined hospitalization and assisted outpatient treatment—if the individual is found to be a person requiring treatment. MCL 330.1465 states that a judge or jury may not find an individual is a person requiring treatment unless that fact has been established by clear and convincing evidence.

2. The Fourteenth Amendment of the United States Constitution provides that no state shall deprive any person of life, liberty, or property without due process of the law. The Fourteenth Amendment includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests. To determine whether the subject of a petition in a civil commitment proceeding is entitled to the effective assistance of counsel requires consideration of three factors: (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards, and (3) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement could entail. Relevant here, proceedings seeking involuntary mental health treatment for an individual are civil in nature, not criminal. With regard to the first factor in determining whether due process requires effective assistance of counsel in civil commitment proceedings, the nature of the private interest at stake is significant and nuanced. In particular, an individual's physical liberty is at stake given the possibility of involuntary hospitalization. While an individual subject to a petition possesses a strong interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment, the correct inquiry is primarily a medical one that turns on the meaning of the facts, which must be interpreted by expert psychiatrists and psychologists. A person requiring treatment as defined in MCL 330.1401 also has an interest in obtaining the potential benefit of treatment that is properly warranted. With regard to the second factor—the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards—it is well established that the right to counsel implies that counsel be effective. Further, an individual who is the subject of a petition for involuntary mental health treatment, one who is thought to be suffering from a mental disease or defect requiring involuntary treatment, has an even greater need for legal assistance because the individual is more

likely to be unable to understand or exercise their rights. Thus, there would be a high risk of an erroneous deprivation of important liberty interests in civil commitment proceedings without the effective assistance of counsel, and the probable value of requiring effective legal assistance is high. Concerning the third factor—the governmental interest at stake—Michigan has a legitimate interest in providing care to its citizens who are unable, because of mental health disorders, to care for themselves. In addition, the government has a significant interest in the protection of the individual and the general public. Indeed, under the Mental Health Code, the state only has an interest in obtaining court-ordered treatment for individuals who are found by clear and convincing evidence to be persons requiring treatment. In tandem with that interest, ensuring that an individual subject to a petition is provided with effective assistance counsel supports the state's interest in an accurate determination whether a person requires treatment. Given that MCL 330.1454 requires that counsel must be appointed for individuals subject to a petition if they do not have retained counsel and that a court must compensate counsel if the individual is indigent, the additional administrative cost and burden of also requiring counsel to be effective is virtually nonexistent and justified to the extent it exists. For those reasons, under the three-factor test, due process requires that an individual subject to a petition in a civil commitment proceeding has a right to the effective assistance of counsel.

3. A claimed denial of effective assistance of counsel in a civil commitment proceeding is evaluated in the same way as in a criminal proceeding. Thus, the benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the process that it cannot be relied on to have produced a just result. To support a claim of ineffective assistance, a respondent in a civil commitment proceeding must therefore demonstrate: (1) that counsel's performance was deficient under an objective standard of reasonableness, which requires showing that counsel was not functioning as the counsel guaranteed by due process, and (2) that the respondent was prejudiced, i.e., that counsel's errors were so serious as to deprive the respondent of a fair hearing whose result is reliable. An attorney's failure to exercise reasonable professional judgment when deciding to forgo particular investigations relevant to effectively representing the attorney's client does not constitute a reasonable strategic decision that satisfies the standard of objectively reasonable performance. The special duties for counsel in civil commitment proceedings that are outlined in MCL 330.1454

and MCR 5.732 are properly considered when determining whether counsel's performance was objectively deficient or prejudiced the respondent. However, as with duties of an attorney in criminal cases, the basic duties in those provisions neither exhaustively define counsel's obligations nor form a checklist for judicial evaluation of attorney performance.

4. In this case, respondent argued that his counsel was ineffective for several reasons, essentially arguing that his counsel did not advocate for respondent's preferred position regarding mental health treatment, contrary to MCR 5.732, thereby undermining the adversarial process, and that counsel failed to protect respondent's interests such that that the hearing was unfair, unreliable, and resulted in an unjust outcome. Respondent's counsel may have been ineffective for failing to investigate the rationale behind the petition used in the civil commitment proceeding. Because the record was incomplete regarding why counsel failed to interview petitioner or what evidence could have been elicited from that interview, as well regarding the other claims raised by respondent, the case was remanded to the probate court for an evidentiary hearing for respondent to develop the factual record related to his ineffective-assistance-of-counsel claims.

Remanded for further proceedings.

CONSTITUTIONAL LAW – DUE PROCESS OF LAW – EFFECTIVE ASSISTANCE OF COUNSEL – CIVIL COMMITMENT PROCEEDINGS – FACTORS TO BE CONSIDERED.

The United States and Michigan Constitutions provide that no state shall deprive any person of life, liberty, or property, without due process of the law; due process requires that an individual subject to a petition in a civil commitment proceeding has a right to the effective assistance of counsel; a claimed denial of effective assistance of counsel in a civil commitment proceeding is evaluated in the same way as in a criminal proceeding; to support a claim of ineffective assistance, a respondent in such a proceeding must demonstrate: (1) that counsel's performance was deficient under an objective standard of reasonableness, which requires showing that counsel was not functioning as the counsel guaranteed by due process, and (2) that the respondent was prejudiced, i.e., that counsel's errors were so serious as to deprive the respondent of a fair hearing whose result is reliable; the special duties for counsel in civil commitment proceedings that are outlined in MCL 330.1454 and MCR 5.732 may be considered when determining whether counsel's performance was objectively deficient or prejudiced the respondent; the basic duties in those

> provisions neither exhaustively define counsel's obligations nor form a checklist for judicial evaluation of the attorney's performance (US Const, Am XIV, § 1; Const 1963, art 1, § 17; MCL 330.1454; MCR 5.732).

Steve Pierangeli, Prosecuting Attorney, and *David Saraceno II*, Assistant Prosecuting Attorney, for petitioner.

Shaw Law Office (by *Christopher D. Shaw*) for respondent.

Amici Curiae:

Rohit Rajan and *Daniel S. Korobkin* for the American Civil Liberties Union Fund of Michigan.

Michael L. Mittlestat, Assistant Defender, for the State Appellate Defender Office.

Before: BORRELLO, P.J., and SERVITTO and STEPHENS, JJ.

BORRELLO, P.J. Respondent appeals as of right the probate court's initial order for mental health treatment. Following oral argument, this Court requested additional briefing on the issue of whether a claim for ineffective assistance of counsel may be made against counsel representing a person in a civil commitment proceeding. We conclude that due process requires the conclusion that counsel is subject to claims of ineffective assistance of counsel in civil commitment proceedings. We further conclude that here, counsel may have been ineffective for failing to investigate the rationale behind the petition used in this civil commitment proceeding. However, because the record is incomplete relative to why counsel failed to interview petitioner or what evidence could have been elicited from such an

interview and relative to respondent's other claims of ineffective assistance of counsel raised in his appeal, we remand this matter for an evidentiary hearing on respondent's claims of ineffective assistance of counsel.

I. BACKGROUND

This case arises out of a petition for mental health treatment filed by petitioner, Arline Londowski, who is respondent's grandmother. Petitioner requested that respondent be hospitalized because he suffered from bipolar disorder and schizophrenia, and as a result of his mental illness, he was likely to injure himself or others in the near future, he was not able to care for his own physical health, and he was unwilling to participate in voluntary treatment. Petitioner alleged that respondent "is easily agitated; rocks back &[]forth while holding ears and mumbles; talks to self; continuously shakes head; exclaims/babbles/blurts out words and phrases; locks doors & make[s] mother sleep outside[.]" Furthermore, petitioner also contended that respondent had been verbally abusive toward others and exhibited violent behavior toward family members.

The probate court held a hearing on the petition. Dr. Priya Rana, a board-certified psychiatrist, testified during the hearing that she had evaluated respondent and reviewed his medical history. Rana had diagnosed respondent with schizophrenia. She explained that respondent exhibited paranoid behavior, that respondent insisted that he not be called by his first or last name, and that respondent instead "wanted to be called by [the] letter C or be referred [to] by his Ameren number." Rana also testified that respondent claimed that "somehow Ford and [the] hospital had communicated" and decided to put him in the hospital "to

protect somebody else . . . .” According to Rana, respondent “was very suspicious of the doctors in the ER.” She indicated that during respondent’s current hospitalization, he isolated himself in his room, slept most of the time, and became irritable quickly. Rana concluded that respondent needed to be hospitalized and on medication because he was likely to injure himself or others intentionally or unintentionally as a result of his mental illness, he did not understand the extent of his mental illness, he was not taking care of his basic physical needs, and he was refusing to take his prescribed medications. Rana explained that respondent refused to take his medications because he did not believe that he had a mental illness or that he needed treatment.

Respondent testified on his own behalf. He explained that he had been living with his mother, Denise Londowski.[1] Petitioner did not live with them. Although he admitted that he became agitated as the petition alleged, he contended that the remaining allegations in the petition were false. Respondent testified that his agitation was caused by living with his “mother’s habits” and being hospitalized. Respondent stated:

> This is not a place I wanna be. So being here and—without having an absolute need to, I assume would make anybody angry and agitated. So that’s the only truth that I can find in any of this.

Respondent believed that he and his mother just needed to discuss how to have a better relationship, and he stated that he believed Rana’s schizophrenia

[1] Because Denise Londowski, respondent, and petitioner all share the same last name, we refer to Denise by her first name only in the remainder of this opinion.

diagnosis was "not true." Respondent denied being verbally abusive, aggressive, or threatening toward anyone. He also maintained that he had been showering regularly, eating regularly, and taking care of himself. He explained that he did not lock his mother out of the home on purpose, that she often forgets her keys when she leaves home, that he habitually locks the door when she leaves, and that there was an incident where he did not let her into the apartment right away when she returned because she was insulting him and cursing at him. Respondent believed that he did not need medication, that he was "here because of a mistake," that "what is on this petition is simply not true," and that the mental health diagnosis resulting from the petition was not accurate.

Respondent's counsel also called Denise to testify at the hearing. Denise admitted that she and respondent "had conflicts," and she further testified that respondent "just seems a little unstable in the evening" and that she thought respondent "had like a mental breakdown." With respect to the incident in which Denise was locked out of the home, respondent's counsel elicited the following testimony from Denise:

> *Q*. Okay. So Denise, specifically in there, there's a statement that Chadd locked you out of your house, and—and we talked about that. Will you explain what happened with that?
>
> *A*. I don't think that has anything to do with his—the mental issues? That is—yeah, I have locked my keys in the house before, and I might have yelled at him, "Open the door." And then I had the officer over there, and he—I mean—yeah, he didn't let the officer in, so I just had to spend the night with a friend. And that was that.
>
> *Q*. Okay.
>
> *A*. About my keys. I got a spare key now. Plus, we—I was having problems with my door—my door keys any-

> ways. But I—apparent—the officer that was there probably put that in the petition.

Denise explained that petitioner is her mother and that petitioner filed the petition because petitioner was tired of Denise calling her for advice.

The probate court granted the petition and ordered respondent to receive combined hospitalization and assisted outpatient treatment for up to 180 days and that respondent would be hospitalized for up to 60 of those 180 days. The court also ordered that the administration of injectable medication would be permitted if respondent did not comply with taking medication orally. Respondent now appeals.

II. ANALYSIS

On appeal, respondent argues that he was denied the effective assistance of counsel at the hearing on the petition for mental health treatment because his counsel's conduct undermined the proper functioning of the adversarial process such that the hearing cannot be relied on to have produced a just result.

A. THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN CIVIL COMMITMENT PROCEEDINGS

As an initial matter, although the standards governing ineffective-assistance-of-counsel claims in the criminal context are well developed, see, e.g., *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the proceedings at issue in this appeal are not criminal in nature. "Proceedings seeking an order of involuntary mental health treatment under the Mental Health Code for an individual on the basis of mental illness . . . generally are referred to as 'civil commitment' proceedings." *In re Portus*, 325 Mich

App 374, 382; 926 NW2d 33 (2018). Civil commitment proceedings are governed by Chapter 4 of the Mental Health Code, MCL 330.1400 *et seq*. *In re Portus*, 325 Mich App at 382. Accordingly, we first must consider whether a respondent in an involuntary mental health treatment proceeding has a right to the effective assistance of counsel grounded in the United States Constitution, Michigan Constitution, statute, or court rule. It appears that this question has not been formally addressed by any Michigan appellate court.

Resolution of this question presents issues of constitutional law, as well as issues involving the interpretation and application of statutes and court rules, all of which are matters of law that this Court reviews de novo. *In re Sanders*, 495 Mich 394, 403-404; 852 NW2d 524 (2014).

It is clear that a person who is the subject of a petition for involuntary mental health treatment has a statutory right to be represented by counsel. Pursuant to MCL 330.1454(1), "[e]very individual who is the subject of a petition is entitled to be represented by legal counsel." The court must appoint counsel to represent the subject of a petition within 48 hours after receipt of a petition and other required documents, or 24 hours after hospitalization if an individual has been hospitalized, unless an appearance has been entered on behalf of the subject of a petition. MCL 330.1454(2). The "subject of a petition" is "an individual regarding whom a petition has been filed with the court asserting that the individual is or is not a person requiring treatment or for whom an objection to involuntary mental health treatment has been made under [MCL 330.1484]." MCL 330.1400(k). "Involuntary mental health treatment" means "court-ordered hospitalization, assisted outpatient treatment, or combined hos-

pitalization and assisted outpatient treatment as described in [MCL 33.1468]." MCL 330.1400(f). The probate court may order such treatment for an individual if that individual is found to be a "person requiring treatment." MCL 330.1468(2). "A judge or jury shall not find that an individual is a person requiring treatment unless that fact has been established by clear and convincing evidence." MCL 330.1465. The term "person requiring treatment" is defined in MCL 330.1401.[2]

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[2] MCL 330.1401 provides:

(1) As used in this chapter, "person requiring treatment" means (a), (b), or (c):

(a) An individual who has mental illness, and who as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself, herself, or another individual, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation.

(b) An individual who has mental illness, and who as a result of that mental illness is unable to attend to those of his or her basic physical needs such as food, clothing, or shelter that must be attended to in order for the individual to avoid serious harm in the near future, and who has demonstrated that inability by failing to attend to those basic physical needs.

(c) An individual who has mental illness, whose judgment is so impaired by that mental illness, and whose lack of understanding of the need for treatment has caused him or her to demonstrate an unwillingness to voluntarily participate in or adhere to treatment that is necessary, on the basis of competent clinical opinion, to prevent a relapse or harmful deterioration of his or her condition, and presents a substantial risk of significant physical or mental harm to the individual or others.

(2) An individual whose mental processes have been weakened or impaired by a dementia, an individual with a primary diagnosis of epilepsy, or an individual with alcoholism or other drug dependence is not a person requiring treatment under this chapter unless the individual also meets the criteria specified in subsection (1). An individual described in this subsection may be

The question we must answer involves the scope of the right to counsel afforded an individual who is the subject of a petition. In the criminal context, "the right to counsel is the right to the effective assistance of counsel," and "[c]ounsel . . . can . . . deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." *Strickland*, 466 US at 686 (quotation marks and citations omitted). "The benchmark for judging any claim of ineffectiveness" in the criminal context is "whether 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." *Id*. A criminal defendant's right to the effective assistance of counsel is protected by the Sixth Amendment of the United States Constitution and the analogous provision of the Michigan Constitution. See US Const, Am VI; Const 1963, art 1, § 20; *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

However, the right to counsel has been provided by statute to subjects of petitions in civil commitment proceedings, MCL 330.1454(1) and (2), and "[i]t is axiomatic that the right to counsel includes the right to competent counsel," *In re Trowbridge*, 155 Mich App 785, 786; 401 NW2d 65 (1986). In the context of child protective proceedings, which also are not criminal proceedings,[3] this Court has determined that constitutional due process indirectly guarantees a right to the effective assistance of counsel. *In re HRC*, 286 Mich App 444, 458; 781 NW2d 105 (2009); see also *In re Martin*, 316 Mich App 73, 85; 896 NW2d 452 (2016).

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hospitalized under the informal or formal voluntary hospitalization provisions of this chapter if he or she is considered clinically suitable for hospitalization by the hospital director.

[3] The right to counsel in child protective proceedings is provided by statute. MCL 712A.17c(4) through (9).

Child protective proceedings involve important fundamental rights protected by due process, as our Supreme Court has explained:

> The Fourteenth Amendment of the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV, § 1. Included in the Fourteenth Amendment's promise of due process is a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Among these fundamental rights is the right of parents to make decisions concerning the care, custody, and control of their children. In the words of this Court, "[p]arents have a significant interest in the companionship, care, custody, and management of their children, and the interest is an element of liberty protected by due process." [*In re Sanders*, 495 Mich at 409 (some citations omitted; alterations in original).]

The United States Supreme Court has recognized that civil commitment proceedings also implicate important liberty interests protected by due process. The Court has stated that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection," *Addington v Texas*, 441 US 418, 425; 99 S Ct 1804; 60 L Ed 2d 323 (1979),[4] and that

> [w]e have recognized that for the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty and in consequence requires due process protection. The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confine-

[4] See also *Specht v Patterson*, 386 US 605, 608; 87 S Ct 1209; 18 L Ed 2d 326 (1967) (stating that civil commitment proceedings are subject to the Due Process Clause).

> ment. It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and that [w]hether we label this phenomena stigma or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual. Also, [a]mong the historic liberties protected by the Due Process Clause is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. Compelled treatment in the form of mandatory behavior modification programs, to which the District Court found Jones was exposed in this case, was a proper factor to be weighed by the District Court. [*Vitek v Jones*, 445 US 480, 491-492; 100 S Ct 1254; 63 L Ed 2d 552 (1980) (quotation marks and citations omitted; second and third alterations in original); see also *id*. at 497 (Powell, J., concurring in part).]

In *Vitek*, 445 US at 492 (opinion of the Court), the Supreme Court concluded that "[w]ere an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause."[5] This Court has also recognized that civil commitment proceedings in Michigan implicate important liberty interests, protected by due process, that belong to the person who is the subject of a petition for involuntary mental health treatment. *In re KB*, 221 Mich App 414, 419; 562 NW2d 208 (1997). "It is axiomatic that an individual subjected to involuntary mental health treatment will be significantly affected by the order because treatment decisions will be made for the individual and, if inpatient treatment is ordered, his or her freedom of movement will be limited." *In re Tchakarova*, 328 Mich App 172, 181; 936 NW2d 863 (2019). Furthermore, an order for involun-

[5] See also *Vitek*, 445 US at 497 (Powell, J., concurring in part).

tary mental health treatment or hospitalization can have "collateral legal consequences," *id*. at 179, in addition to adverse social consequences significantly affecting the individual, *Addington*, 441 US at 425-426.

Determining what due process requires in a particular situation—here whether the subject of a petition in civil commitment proceedings is entitled to the *effective* assistance of counsel—involves application of the test set forth by the United States Supreme Court in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976). See *Addington*, 441 US at 425; *In re KB*, 221 Mich App at 419.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, 424 US at 335.]

Accordingly, our analysis entails balancing the individual's interest in not being subject to involuntary mental health treatment against the state's interest in compelling mental health treatment for a particular individual. See *Addington*, 441 US at 425.

The private interest at stake in civil commitment proceedings is, without question, significant and nuanced. Considering the possibility of involuntary hospitalization in these proceedings, the individual's physical liberty is obviously at issue. *Vitek*, 445 US at 491-492 (opinion of the Court); *id*. at 497 (Powell, J., concurring in part); *Addington*, 441 US at 425-426. The

individual also possesses a liberty interest, protected by due process, to be free from unjustified, compelled participation in mandatory mental health treatment. *Vitek*, 445 US at 492 (opinion of the Court); *id*. at 497 (Powell, J., concurring in part). However, it is also necessary to consider the nature and purpose of civil commitment proceedings, because the interest at stake for a person subject to a petition is not as simple as avoiding involuntary treatment in all situations.

As we have already noted, proceedings seeking involuntary mental health treatment for an individual are civil proceedings, *In re Portus*, 325 Mich App at 394 n 6, although not of the "typical" variety "involving a monetary dispute between private parties," *Addington*, 441 US at 423. The involuntary mental health treatment proceedings involved in this case, even though they carry the potential for curtailing an individual's liberty for a period of hospitalization, nonetheless cannot "be equated to a criminal prosecution." *Addington*, 441 US at 428. "In a civil commitment state power is not exercised in a punitive sense." *Id*. Instead, the intended outcome of these proceedings is to provide appropriate treatment if the individual is found to require it. MCL 330.1468(2); MCL 330.1401; MCL 330.1465.

An individual subject to a petition clearly possesses a strong interest "in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment . . . ." *Vitek*, 445 US at 495 (opinion of the Court); *id*. at 497 (Powell, J., concurring in part).

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. How-

> ever, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. [*Addington*, 441 US at 426-427.]

However, the inquiry involved in these circumstances is primarily a medical one that " 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.' " *Vitek*, 445 US at 495 (opinion of the Court), quoting *Addington*, 441 US at 429; see also *Vitek*, 445 US at 497 (Powell, J., concurring in part). A person in need of treatment because of debilitating mental illness and meeting the statutory definition of a person requiring treatment, MCL 330.1401, also has an interest in obtaining the potential benefit of treatment that is properly warranted. See *Addington*, 441 US at 428-429.

Duties specific to the civil commitment context have been placed, by court rule and statute, on attorneys representing individuals who are subject to a petition. "The attorney of record must represent the individual in all probate court proceedings under the Mental Health Code until the attorney is discharged by court order or another attorney has filed an appearance on the individual's behalf." MCR 5.732(A). Generally, the "attorney must serve as an advocate for the individual's preferred position." MCR 5.732(B). However, "[i]f the individual does not express a preference, the attorney must advocate for the position that the attorney believes is in the individual's best interest." *Id*. Additionally, pursuant to MCL 330.1454(7) through (9):

> (7) Legal counsel shall consult in person with the subject of a petition at least 24 hours before the time set for a court hearing.

> (8) Legal counsel for the subject of a petition under section 452(1)(a) who is hospitalized pending the court hearing shall consult in person with the individual for the first time not more than 72 hours after the petition and 2 clinical certificates have been filed with the court.
>
> (9) After the consultation required in subsection (7) or (8), counsel promptly shall file with the court a certificate stating that he or she personally has seen and has consulted with the subject of a petition as required by this section.

An individual's right to be represented by counsel in these circumstances has also been protected from inadvertent waiver by court rule and statute. Under MCR 5.732(C),

> [t]he individual may waive an attorney only in open court and after consultation with an attorney. The court may not accept the waiver if it appears that the waiver is not voluntarily and understandingly made. If an attorney is waived, the court may appoint a guardian ad litem for the individual.

Additionally, MCL 330.1454 provides, in relevant part:

> (3) If, after consultation with appointed counsel, the subject of a petition desires to waive his or her right to counsel, he or she may do so by notifying the court in writing.
>
> (4) If the subject of a petition prefers counsel other than the initially appointed counsel, the preferred counsel agrees to accept the appointment, and the court is notified of the preference by the subject of the petition or the preferred counsel, the court shall replace the initially appointed counsel with the preferred counsel.
>
> (5) If the subject of a petition is indigent, the court shall compensate appointed counsel from court funds in an amount that is reasonable and based upon time and expenses.

"[S]tate statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek*, 445 US at 488 (opinion of the Court); *id*. at 497 (Powell, J., concurring in part). The Supreme Court has stated that "[i]t is precisely [t]he subtleties and nuances of psychiatric diagnoses that justify the requirement of adversary hearings." *Id*. at 495 (opinion of the Court) (quotation marks and citation omitted; second alteration in original); *id*. at 497 (Powell, J., concurring in part). A right to the effective assistance of counsel for individuals subject to petitions in civil commitment proceedings thus protects the important liberty interests at stake because "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v Cronic*, 466 US 648, 656-657; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The nature of the private interests at stake warrant concluding that due process gives individuals a right to the effective assistance of counsel in civil commitment proceedings. *Mathews*, 424 US at 335.

Turning to the second factor under *Mathews*, it is well established that the right to counsel necessarily implies that counsel will be effective. *Strickland*, 466 US at 686. Otherwise, the provision of "counsel" would be a meaningless exercise. *Cronic*, 466 US at 654-655. Moreover, a person "thought to be suffering from a mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a [person] is more likely to be unable to understand or exercise his rights." *Vitek*, 445 US at 496-497 (opinion of White, J.). As the United States Supreme Court recognized in *Minnesota ex rel Pearson v Ramsey Co Probate Court*, 309 US 270, 276-277; 60 S Ct 523; 84 L Ed 744 (1940), we also "recognize the danger of a deprivation of due process"

in proceedings involving involuntary commitments based on mental illness, as well as "the special importance of maintaining the basic interests of liberty in a class of cases where the law though fair on its face and impartial in appearance may be open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons [subject to a petition] are not adequately safeguarded at every stage of the proceedings." (Quotation marks and citation omitted.) Accordingly, we conclude that there would be a high risk of an erroneous deprivation of important liberty interests in civil commitment proceedings without the effective assistance of counsel and that the probable value of requiring effective legal assistance is high. *Mathews*, 424 US at 335.

Finally, turning to the governmental interest at stake, the "state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill." *Addington*, 441 US at 426; accord *In re KB*, 221 Mich App at 421 ("[W]ith respect to the governmental interests involved, the government has a significant interest in the protection of the individual and the general public."). Under Chapter 4 of the Mental Health Code, the state only has an interest in obtaining court-ordered treatment for individuals who are found by clear and convincing evidence to be persons "requiring treatment" as that phrase is defined by statute. MCL 330.1468(2); MCL 330.1465; MCL 330.1401. Ensuring that an individual subject to a petition is provided with *effective* assistance of counsel also supports the state's interest in an accurate determination whether a person requires treatment as defined by statute. "The

subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations." *Addington*, 441 US at 430. Given that counsel must be appointed for individuals subject to a petition if they do not have retained counsel and that the court shall compensate counsel if the individual is indigent, MCL 330.1454, the additional administrative cost and burden of also requiring counsel to be effective would appear to be virtually nonexistent and certainly justified to the extent it exists. *Mathews*, 424 US at 335.

Accordingly, we conclude that due process requires that an individual subject to a petition in a civil commitment proceeding has a right to the effective assistance of counsel. *Mathews*, 424 US at 335.

In evaluating a claimed denial of the right to effective assistance of counsel in the civil commitment context, we adopt the familiar and well-established test that has developed in the criminal context, as we have done in the context of other civil proceedings. See *In re Martin*, 316 Mich App at 85 (applying the test in child protective proceedings). Accordingly, the "benchmark for judging any claim of ineffectiveness" is "whether counsel's conduct so undermined the proper functioning" of the process that it cannot be relied on to have produced a "just result." *Strickland*, 466 US at 686. First, the respondent must show that counsel's performance was "deficient" under an "objective standard of reasonableness." *Id*. at 687-688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by due process. *Id*. at 687. Second, the respondent must show prejudice by demonstrating that "counsel's errors were so serious as to deprive the [respondent] of a fair [hearing] . . . whose result is reliable." *Id*.

We recognize the special challenges for counsel in these proceedings, challenges which are reflected in the duties outlined for counsel in MCL 330.1454 and MCR 5.732. Thus, these provisions are proper considerations to include in determining whether counsel's performance was objectively deficient or prejudiced the respondent. However, as with the duties of an attorney in criminal cases discussed by the Supreme Court in *Strickland*, "[t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." *Strickland*, 466 US at 688.

B. APPLICATION TO THIS CASE

"The question whether defense counsel performed ineffectively is a mixed question of law and fact; this Court reviews for clear error the trial court's findings of fact and reviews de novo questions of constitutional law." *Trakhtenberg*, 493 Mich at 47. If no evidentiary hearing was held in the lower court to create a factual record related to the alleged ineffective-assistance-of-counsel claims, see *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), then appellate review is "for errors apparent on the record, though we retain the authority to remand for an evidentiary hearing if one is needed," *People v Smith*, 336 Mich App 79, 100; 969 NW2d 548 (2021). As explained, respondent must demonstrate that counsel's performance was "deficient" under an "objective standard of reasonableness" and that "counsel's errors were so serious as to deprive the [respondent] of a fair [hearing] . . . whose result is reliable." *Strickland*, 466 US at 687-688.

Here, respondent argues that his counsel was ineffective by failing to cross-examine Dr. Rana; by failing to adequately investigate the petition by failing to

question petitioner at any time before the hearing and, relatedly, failing to call petitioner as a witness during the hearing; by impeaching his own witness, Denise; and by repeatedly impeaching and disparaging respondent. Respondent essentially alleges that his counsel did not advocate for respondent's preferred position regarding mental health treatment, MCR 5.732(B), thereby undermining the adversarial process and failing to protect respondent's liberty interests such that the hearing was unfair, unreliable, and resulted in an unjust outcome.

Respondent testified at the hearing that, although petitioner filed the petition, petitioner did not have direct knowledge of the information alleged in the petition. Respondent maintained that the allegations in the petition were untrue. Petitioner was not called to testify by any party. During closing argument, petitioner's counsel stated:

> I didn't—I didn't call grandma. I didn't call petitioner. I don't—I don't really know what she would say. But we can just read what was in the petition.

Although the various decisions by counsel of which respondent now complains may have been justified by legitimate trial strategy, counsel's statement at the hearing suggests a deficit in the adequacy of the investigation on which those strategic choices may have been based. As our Supreme Court has explained:

> In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy. Yet a court cannot insulate the review of counsel's performance by calling it trial strategy. Initially, a court must determine whether the "strategic choices [were] made after less than complete investigation," and any

> choice is "reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Counsel always retains the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Trakhtenberg*, 493 Mich at 52 (citations omitted; alteration in original).]

An attorney's failure to exercise "reasonable professional judgment when deciding to forgo particular investigations" relevant to effectively representing the attorney's client does not constitute a reasonable strategic decision that satisfies the standard of objectively reasonable performance. *Id*. at 52-53.

Taking note of the relatively undeveloped state of Michigan law regarding the due-process right to the effective assistance of counsel in civil commitment proceedings, we conclude that respondent is entitled to an evidentiary hearing to develop the factual record related to his claims of ineffective assistance, and we remand this matter to the probate court for that purpose. *Ginther*, 390 Mich 436, 443-445; *Smith*, 336 Mich App at 100; MCR 7.216(A)(5).

On remand, the probate court shall hold a *Ginther* hearing to first examine whether counsel's performance was "deficient" under an "objective standard of reasonableness." *Strickland*, 466 US at 687-688. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed" by due process. *Id*. at 687. Second, the probate court shall determine whether respondent was prejudiced by demonstrating that "counsel's errors were so serious as to deprive the [respondent] of a fair [hearing] . . . whose result is reliable." *Id*.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO and STEPHENS, JJ., concurred with BORRELLO, P.J.

THREET v DEPARTMENT OF CORRECTIONS
(ON RECONSIDERATION)

Docket No. 356587. Submitted November 10, 2021, at Lansing. Decided December 16, 2021. Motion for reconsideration granted; December 16, 2021 opinion vacated; and new opinion issued February 17, 2022, at 9:05 a.m.

James Threet filed a petition for a writ of mandamus in the Ingham Circuit Court to compel the application of special good-time credits to his 1980 prison sentence. Petitioner was convicted in 1980 of assault with intent to murder (AWIM), MCL 750.83; kidnapping, MCL 750.349; and felony-firearm, MCL 750.227b. He was sentenced to serve 66 years and 8 months to 100 years in prison for AWIM, concurrently with a parolable life sentence for kidnapping. The concurrent sentences were to be served after petitioner served a two-year sentence for felony-firearm. In 2016, the Department of Corrections (the DOC) granted 7,000 days of special good-time credits to petitioner pursuant to MCL 800.33. However, the DOC and Cynthia Partridge, its time computation manager, later concluded that the credits could not be used to reduce petitioner's maximum sentences for AWIM or kidnapping and refused to apply the credits. Petitioner sought a writ of mandamus to compel the application of the credits to his AWIM sentence. The trial court, Clinton Canady III, J., ordered the DOC to apply 7,000 days of special good-time credits to petitioner's maximum sentence for AWIM. Respondents appealed.

On reconsideration, the Court of Appeals *held*:

Under MCL 800.33(11), the DOC is required to compute good-time credits on the basis of the longest of a prisoner's concurrent sentences, if the prisoner has been sentenced concurrently. Additionally, the statute provides that a prisoner who is serving consecutive sentences for separate convictions is entitled to good-time credits, and those credits must be computed and accumulated on each sentence individually. Respondents argued that MCL 800.33(11) did not permit the DOC to apply special good-time credits to petitioner's AWIM sentence because such credits can only be applied to a prisoner's longest concurrent sentence; that is, good-time credits can only be applied to one concurrent sentence.

However, the plain language of MCL 800.33(11) does not prohibit the DOC from applying good-time credits to other concurrent sentences. The statute provides that in situations involving concurrent sentences, credits must be *computed* on the basis of the longest of the concurrent sentences. The statute does not direct that the credits may only be *applied* to the longest concurrent sentence. Therefore, good-time credits earned on the longest concurrent sentence must be applied to the other concurrent sentences, as permitted by law. In this case, petitioner began serving his sentences for AWIM and kidnapping after serving his two-year sentence for felony-firearm. Because those sentences were concurrent and petitioner was no longer serving a consecutive sentence, respondents had a clear legal duty under MCL 800.33(11) to calculate credits on the basis of the kidnapping sentence and to apply the credits to the AWIM sentence.

Affirmed.

SENTENCING – SENTENCE REDUCTIONS – GOOD-TIME CREDITS – CONCURRENT SENTENCES.

MCL 800.33(2) establishes that certain prisoners are entitled to receive reductions in their sentences by earning good-time credits; when a prisoner has been sentenced to consecutive sentences, credits must be computed on the basis of the longest of the concurrent sentences under MCL 800.33(11); good-time credits earned on the longest concurrent sentence must be applied to the other concurrent sentence or sentences, if permitted by law.

Laura Kathleen Sutton for petitioner.

Dana Nessel, Attorney General, *Ann M. Sherman*, Solicitor General, and *H. Steven Langschwager*, Assistant Attorney General, for respondents.

ON RECONSIDERATION

Before: RICK, P.J., and O'BRIEN and CAMERON, JJ.

CAMERON, J. Respondents the Department of Corrections (DOC) and Cynthia Partridge, the DOC's Time Computation Unit manager, appeal the trial court's orders that compel respondents to apply "special good time" credits to petitioner James Threet's prison sentence. Specifically, the trial court granted petitioner a

writ of mandamus and ordered respondents to apply 7,000 days of special good-time credits to petitioner's sentence for assault with the intent to murder (AWIM), MCL 750.83. For the following reasons, we affirm.

I. BACKGROUND

In 1980, petitioner was convicted of AWIM; kidnapping, MCL 750.349; and felony-firearm, MCL 750.227b. Petitioner was sentenced to 66 years and eight months to 100 years' imprisonment for the AWIM conviction, which was ordered to be served concurrently with a parolable life sentence for the kidnapping conviction. These concurrent sentences were to be served after petitioner served two years in prison for the felony-firearm conviction.

Based on the offense date, the DOC considered petitioner's eligibility to earn special good-time credits, which would be applied to reduce petitioner's maximum sentence. In 2016, the DOC granted petitioner 7,000 days of special good-time credits. However, respondents later concluded that the credits awarded could not be used to reduce the maximum sentences for petitioner's AWIM or kidnapping sentences. Consequently, respondents refused to apply the good-time credits that the DOC had previously awarded to petitioner.

In 2020, petitioner filed a petition for a writ of mandamus to compel the application of special good-time credits to petitioner's AWIM sentence. Petitioner argued that if the special good-time credits were applied to the maximum term of his AWIM sentence, the AWIM sentence would be "closed out," and he would automatically be eligible for parole on the kidnapping sentence. Petitioner noted that if the credits were not applied to the AWIM sentence, he would not be eligible

for parole until 2036. Respondents replied that the DOC had erroneously awarded special good-time credits, but even so the credits could not be used to shorten petitioner's AWIM sentence. Respondents first explained that petitioner is not eligible to earn credits on his kidnapping sentence because credit cannot be earned on parolable life sentences.[1] Respondents also asserted that credits could not be used to shorten petitioner's AWIM maximum sentence because in concurrent-sentencing situations, like this one, the DOC is permitted to apply good-time credit only to the sentence that carries the longest possible incarceration term, described by respondents as the "controlling maximum sentence." Respondents argued that, because petitioner's controlling maximum sentence is the sentence for his kidnapping conviction for which credits cannot be earned or applied, special good-time credits could not be lawfully applied to petitioner's AWIM sentence.

After hearing oral argument, the trial court ordered the DOC to apply 7,000 days of special good-time credits to petitioner's AWIM minimum sentence. Respondents sought reconsideration, arguing in relevant part that credits could not be applied to petitioner's minimum sentences for kidnapping and AWIM because they are both Proposal B crimes.[2] Respondents also argued that the trial court erred because MCL

[1] Petitioner's parole eligibility for his kidnapping conviction is governed by MCL 791.234(7)(a), which requires that petitioner serve not less than 10 calendar years before the prisoner is eligible for parole.

[2] Proposal B, codified at MCL 791.233b, abolished the "good time" credit system. "Thus, after December 12, 1978, Proposal B offenders were no longer eligible to receive good-time or special good-time credit on their minimum terms; but, they continued to be eligible to receive good-time and special good-time credit on their maximum terms." *Lowe v Dep't of Corrections (On Rehearing)*, 206 Mich App 128, 131; 521 NW2d

800.33(11) prohibits the credits from being applied to the AWIM sentence because the kidnapping sentence is defendant's "longest sentence[.]" Petitioner agreed that the credits could be applied only to the maximum AWIM sentence, but argued that the trial court had ruled correctly in all other respects. The trial court corrected its previous order to reflect that the 7,000 days would be applied to reduce petitioner's maximum AWIM sentence, and this appeal followed.[3]

II. STANDARDS OF REVIEW

"A lower court's decision on whether to grant a writ of mandamus is reviewed for an abuse of discretion." *Citizens Protecting Michigan's Constitution v Secretary of State*, 503 Mich 42, 59; 921 NW2d 247 (2018). However, "any underlying issue of statutory interpretation is a question of law, which is reviewed de novo on appeal[.]" *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 133; 715 NW2d 398 (2006). "Whether a defendant has a clear legal duty to perform an act and whether a plaintiff has a clear legal right to performance are legal questions that we also consider de novo." *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 531; 866 NW2d 817 (2014) (quotation marks and citation omitted). "An error of law

336 (1994). It is undisputed that the AWIM and kidnapping offenses for which petitioner was sentenced in 1980 are Proposal B offenses.

[3] This Court stayed "further proceedings . . . pending resolution of this appeal or further order of this Court." *Threet v Dep't of Corrections*, unpublished order of the Court of Appeals, entered April 16, 2021 (Docket No. 356587).

necessarily constitutes an abuse of discretion." *Denton v Dep't of Treasury*, 317 Mich App 303, 314; 894 NW2d 694 (2016).[4]

III. GENERAL PRINCIPLES OF LAW

"Mandamus is an extraordinary remedy and the primary purpose of a writ of mandamus is to enforce duties required by law." *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 618; 822 NW2d 159 (2012). In *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001), this Court set forth the principles governing the granting of mandamus in the context of criminal sentences:

> The issuance of a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result.

The principles of statutory construction also guide the disposition of this case. The relevant principles of statutory construction are:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of

[4] To the extent that petitioner argues that respondents' arguments on appeal are not preserved and therefore not properly before this Court, we conclude that it is nonetheless proper to consider respondents' arguments. See *In re Murray Conservatorship*, 336 Mich App 234, 240-241; 970 NW2d 372 (2021) (acknowledging that "this Court may overlook preservation requirements if . . . the issue involves a question of law and the facts necessary for its resolution have been presented") (quotation marks and citation omitted).

> that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory. [*Vermilya v Delta College Bd of Trustees*, 325 Mich App 416, 418-419; 925 NW2d 897 (2018) (quotation marks and citation omitted).]

IV. ANALYSIS

Respondents argue on appeal that the trial court erred by concluding that they had a clear legal duty to apply the special good-time credits to the maximum AWIM sentence because doing so violates MCL 800.33(11). We disagree.

"Sentence reduction for good-time and special good-time credit is set forth in MCL 800.33,"[5] *Michigan ex rel Oakland Co Prosecutor v Dep't of Corrections*, 199 Mich App 681, 686; 503 NW2d 465 (1993), which currently provides in relevant part:

> (11) A prisoner who has been sentenced concurrently for separate convictions shall have his or her good time . . . computed on the basis of the longest of the concurrent sentences. If a prisoner is serving consecutive sentences for separate convictions, his or her good time . . . shall be computed and accumulated on each sentence individually and all good time . . . credits that have been earned on any of the sentences shall be subject to forfeiture pursuant to subsections (5) and (8).

[5] The version of MCL 800.33(2), which sets forth the way in which good-time credit is computed, in effect when petitioner was sentenced in 1980 is substantially similar to the current version. See 1978 PA 80. The current language of Subsection (11) was not in effect when petitioner was sentenced. See 1978 PA 80. However, the parties impliedly concede that Subsection (11) applies here.

> (12) The warden of an institution may grant special good time allowances to eligible prisoners who are convicted of a crime that is committed before April 1, 1987. Special good time credit shall not exceed 50% of the good time allowances under the schedule in subsection (2). Special good time shall be awarded for good conduct only and shall not be awarded for any month in which a prisoner has been found guilty of a major misconduct.

Thus, under MCL 800.33(11), the DOC is required to compute good-time credits "on the basis of the longest of the concurrent sentences" if the prisoner "has been sentenced concurrently[.]" See *Wolfenbarger v Wright*, 336 Mich App 1, 30; 969 NW2d 518 (2021) ("The use of the word 'shall' denotes mandatory action."). A "prisoner [who] is serving consecutive sentences for separate convictions" is entitled to good-time credits, and those credits must "be computed and accumulated on each sentence individually[.]" MCL 800.33(11). See also *Ryan v Dep't of Corrections*, 259 Mich App 26, 34; 672 NW2d 535 (2003) ("Subsection 11 clearly states that when sentences are being served consecutively, credits shall be computed and accumulated separately.").

The statute does not define "computed" or "accumulated." Therefore, it is proper to consult dictionary definitions. *West St Joseph Prop, LLC v Delta Twp*, 338 Mich App 522, 534; 980 NW2d 727 (2021). "Compute" is defined as "to determine . . . by mathematical means," and "accumulate" is defined as "to increase gradually in quantity or number[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed).

Respondents argue that MCL 800.33(11) does not permit the DOC to apply special good-time credits to petitioner's AWIM sentence because these credits can only be applied to a prisoner's longest concurrent sentence. Thus, respondents argue that good-time

credits only apply to one concurrent sentence. However, the plain language of MCL 800.33(11) does not prohibit the DOC from applying good-time credits to other concurrent sentences. Simply put, MCL 800.33(2) establishes that good-time credits that are earned and awarded as permitted by law entitle prisoners to receive a sentence reduction. MCL 800.33(2) and (11) explain how these earned credits are computed and accumulated. In situations like this one that involve concurrent sentences, credits must be "computed *on the basis of* the longest of the concurrent sentences." MCL 800.33(11) (emphasis added). Nowhere in the plain language of MCL 800.33 did our Legislature direct that these credits can only be *applied* to the longest concurrent sentence. Indeed, respondents' construction of the statute conflates the term "computed" with "applied," a term that does not appear in the statute. We therefore reach the unremarkable conclusion that the good-time credits earned on the longest concurrent sentence must be applied to the other concurrent sentence or sentences, so long as it is permitted by law.

Our conclusion is entirely consistent with the proper operation of concurrent sentencing. "The term consecutive or cumulative sentences mean[s] those following in a train, succeeding one another in a regular order, with an uninterrupted course or succession, and having no interval or break. By contrast, the term concurrent sentences refers to sentences operating simultaneously." *People v Chambers*, 430 Mich 217, 220 n 2; 421 NW2d 903 (1988). Thus, because concurrent sentences are to be served simultaneously and because it would make little sense to calculate credits on the basis of each concurrent sentence, it reasonably follows that the good-time credits that are computed on the longest

of the concurrent sentences should be applied to the other concurrent sentence or sentences.

In this case, petitioner was sentenced to 66 years and eight months to 100 years' imprisonment for the AWIM conviction, to life imprisonment for the kidnapping conviction, and to two years' imprisonment for the felony-firearm conviction. The felony-firearm sentence was to be served before the other two sentences, which were concurrent. See MCL 750.227b(3). Accordingly, after petitioner served his felony-firearm sentence, petitioner began serving his sentences for AWIM and kidnapping. Because those sentences were concurrent and because petitioner was no longer serving a consecutive sentence, respondents had a clear legal duty under MCL 800.33(11) to calculate credits on the basis of the kidnapping sentence and to apply the credits to the AWIM sentence for the reasons already discussed. Concluding otherwise would require us to read words into the plain language of the statute. We are not permitted to do so. See *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403, 410-411; 809 NW2d 669 (2011).

In sum, we conclude that the trial court did not err by concluding that respondents had a clear legal duty to apply the credits to the AWIM sentence.[6] See *Hayes v Parole Bd*, 312 Mich App 774, 782; 886 NW2d 725 (2015) ("A clear legal duty, like a clear legal right, is one that is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided.") (quotation marks and citation

[6] Respondents do not dispute that a writ of mandamus is necessary given that "no other remedy exists, legal or equitable, that might achieve the same result," i.e., application of the 7,000 days of special good-time credits to the maximum AWIM sentence. *Lickfeldt*, 247 Mich App at 302.

omitted). Additionally, we conclude that the act of applying the special good-time credits was ministerial in nature. See *Berry v Garrett*, 316 Mich App 37, 42; 890 NW2d 882 (2016) (an act is ministerial where "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment"). Consequently, the trial court did not abuse its discretion by issuing the writ of mandamus.

Affirmed.

RICK, P.J., and O'BRIEN, J., concurred with CAMERON, J.

PEOPLE v JOHNSON

Docket No. 353825. Submitted December 14, 2021, at Lansing. Decided February 17, 2022, at 9:10 a.m.

Defendant was convicted following a jury trial in the Ontonagon Circuit Court of witness retaliation, MCL 750.122(8)(b). In an earlier proceeding, in March 2018, defendant had been convicted by a jury of resisting or obstructing a police officer, MCL 750.81d(1), and allowing a dog to stray off-leash, MCL 287.262. During that trial, several witnesses testified about the events that resulted in his conviction. Importantly, BP, who was then 14 years old, testified regarding his encounter with the dog. In May 2019, after his release from jail, defendant sent a message to BP through Facebook Messenger, calling BP a "lying pc of sht," stating that what "[g]oes around comes around, and Karma WILL fuck you," asserting that he "hope[d] [BP] suffer[s] an extremely horrible death that causes u and ur family dire pain," and stating that "when ur 18, Id love to show u how much I and my family appreciates your fkn lies." The prosecutor charged defendant with witness retaliation. Defendant moved to dismiss the charge or for appropriate jury instructions. In particular, defendant challenged on First Amendment grounds the statute itself, as well as its application, and argued that MCL 750.122(8) is a specific-intent crime. The court, Michael K. Pope, J., denied the request to dismiss, concluding that MCL 750.122(8) did not infringe any First Amendment protections and that there was sufficient evidence to support the charge. The court also stated that it would give the jurors the standard instruction on witness retaliation, M Crim JI 37.6. After the presentation of proofs and closing arguments, the court recited, verbatim, M Crim JI 37.6, after which the court appended the stand-alone instruction regarding the ways that "specific" intent can be proved (M Crim JI 4.16). During deliberations, the jury sent a note to the court, questioning whether "psychological injury count[s] as injury under the law? Threaten to kill or injure." Without discussion with counsel beforehand, the trial court instructed the jury that "[t]he answer is, yes. Injury means bodily injury, disfigurement, chronic pain, or mental anguish." When the jury subsequently notified the court that it was at an impasse, the court gave the

jury the deadlocked-jury instruction under M Crim JI 3.12. After the jury found him guilty of the witness retaliation, defendant moved for judgment notwithstanding the verdict, arguing that the message did not amount to witness retaliation, that the trial court erred by failing to give an instruction on specific intent, and that the conviction violated the First Amendment. The trial court denied the motion, and defendant appealed.

The Court of Appeals *held*:

1. Viewing the evidence in a light most favorable to the prosecution—in particular, the threatening language of the full Facebook message—there was sufficient evidence to support defendant's conviction of witness retaliation.

2. The First Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that Congress shall make no law abridging the freedom of speech. However, the protections afforded by the First Amendment are not absolute. Restrictions on the content of speech are permitted in a few limited areas, including allowing the state to ban "true threats," i.e., those statements in which the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not intend to actually carry out the threat; rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. Because the First Amendment does not protect true threats, a penal statute that proscribes a person from making a "threat" must be interpreted as prohibiting "true threats" in order to pass constitutional muster under the Free Speech Clause of the First Amendment.

3. MCL 750.122(8)(b) provides, in relevant part, that a person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony; for purposes of the statute, "retaliate" means to threaten to kill or injure any person. To render the statute constitutional, the word "retaliate" encompasses only "true" threats to kill or injure. Thus, the word "retaliate" means, in part, to make a verbal or written statement in which the speaker or author meant to communicate an expression of an intent to kill or injure another person for having been a witness in an official proceeding. The relevant intent relates to intending to threaten a witness with death or injury or intending to communicate such a threat. Thus, MCL 750.122(8)

contains a criminal-intent element, but the prosecution does not have to prove that a defendant *actually* intended to carry out the threat.

4. Taken in context, the witness-retaliation statute addresses threats to kill or *physically* injure a witness given that the Legislature employed the term "injure" directly after the term "kill"; therefore, the statute does not apply to a threat to psychologically injure a witness. Further, because the statute does not specifically refer to threats to mentally injure a witness, the statute is at most ambiguous on the issue, and the rule of lenity precludes extending the reach of the statute to threats of psychological injury.

5. M Crim JI 37.6 provides that to prove a charge of witness retaliation, the prosecution must prove the following beyond a reasonable doubt: (1) that the complainant was a witness at an official proceeding and (2) that the defendant retaliated, attempted to retaliate, or threatened to retaliate against the complainant for having been a witness; "retaliate" means to commit or attempt to commit a crime against the witness or to threaten to kill or injure any person, or to threaten to cause property damage to the witness. As written, M Crim JI 37.6 infringes the First Amendment because, to satisfy the "true threat" exception to the Free Speech Clause, a jury must also be instructed that the prosecution is required to prove beyond a reasonable doubt that the defendant meant to express a serious intent to kill or injure the complainant, although actual intent to kill or injure does not have to be proved.

6. Defendant's argument that MCL 750.122(8) violates the First Amendment because it is overly broad—specifically, because it does not contain a criminal-intent element—was without merit because the statute was interpreted as including a criminal-intent element. However, the jury was not properly instructed on witness retaliation because M Crim JI 37.6, the instruction given, failed to inform the jury that the prosecution was required to prove beyond a reasonable doubt that defendant meant to express a serious intent to kill or injure BP. Whether BP suffered mental anguish or psychological injury as a result of defendant's message was irrelevant to the prosecution's burden of proving the elements of witness retaliation, and there was a real danger the jury convicted defendant on the basis that it found BP suffered mental anguish because of the message. In addition, the jury could have erroneously construed the trial court's response-instruction to mean that retaliation included threats to injure BP psychologi-

cally or mentally, which is not proscribed by MCL 750.122(8)(b). Because the jury was not instructed correctly, reversal was required.

Reversed and remanded for a new trial.

RONAYNE KRAUSE, J., concurring, agreed with the majority that there was sufficient evidence to support defendant's conviction of witness retaliation and that defendant was entitled to a new trial, but her reasoning differed from the majority's. The words "injure" and "threaten" in MCL 750.122(8)(b) are undefined. While a "threat" under the statute must mean a "true threat" to conform with the First Amendment, it does not follow that the jury instruction, as written or as given, was constitutionally infirm. The trial court's instruction regarding the determination of defendant's intent, in light of the extensive argument that defendant only intended to express hope that BP would suffer a dire fate, clearly communicated to the jury that it must determine whether defendant intended to promise harm upon BP or merely engage in crass invective. Reviewed as a whole and in light of the entire proceedings, the jury instructions clearly informed the jury, in substance, that it had to find the requisite intent to convey a "true threat." Thus, M Crim JI 37.6, as augmented by M Crim JI 4.16, did not run afoul of the First Amendment. However, the jury's question to the trial court during deliberations should have alerted the trial court and the parties that the jury misunderstood that the touchstone of witness retaliation is the threat issued, not the harm sustained. Defendant was entitled to a new trial because the trial court's response to the jury's question created an unacceptable danger that the jury convicted defendant on the impermissible basis of BP suffering actual injury. The court failed to recognize that the jury's question made no legal sense given that it was legally irrelevant whether BP suffered any actual injury or whether defendant actually intended to cause BP any actual injury. Judge RONAYNE KRAUSE also would have exercised judicial restraint and refrained from making a pronouncement about whether "injury," as used in MCL 750.122(8)(b), may include psychological injury because the inquiry was not germane to the case before the Court; given the majority's analysis, however, she noted her disagreement that the plain language of the statute compelled the conclusion that it applied only to physical injuries.

1. STATUTES – WITNESS RETALIATION – WORDS AND PHRASES – "RETALIATE" – TRUE THREATS.

MCL 750.122(8)(b) provides, in relevant part, that a person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony; for purposes of the statute, "retaliate" means to threaten to kill or injure any person; to comply with the First Amendment, the word "retaliate" encompasses only "true" threats to kill or injure; accordingly, the word "retaliate" means to make a verbal or written statement in which the speaker or author meant to communicate an expression of an intent to kill or injure another person for having been a witness in an official proceeding; the relevant intent relates to intending to threaten a witness with death or injury or intending to communicate such a threat (US Const, Am I).

2. STATUTES – WITNESS RETALIATION – ELEMENTS OF OFFENSE – CRIMINAL INTENT.

MCL 750.122(8)(b) provides, in relevant part, that a person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony; for purposes of the statute, "retaliate" means to threaten to kill or injure any person; the word "retaliate" means to make a verbal or written statement in which the speaker or author meant to communicate an expression of an intent to kill or injure another person for having been a witness in an official proceeding; the relevant intent relates to intending to threaten a witness with death or injury or intending to communicate such a threat; MCL 750.122(8) contains a criminal-intent element, but the prosecution does not have to prove that a defendant actually intended to carry out the threat.

3. STATUTES – WITNESS RETALIATION – "RETALIATE" – THREATS TO KILL OR PHYSICALLY INJURE WITNESSES.

MCL 750.122(8)(b) provides, in relevant part, that a person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony; for purposes of the statute, "retaliate" means to threaten to kill or injure any person; the statute addresses threats to kill or physically injure a witness only; it does not apply to a threat to psychologically injure a witness.

4. JURY INSTRUCTIONS – CRIMINAL – WITNESS RETALIATION – VIOLATION OF FIRST AMENDMENT.

M Crim JI 37.6 provides that to prove a charge of witness retaliation, the prosecutor must prove the following beyond a reasonable doubt: (1) that the complainant was a witness at an official proceeding and (2) that the defendant retaliated, attempted to retaliate, or threatened to retaliate against the complainant for having been a witness; "retaliate" means to commit or attempt to commit a crime against the witness or to threaten to kill or injure any person, or to threaten to cause property damage to the witness; the model criminal jury instruction applicable to witness retaliation, standing alone, infringes the First Amendment because it fails to instruct the jury that the prosecution is required to prove beyond a reasonable doubt that the defendant meant to express a serious intent to kill or injure the complainant, the intent necessary to constitute a "true threat" as an exception to the Free Speech Clause (MCL 750.122(8)(b)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Autumn A. Gruss*, Assistant Attorney General, and *Michael D. Findlay*, Prosecuting Attorney, for the people.

Robert A. Johnson, Jr., *in propria persona*, and State Appellate Defender (by *Matthew A. Monahan*) for defendant.

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

MARKEY, P.J. A jury convicted defendant of witness retaliation, MCL 750.122(8). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 6 to 30 years' imprisonment. Defendant appeals by right. We reverse and remand for a new trial.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In March 2018, defendant, Robert A. Johnson, Jr., was convicted by a jury of resisting or obstructing a

police officer, MCL 750.81d(1), and allowing a dog to stray off-leash, MCL 287.262. See *People v Johnson*, unpublished per curiam opinion of the Court of Appeals, issued January 28, 2020 (Docket No. 343882), p 1. This Court affirmed the convictions, which arose out of an incident involving defendant's dog and an altercation between defendant and a police officer who had responded to reports of a dog at large. *Id*. At that earlier trial, several witnesses testified about the events that resulted in defendant's convictions. *Id*. at 2. One of those witnesses was then-14-year-old BP. BP testified that he encountered a three-legged white pit bull—the dog at issue—as BP walked to a clinic for a physical therapy appointment. BP further testified that the dog was barking, that the dog chased him, that BP was afraid that the dog was going to bite him, and that someone then called the dog back and BP was able to safely enter the clinic. The jury viewed a video of BP's encounter with the dog. Defendant attempted to impeach BP's trial testimony with the video footage and a written statement that BP had provided to the police. Defendant's effort at impeachment primarily concerned whether BP was running or walking during portions of the episode. We note that any purported discrepancies in BP's account of events had no real bearing on whether defendant's dog was straying off-leash or on whether defendant resisted or obstructed the responding police officer. In May 2018, defendant was sentenced to 12 months in jail for the resisting-or-obstructing conviction and three months in jail for the stray-dog conviction. *Id*. at 1.

With respect to the instant charge and conviction, on May 29, 2019, at 10:03 a.m., defendant, no longer

incarcerated, sent a message to BP through Facebook Messenger. The message, which defendant admitted sending to BP, stated:[1]

> Hey there you lying pc of sht, I hope yr proud of yourself. Your fkn lies cost me a year in jail, as the video clearly shows u weren't walking to clinic, werent charged by a dog, nor ran as fast as u could into clinic, cuz u were afraid the dog would bite u. U must have been coached by the cops, and were coherced into lying for then. U dont know the difference bwtween right and wrong, and based on ur writing skills, you MUST be fkn retarded. Goes around comes around, and Karma WILL fuck you, for the lies u told, and the harm you caused me from ur choice to lie. You should be ashamed of yourself, and I hope u suffer an extremely horrible death that causes u and ur family dire pain, like YOU put upon me, and consequences for being a lying little twerp who deserves to have his fkn tongue cut off, cuz if thats the BEST you can do with it, YOU DON'T NEED IT. Fk u and ur family, eat shit and die u lying pc of shit, middle finger high in the air to you, and when ur 18, Id love to show u how much I and my family appreciates your fkn lies. Fuck you[.]

On the basis of this message, the prosecutor charged defendant with witness retaliation under MCL 750.122(8), which provides:

> A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following:
>
> (a) Commit or attempt to commit a crime against any person.
>
> (b) Threaten to kill or injure any person or threaten to cause property damage.

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[1] The message is quoted exactly as sent by defendant.

The prosecution's theory at trial focused on the language in Subsection (8)(b) of the statute, with the prosecutor arguing that defendant retaliated against BP for his earlier testimony by threatening to kill or injure BP as communicated through Facebook Messenger.

At the preliminary examination, defendant contended that the message he sent to BP did not contain or constitute a threat to kill or injure BP. The district court disagreed and bound defendant over for trial. In the trial court, defendant moved "to dismiss the retaliation charge and/or for appropriate jury instructions." Defendant maintained that the evidence was insufficient to establish a violation of MCL 750.122(8). He also presented First Amendment challenges to the statute and its application. Defendant further asserted that the offense is a specific-intent crime. Defendant requested dismissal of the charge or, in the alternative, the reading of jury instructions that would protect his First Amendment rights and require the prosecution to establish specific intent. The trial court denied defendant's request to dismiss the charge, concluding that MCL 750.122(8) did not infringe any First Amendment protections and that there was sufficient evidence to go to trial on the charge of witness retaliation. The trial court also ruled that it would give the jurors the standard jury instruction on witness retaliation, M Crim JI 37.6, although, at the time, the court couched its ruling solely in regard to preliminary jury instructions.

At trial, following the presentation of proofs and closing arguments, the trial court instructed the jury as follows regarding the offense of witness retaliation:

> The defendant is charged with the crime of witness retaliation. To prove this charge the prosecutor must

> prove each of the following elements beyond a reasonable doubt. First, that [BP] was a witness at an official proceeding. . . . Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against [BP] for having been a witness. Retaliate means to commit or attempt to commit a crime against the witness or to threaten to kill or injure any person, or to threaten to cause property damage to the witness. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence.

These instructions, except for the final sentence, paralleled M Crim JI 37.6 verbatim. The last sentence is not found in M Crim JI 37.6; rather, it is a stand-alone instruction contained in M Crim JI 4.16, which addresses the various ways that "specific" intent can be proved. See *People v Maynor*, 470 Mich 289, 296; 683 NW2d 565 (2004) (the *Maynor* opinion is the only referenced citation in support of M Crim JI 4.16 following the Use Notes and History). We note that the trial court, consistently with its pretrial ruling, instructed the jury pursuant to M Crim JI 37.6 when the preliminary instructions were read. But, unlike the final jury instructions, the court said nothing about "[t]he defendant's intent" and M Crim JI 4.16 was not given.

About a half-hour after the jury began to deliberate, it sent a question to the trial court asking, "Does psychological injury count as injury under the law? Threaten to kill or injure." The jury returned to the courtroom, and, after the question was read on the record, the trial court responded, "The answer is, yes. Injury means bodily injury, disfigurement, chronic pain, or mental anguish." There is no indication in the record that the trial court discussed the responsive instruction with counsel beforehand, nor did the court ask counsel if they had any objections to the instruc-

tion. The jury then returned to its deliberations. Subsequently, the trial court noted on the record that it had received word that the jury had reached an impasse and that the court intended to give the jury an instruction and order continuing deliberations. The trial court gave the jury the deadlocked-jury instruction, M Crim JI 3.12. The jury resumed deliberations and eventually reached a verdict, finding defendant guilty of witness retaliation under MCL 750.122(8). Defendant moved for judgment notwithstanding the verdict (JNOV), arguing that the message to BP did not amount to witness retaliation, that the trial court erred by not giving an instruction on specific intent, and that the conviction was rendered in violation of the First Amendment. The trial court denied the motion for JNOV, and defendant appeals by right.

II. ANALYSIS

A. DEFENDANT'S ARGUMENTS ON APPEAL

On appeal, defendant first argues that MCL 750.122(8) violates the First Amendment under the overbreadth doctrine by improperly encompassing both protected and unprotected speech. Defendant further contends that the First Amendment was violated because although "true threats" are not a form of protected speech, specific intent has to be established to demonstrate a true threat, and the jury in the instant case was not instructed that the prosecution was required to prove specific intent. On a similar note, defendant maintains that there was instructional error because the trial court failed to read a *mens rea* element into MCL 750.122(8), i.e., that the prosecution had to establish that defendant specifically intended to threaten BP with injury or death. Next, defendant claims that the trial court effectively coerced a verdict

in reading the deadlocked-jury instruction, thereby requiring reversal. In a Standard 4 brief and a supplemental Standard 4 brief, defendant raises numerous arguments, only two of which we need reach. First, defendant argues that the evidence was insufficient to support the conviction of witness retaliation. Second, defendant contends that the trial court erred by instructing the jury that a threat to injure for purposes of MCL 750.122(8)(b) includes a threat to inflict mental harm.

B. THE FIRST AMENDMENT, CRIMINAL INTENT, AND THE JURY INSTRUCTIONS

We review de novo issues of constitutional law. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). Whether criminal intent is an element of an offense enacted into law by our Legislature is an issue of statutory construction and is therefore subject to de novo review on appeal. See *People v Tombs*, 472 Mich 446, 451; 697 NW2d 494 (2005) (opinion by KELLY, J.). "[J]ury instructions that involve questions of law are also reviewed de novo." *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005).

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech[.]" The First Amendment applies to the states through the Fourteenth Amendment. *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003). Protected speech under the First Amendment includes expressions or "ideas that the overwhelming majority of people might find distasteful or discomforting." *Id*. A bedrock principle underlying the First Amendment is that the government cannot prohibit speech simply because the populace finds the speech disagreeable or

offensive. *Id*. The First Amendment, therefore, ordinarily deprives a state of the authority to prevent the dissemination of social, economic, and political doctrine that a vast majority of its citizens believe to be fraught with evil consequence. *Id*.

But the *Black* Court further explained:

> The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. . . . The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
>
> Thus, for example, a State may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . We have consequently held that fighting words—those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction—are generally proscribable under the First Amendment. Furthermore, the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. And the First Amendment also permits a State to ban a "true threat."
>
> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility

> that the threatened violence will occur. Intimidation[2] in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. [*Id*. at 358-360 (quotation marks, citations, and brackets omitted).]

Relying primarily on *Black*, this Court has acknowledged that there is no constitutional protection under the First Amendment for "true threats," which encompass "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *People v Byczek*, 337 Mich App 173, 184; 976 NW2d 7 (2021); see also *People v Gerhard*, 337 Mich App 680, 687; 976 NW2d 907 (2021); *TM v MZ (On Remand)*, 326 Mich App 227, 239; 926 NW2d 900 (2018). Accordingly, a penal statute that proscribes a person from making a "threat" must be interpreted as prohibiting "true threats" in order to pass constitutional muster under the Free Speech Clause of the First Amendment.

In this case, the prosecutor argued that defendant, in violation of MCL 750.122(8), retaliated against BP for his prior testimony by threatening to kill or injure him. Consistently with the prosecutor's theory, MCL 750.122(8)(b) provides that retaliation includes a "threat[] to kill or injure any person . . . ." Guided by the principle that "courts should construe statutes in such a manner as to render them constitutional," *People v Hayes*, 421 Mich 271, 284; 364 NW2d 635 (1984), we interpret MCL 750.122(8)(b) when defining the term "retaliate" as encompassing only "true" threats to kill or injure. And " '[t]rue threats' encompass those state-

[2] We note that, strictly speaking, this matter involves retaliation rather than intimidation.

ments where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," although "[t]he speaker need not actually intend to carry out the threat." *Black*, 538 US at 359-360. Taking this definition of "true threats" enunciated by the United States Supreme Court and reading it in the context of MCL 750.122(8), we conclude that the term "retaliate" means, in part,[3] to make a verbal or written statement in which the speaker or author meant to communicate a serious expression of an intent to kill or injure another person for having been a witness in an official proceeding.[4] Albeit a bit nuanced, the relevant intent relates to intending to threaten a witness with death or injury or intending to communicate such a threat. The prosecution need not prove, however, that a defendant actually intended to carry out the threat.

Our ruling effectively reads a "criminal intent" element into the offense of witness retaliation as charged and pursued by the prosecution in this case. By doing so, we no longer need to address defendant's contention that MCL 750.122(8) is overbroad in violation of the First Amendment and should thus be struck down: Defendant's overbreadth argument is premised on the absence of a "criminal intent" element.[5] We also note that our ruling is consistent with our Supreme Court's

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[3] Our ruling does not affect or concern the definition of "retaliate" found in MCL 750.122(8)(a) ("Commit or attempt to commit a crime against any person.").

[4] We note that this proposition applies equally to circumstances involving a "threat[] to cause property damage." MCL 750.122(8)(b).

[5] "A statute is overbroad when it precludes or prohibits constitutionally protected conduct in addition to conduct or behavior that it may legitimately regulate." *People v Gaines*, 306 Mich App 289, 320; 856 NW2d 222 (2014). We recognize that our holding could be viewed as finding MCL 750.122(8) overbroad as written, which constitutional defect is corrected by reading a criminal-intent element into the statute.

observations in *Tombs*, 472 Mich at 451 (opinion by KELLY, J.),[6] wherein the Court stated:

> [T]o determine whether a statute imposes strict liability or requires proof of a guilty mind, the Court first searches for an explicit expression of intent in the statute itself.
>
> Normally, criminal intent is an element of a crime. Statutes that create strict liability for all their elements are not favored. Hence, we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated. [Citations omitted.]

In the instant case, the trial court instructed the jury, consistently with M Crim JI 37.6, that to "[r]etaliate means to . . . threaten to kill or injure any person . . . ." There was no elaboration on this instruction. The trial court then instructed the jury that "defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence." This instruction, which was consistent with M Crim JI 4.16, explained to the jury how specific intent can be proved, yet the court did not even instruct the jury that the prosecution had to prove specific or criminal intent to establish the crime of witness retaliation.

We hold that the jury was not properly instructed and that M Crim JI 37.6 lacks language necessary to avoid infringement of the First Amendment right to free speech.[7] To satisfy the "true threat" exception to the Free Speech Clause, the jury needed to be in-

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[6] Joined in relevant part by Chief Justice TAYLOR. *Tombs*, 472 Mich at 465 (opinion by TAYLOR, C.J.)

[7] We note that on appeal the prosecution attempts to play both sides of the fence, arguing that defendant's overbreadth argument fails because specific or criminal intent is inferred for purposes of MCL

structed that the prosecution was required to prove beyond a reasonable doubt that defendant meant to express a serious intent to kill or injure BP, although the prosecutor did not have to prove that defendant actually intended to kill or injure BP. We need not explore whether this instructional error of constitutional magnitude was harmless, forfeited, or waived, considering that an additional instructional error discussed later in this opinion requires reversal.[8] In any new trial held on remand, the court shall instruct the jury on witness retaliation consistently with this opinion.

C. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to prove beyond a reasonable doubt that the message sent to BP actually contained a threat to "kill" or "injure" BP. We examine this issue without contemplation of criminal intent and our determination of instructional error. It is necessary to address this issue because if the evidence was insufficient to show that the message spoke to defendant's killing or injuring BP, defendant would be entitled to an order of acquittal.

In *People v Kenny*, 332 Mich App 394, 402-403; 956 NW2d 562 (2020), this Court set forth the well-established principles governing a sufficiency argument, observing as follows:

750.122(8), while later contending that defendant's argument of instructional error fails because MCL 750.122(8) only requires proof of general intent.

[8] We do highly question the prosecution's argument that defendant waived any instructional error by indicating that there was no objection to the court's instructions. The argument fails to recognize that defendant moved before trial for an instruction on specific or criminal intent.

> This Court reviews de novo whether there was sufficient evidence to support a conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence —whether direct or circumstantial—in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. A jury, and not an appellate court, observes the witnesses and listens to their testimony; therefore, an appellate court must not interfere with the jury's role in assessing the weight of the evidence and the credibility of the witnesses. Circumstantial evidence and any reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. The prosecution need not negate every reasonable theory of innocence; it need only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. All conflicts in the evidence must be resolved in favor of the prosecution. [Quotation marks and citations omitted.]

In this case, the message defendant sent to BP through Facebook Messenger included the following penultimate sentence: "when ur 18, Id love to show u how much I and my family appreciates your fkn lies." When this particular language is viewed in conjunction with earlier references in the message, including defendant's hope that BP suffers "an extremely horrible death" and that BP "deserves to have his fkn tongue cut off," a juror could reasonably infer that defendant was threatening to "kill" or "injure" BP for having testified against defendant in the earlier prosecution. Upon viewing the evidence in a light most favorable to the prosecution, resolving all conflicts in the evidence in favor of the prosecution and appreciating that it was for the jury to assess the weight of the evidence, we hold that the evidence and reasonable inferences arising from the evidence were sufficient to establish

beyond a reasonable doubt that the message sent to BP contained a threat to "kill" or "injure" BP.

D. MENTAL ANGUISH OR PSYCHOLOGICAL INJURY

As indicated earlier in this opinion, after the jury began to deliberate, it sent a question to the trial court asking, " 'Does psychological injury count as injury under the law? Threaten to kill or injure.' " The trial court responded, "The answer is, yes. Injury means bodily injury, disfigurement, chronic pain, or mental anguish." Defendant argues on appeal that the trial court erred by essentially instructing the jury that retaliation includes threats to psychologically injure a witness.

We are somewhat confused by the jury's question because it suggests that the jurors were perhaps making inquiry in regard to the type of harm or injury BP suffered and not in regard to the nature of the threat defendant made against BP. Whether BP suffered mental anguish or psychological injury as a result of defendant's message was irrelevant to the prosecution's burden to prove the elements of the crime of witness retaliation. There existed a real danger that the jury convicted defendant on the basis that BP suffered mental anguish.

To the extent that the jury construed the trial court's response-instruction to mean that retaliation included threats to psychologically or mentally injure BP, it is still problematic and requires reversal. Again, MCL 750.122(8)(b) defines the term "retaliate" as meaning, in part, to "[t]hreaten to kill or injure any person . . . ." When construing a statute, we must ascertain and give effect to the Legislature's intent, and the words used in the statute reflect the most reliable indicator of legislative intent and should be interpreted on the basis of

their ordinary meaning and the context within which the words are used in the statute. *People v Zajaczkowski*, 493 Mich 6, 13; 825 NW2d 554 (2012). When statutory language is unambiguous, the statute must be enforced as written, with no further judicial construction being permitted. *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018). When viewed in context, we conclude that the plain and unambiguous language of MCL 750.122(8)(b) demonstrates that the Legislature was addressing threats to kill or *physically* injure a witness. Employing the term "injure" directly after referencing the term "kill" reveals that the Legislature was focused on threats of a physical nature. Moreover, if the Legislature intended for the statute to encompass a threat to psychologically injure a witness, which seems a strained interpretation, it needed to expressly so provide to avoid the application of the rule of lenity. "The rule of lenity stands for the proposition that penal laws are to be strictly construed, with all doubts resolved in a defendant's favor," and "[t]he rule applies only when the statutory text is ambiguous[.]" *People v Arnold*, 508 Mich 1, 24 n 51; 973 NW2d 36 (2021). Absent a specific reference to threats to mentally injure a witness, the statute is, at most, ambiguous on the issue. And the rule of lenity precludes extending the reach of the statute to threats of psychological injury. Reversal is warranted.

E. MISCELLANEOUS MATTERS

Defendant raises additional issues on appeal concerning the deadlocked-jury instruction, the scoring of the sentencing variables, the jury-selection process, and other matters that are rendered moot in light of our ruling reversing defendant's conviction and remanding the case for a new trial. We deem abandoned

remaining issues defendant raised in his Standard 4 briefs because they are either indecipherable, entirely unsupported by citation to the record or law, or otherwise inadequately briefed for consideration. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998).

We reverse and remand for a new trial. We do not retain jurisdiction.

SHAPIRO, J., concurred with MARKEY, P.J.

RONAYNE KRAUSE, J. (*concurring*). I concur in the outcome reached by the majority, but I respectfully conclude that defendant is entitled to a new trial for different reasons.

I. BACKGROUND

As the majority discussed, BP was a witness in a proceeding against defendant, Robert A. Johnson, Jr. Shortly after defendant was released from incarceration, he sent the following message to BP:

> Hey there you lying pc of sht, I hope yr proud of yourself. Your fkn lies cost me a year in jail, as the video clearly shows u weren't walking to clinic, werent charged by a dog, nor ran as fast as u could into clinic, cuz u were afraid the dog would bite u. U must have been coached by the cops, and were coherced into lying for then. U dont know the difference bwtween right and wrong, and based on ur writing skills, you MUST be fkn retarded. Goes around comes around, and Karma WILL fuck you, for the lies u told, and the harm you caused me from ur choice to lie. You should be ashamed of yourself, and I hope u suffer an extremely horrible death that causes u and ur family dire pain, like YOU put upon me, and consequences for being a lying little twerp who deserves to have his fkn tongue cut off, cuz if thats the BEST you can do with it, YOU DON'T

> NEED IT. Fk u and ur family, eat shit and die u lying pc of shit, middle finger high in the air to you, and when ur 18, Id love to show u how much I and my family appreciates your fkn lies. Fuck you[.]

Defendant was charged with witness retaliation, the definition of which I will discuss further later in this opinion. Defendant never disputed sending the message or that BP had been a witness against defendant at the prior trial. Rather, his theory of the case, as expressed in his opening statement to the jury, was that while the message was admittedly offensive, it contained only expressions of hope that something bad would happen to BP and no actual threats to kill or threats to injure. During closing argument, defendant conceded that BP had been frightened by the message, but defendant argued that BP's feelings were irrelevant and that nowhere in the message did defendant affirmatively state that he would do anything to BP.

In relevant part, the trial court instructed the jury as follows:

> The defendant is charged with the crime of witness retaliation. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that [BP] was a witness at an official proceeding. . . . Second, that the defendant retaliated, attempted to retaliate, or threatened to retaliate against [BP] for having been a witness. Retaliate means to commit or attempt to commit a crime against the witness or to threaten to kill or injure any person, or to threaten to cause property damage to the witness. The defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence.

As the majority states, these instructions were a verbatim recitation of M Crim JI 37.6, appended by M Crim JI 4.16. Half an hour after the jury began

deliberations, it sent a message, and the trial court made the following statement on the record:

> Thank you. Please be seated. Ladies and gentlemen of the jury, the court has received a question from the bailiff. The question reads as follows,
>
> "Does psychological injury count as injury under the law?"
>
> And in quotes,
>
> "Threaten to kill or injure."
>
> Close quotes.
>
> The answer is, yes. Injury means bodily injury, disfigurement, chronic pain, or mental anguish.
>
> I will now excuse you to continue your deliberations.

The transcript indicates that all parties were present at the time, although the record does indicate that the trial court consulted with counsel before addressing the jury's question. However, the trial court did ask the attorneys after the jury resumed its deliberations whether they had "anything for the record," and both parties declined. A few hours later, the jury indicated that it had reached an impasse, and with the consent of both attorneys, the trial court read the deadlocked-jury instruction. The jury returned with its verdict of guilty approximately half an hour later. The jury was polled, and each juror affirmed that their verdict was guilty.

II. APPLICABLE STATUTORY LAW

Defendant was charged with witness retaliation under MCL 750.122(8), which provides:

> A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony . . . . As used in this subsection, "retaliate" means to do any of the following:

(a) Commit or attempt to commit a crime against any person.

(b) Threaten to kill or injure any person or threaten to cause property damage.

Under MCL 750.5, " 'Crime' means an act or omission forbidden by law which is not designated as a civil infraction" and may be punishable by imprisonment, a noncivil fine, removal from office, various kinds of disqualification, or "other penal discipline." Nowhere in MCL 750.122 is "injure" or "threaten" defined. However, MCL 750.2 provides that the "rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof," but, rather, that the provisions of the Michigan Penal Code "shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law."

III. CONSTITUTIONALITY OF JURY INSTRUCTIONS

I entirely agree with, and will not repeat, the majority's conclusion, in Part II(B) of its opinion, that a "threat" under MCL 750.122(8)(b) must mean a "true threat" as described in *Virginia v Black*, 538 US 343, 358-360; 123 S Ct 1536; 155 L Ed 2d 535 (2003); see also *People v Byczek*, 337 Mich App 173, 184; 976 NW2d 7 (2021); *People v Gerhard*, 337 Mich App 680, 687; 976 NW2d 907 (2021); *TM v MZ (On Remand)*, 326 Mich App 227, 239; 926 NW2d 900 (2018). However, I do not agree that the jury instructions, as written or as given, are therefore constitutionally infirm.

It is well established that jury instructions must be reviewed as a whole and in context. *People v Kelly*, 423 Mich 261, 270-271; 378 NW2d 365 (1985); see also *People v Traver*, 502 Mich 23, 40; 917 NW2d 260 (2018). *Black* defined a "true threat" as a statement

"where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," irrespective of whether the speaker "actually intend[ed] to carry out the threat." *Black*, 538 US at 359-360. The plain language of both the statute and M Crim JI 37.6 clearly restricts the class of threats that constitute a violation of the statute: threats to kill, threats to injure, or threats to cause property damage. All three of these possibilities obviously constitute "act[s] of unlawful violence." *Black*, 538 US at 359. Whether a particular communication included a "serious expression of intent" seeks to distinguish hyperbole and invective from speech calculated to place someone in fear of violence. See *id*. at 359-360. The trial court's instruction regarding the determination of defendant's intent, in light of the extensive argument that defendant only intended to express hope that BP would suffer a dire fate, clearly communicated to the jury that it must determine whether defendant intended to promise harm upon BP or merely engage in crass invective. There is no contention that defendant sent the message by accident.

When the jury instructions are reviewed as a whole and in light of the entire proceedings, they clearly informed the jury—in substance, even if not in exactly so many words—that it must find the requisite intent to convey a "true threat." I respectfully do not agree with the majority that M Crim JI 37.6, at least as augmented by M Crim JI 4.16, is constitutionally infirm. I agree entirely with the discussion in Part II(C) of the majority opinion that the evidence was sufficient to establish beyond a reasonable doubt that defendant violated MCL 750.122(8).

IV. TRIAL COURT RESPONSE TO JURY QUESTION

I nevertheless concur that defendant must be given a new trial. Like the majority, I find the jury's question regarding psychological injury confusing. It is possible, as the majority surmises, that the jurors believed it was relevant whether BP actually suffered harm as a consequence of defendant's threats. It is also possible, from the way the note was phrased by the trial court,[1] that the jury misparsed its instructions and believed that "threaten to kill" was distinct from "injure," and thus actual injury[2] was required if there had been no

[1] Insofar as I can determine, no copy of the jury's note was included in the record.

[2] I conclude that it is a red herring whether "injury," as used in MCL 750.122(8)(b), may include psychological injury. However, because the majority chooses to address the issue, I respectfully disagree that the plain language of the statute necessarily compels the conclusion that it is restricted to physical injuries only. Although MCL 750.122 does not define "injure," elsewhere the Legislature has explicitly clarified whether an injury must be physical. For example, MCL 750.411s(8)(e), regarding posting a message through an electronic medium, defines "credible threat" as "a threat to kill another individual or a threat to inflict *physical* injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual." (Emphasis added.) I also note that governments may impose some content-based restrictions on speech if the goal is to avoid a " 'secondary effect[],' of the speech" so long as the restriction is necessary to serve a compelling interest and there is no content-neutral way to achieve the same result. *RAV v City of St Paul, Minnesota*, 505 US 377, 389-390, 394-396; 112 S Ct 2538; 120 L Ed 2d 305 (1992) (citation omitted). The goal of protecting the sanctity of the entire justice system by protecting witnesses is certainly compelling; and injuries to, say, a person's reputation or mental state can be as harmful and effective at intimidation as injuries to a person's body. I am therefore not persuaded that "injury" as used in MCL 750.122(8)(b) *plainly and unambiguously* must be restricted to physical injuries. Furthermore, under MCL 750.2, the "rule of lenity" is inapplicable to statutes found within the Michigan Penal Code, MCL 750.1 *et seq*. See *People v Morris*,

threat to kill or threat to cause property damage. There may be other possibilities, at which I could only guess. The trial court erred, in part, by failing to discuss the question with counsel, and it also erred by failing to recognize that the jury's question simply made no legal sense.

As discussed, it was legally irrelevant whether BP suffered any actual injury. Indeed, it was legally irrelevant whether defendant genuinely intended to cause BP any actual injury. Importantly, defendant's message included numerous statements that implicitly or explicitly threatened physical injury to BP, but nothing that seemingly threatened psychological injury. There was, however, ample testimony that BP did, in fact, sustain psychological injuries. The jury's question should have alerted the trial court and the parties that the jury misapprehended that the touchstone of witness retaliation is the *threat issued*, not the harm sustained. The trial court's response, however, compounded that confusion instead of clarifying it. As discussed, there was more than ample evidence to find defendant guilty of witness retaliation for issuing a "true threat" to BP. Nevertheless, I agree with the majority that the trial court's response to the jury's question created an unacceptable danger that the jury instead convicted defendant on the impermissible basis of BP suffering actual injury, of whatever kind.[3]

In summary, I find nothing improper or unconstitutional about the jury instructions—either as they were given before the jury began deliberations, or as they are written. Rather, I find that the trial court's im-

450 Mich 316, 327; 537 NW2d 842 (1995). I would exercise judicial restraint and refrain from making a pronouncement about a definition that is not germane to the case before us.

[3] Again, psychological injury is a red herring in this appeal.

proper response to the jury's question caused the jury to be, on the whole, improperly instructed. On that more limited basis, I concur with the majority's conclusion that defendant must receive a new trial.

PEOPLE v MEEKER (ON REMAND)

Docket No. 355046. Submitted December 28, 2021, at Lansing. Decided February 17, 2022, at 9:15 a.m.

Thomas E. Meeker was charged in the Jackson Circuit Court with possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), after he experienced medical issues from using the drug, his mother called 911, and he bit one of the first responders on the arm. Defendant initially pleaded guilty to both charges; however, before sentencing, he moved to dismiss the possession count under the "good-samaritan law," MCL 333.7403(3)(a), which provides immunity from prosecution under certain circumstances for a person who needed medical assistance because they were incapacitated from a drug overdose. The trial court heard oral argument, watched a body camera video from the first responders on the day of the incident, and granted defendant's motion. The prosecution appealed. The Court of Appeals, JANSEN, P.J., and RONAYNE KRAUSE and GADOLA, JJ., affirmed the trial court order in a published opinion issued May 6, 2021, and the prosecution applied for leave to appeal in the Supreme Court, which vacated the Court of Appeals opinion and remanded the case for reconsideration. 508 Mich 984 (2021).

On remand, the Court of Appeals *held*:

1. The trial court erred by applying a "good faith" standard when determining whether defendant was entitled to immunity under MCL 333.7403(3)(a). Under MCL 333.7403(1), a person may not knowingly or intentionally possess a controlled substance or controlled substance analogue. However, under certain circumstances, if a person overdoses on a controlled substance, they might not be in violation of the statute under the good-samaritan law, MCL 333.7403(3). Under the unambiguous language of the statute, Subsection (3)(a) applies to the individual who overdosed on a controlled substance, and Subsection (3)(b) applies to a separate individual who seeks medical attention in good faith for the individual who overdosed. The trial court misapplied the statute when it considered whether defendant's mother called for emergency services "in good faith" in determin-

ing whether defendant was "incapacitated" for purposes of Subsection (3)(a) of the law. The test for immunity in Subsection (3)(a) is whether the individual was "incapacitated because of a drug overdose." Although the term "incapacitated" is not defined in the statute or by caselaw, the clear and unambiguous language does not include the "good faith" perspective of the person seeking help as a determining factor. Nevertheless, the trial court reached the right result by allowing defendant to withdraw his plea on the basis of the statute and dismissing the possession-of-methamphetamine charge.

2. A remand for the trial court to apply the correct standard and determine whether defendant was incapacitated under MCL 333.7403(3)(a) was not necessary. The issue was addressed to and fully briefed for the trial court, and the record was sufficient to decide the question. An "incapacitated person" is defined by *Black's Law Dictionary* (11th ed) as "[s]omeone who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible." *Black's* defines "incapacity" as a "[l]ack of physical or mental capabilities," and *Merriam-Webster's Collegiate Dictionary* (11th ed) defines it as "the quality or state of being incapable"; a "lack of physical or intellectual power or of natural or legal qualifications." The record evidence established that defendant was impaired by an intoxicant and rendered unfit for normal functioning. Although defendant was conscious and could follow simple commands, he was unfocused and had been sitting and staring into space all day, he responded to things that others present could not see, and he repeated phrases for no apparent reason. He also called 911 while two police officers were standing over him, got into a physical altercation with the first responders until he was restrained and handcuffed, and could be heard in the patrol car ranting and yelling to himself. The plain language of the statute did not require a person to be unconscious or completely incapacitated to come within its terms. Thus, defendant was "incapacitated" for purposes of the good-samaritan law, and a remand was not necessary to make this determination.

Affirmed.

CRIMINAL LAW – POSSESSION OF CONTROLLED SUBSTANCES – GOOD-SAMARITAN LAW – DEFINITIONS – "INCAPACITATED PERSON."

Under MCL 333.7403(1), a person may not knowingly or intentionally possess a controlled substance or controlled substance analogue; however, under MCL 333.7403(3)(a), an individual is not in violation of MCL 333.7403(1) if they seek medical assistance for

> themselves or require medical assistance and are presented for assistance by another individual if they are incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that they possess or possessed in an amount sufficient only for personal use and the evidence of their violation of MCL 333.7403(1) was obtained as a result of their seeking or being presented for medical assistance; for purposes of MCL 333.7403(3)(a), an incapacitated person is someone who is impaired by an intoxicant to the extent that personal decision-making is impossible; under this provision, a person need not be unconscious or completely incapacitated to be determined "incapacitated," and whether the person attempted to procure medical assistance in good faith is irrelevant to the question whether they were incapacitated.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

State Appellate Defender (by *Maya Menlo*) for defendant.

ON REMAND

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

JANSEN, P.J. The prosecution originally appealed by leave granted[1] the trial court order granting defendant's motion to dismiss the charge of possession of methamphetamine, MCL 333.7403(2)(b)(*i*), and allowing defendant to withdraw his guilty plea. In a published opinion, this Court affirmed the trial court order, having concluded that the record evidence established that defendant was "incapacitated" for purposes

[1] *People v Meeker*, unpublished order of the Court of Appeals, entered November 13, 2020 (Docket No. 355046).

of the "good-samaritan law," MCL 333.7403(3), and therefore, the trial court did not abuse its discretion by permitting defendant to withdraw his plea and dismissing the possession-of-methamphetamine charge. The prosecution applied for leave to appeal in the Michigan Supreme Court, and in lieu of granting leave to appeal, the Supreme Court vacated our previous opinion and remanded to this Court for reconsideration. *People v Meeker*, 508 Mich 984 (2021). The Supreme Court order states:

> The Court of Appeals opinion failed to address the arguments raised by the prosecutor on appeal. On remand, the Court of Appeals shall address and resolve, in addition to any other issues necessary to the resolution of this case: (1) whether the trial court improperly applied a good faith standard when determining that the defendant was entitled to immunity under MCL 333.7403(3)(a); and (2) if so, whether a remand to the trial court is necessary to apply the correct standard and to determine whether the defendant was "incapacitated" under MCL 333.7403(3)(a) in the first instance. [*Id*. at 984.]

On remand from our Supreme Court, we again affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on May 27, 2019, during which defendant was experiencing medical issues as a result of using methamphetamine. Defendant's mother called 911, and law enforcement and first responders arrived. Defendant bit the arm of one first responder while he received treatment. At the time, defendant was in possession of 0.38 grams of methamphetamine for personal use. Defendant was charged with possession of methamphetamine and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), and pleaded guilty to both offenses. However, before sentencing took place, defendant

moved to dismiss the possession count of the felony information under the good-samaritan law, specifically MCL 333.7403(3)(a). The trial court heard oral argument, watched a body camera video from the first responders on the day of the incident, and granted defendant's motion, dismissing the possession count. As noted, this Court affirmed the trial court order, the prosecution applied for leave to appeal in the Supreme Court, and the Supreme Court remanded to this Court for reconsideration, *Meeker*, 508 Mich at 984.

II. STANDARDS OF REVIEW

Questions of statutory interpretation are reviewed de novo on appeal. *People v Rodriguez*, 327 Mich App 573, 576; 935 NW2d 51 (2019). "We review for an abuse of discretion a trial court's ruling on a motion to withdraw a plea." *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). An abuse of discretion occurs when the trial court's outcome falls outside the range of reasonable and principled outcomes. *Id*. A trial court's decision on a motion to dismiss charges is also reviewed for an abuse of discretion. *People v Nicholson*, 297 Mich App 191, 196; 822 NW2d 284 (2012). The trial court's findings of fact are reviewed for clear error. *People v Rydzewski*, 331 Mich App 126, 137; 951 NW2d 356 (2020). A finding of fact is clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that a mistake was made. *People v Anthony*, 327 Mich App 24, 31; 932 NW2d 202 (2019). Issues that are unpreserved are reviewed for plain error affecting substantial rights. *People v Speed*, 331 Mich App 328, 331; 952 NW2d 550 (2020).

III. ANALYSIS

Under MCL 333.7403(1), a person shall not knowingly or intentionally possess a controlled substance or controlled substance analogue. However, under certain circumstances, if a person overdoses on a controlled substance, they might not be in violation of the statute under the good-samaritan law, MCL 333.7403(3). *People v Morrison*, 328 Mich App 647, 650; 939 NW2d 728 (2019). The good-samaritan law provides:

> (3) The following individuals are not in violation of this section:
>
> (a) An individual who seeks medical assistance for himself or herself or who requires medical assistance and is presented for assistance by another individual if he or she is incapacitated because of a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of this section is obtained as a result of the individual's seeking or being presented for medical assistance.
>
> (b) An individual who in good faith attempts to procure medical assistance for another individual or who accompanies another individual who requires medical assistance for a drug overdose or other perceived medical emergency arising from the use of a controlled substance or a controlled substance analogue that he or she possesses or possessed in an amount sufficient only for personal use and the evidence of his or her violation of this section is obtained as a result of the individual's attempting to procure medical assistance for another individual or as a result of the individual's accompanying another individual who requires medical assistance to a health facility or agency. [MCL 333.7403(3).]

As provided in *Morrison*, 328 Mich App at 651:

> When interpreting a statute, a court's goal is to give effect to the Legislature's intent by first looking to the plain language of the statute. If the statutory language is unambiguous, the court must apply the language as written, and further analysis is neither required nor permitted. A court must presume that each word has some meaning and should avoid constructions that render a part of the statute surplusage or nugatory. A court may not look to the statute's purpose or its public-policy objectives unless the statutory language is ambiguous or unclear. When a court looks to public policy without first analyzing the plain language, the court runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language. [Quotation marks and citations omitted.]

Under the unambiguous language of the statute, it is clear that Subsection (3)(a) applies to the individual who overdosed on a controlled substance, and Subsection (3)(b) applies to a separate individual who seeks medical attention for the individual who overdosed. MCL 333.7403(3). Subsection (3)(a) applies to defendant; however, on reconsideration from the Supreme Court we are directed to consider whether the trial court improperly applied a good-faith standard as provided under Subsection (3)(b) when it determined that defendant was entitled to immunity under Subsection (3)(a). *Meeker*, 508 Mich at 984.

At the September 1, 2020 hearing on defendant's motion to withdraw and dismiss his guilty plea for possession of a controlled substance, the parties debated whether defendant was "incapacitated" for purposes of MCL 333.7403(3)(a)—the prosecution arguing that he was not incapacitated; defendant arguing that he was. The trial court asked the prosecution:

> But, from whose point of view do you look at it? Do you look at it from the individual, do they perceive themself [sic] as incapacitated or the person who[] is making the

> phone call based on their observations? And, looking around the room I think we've all been to a party or two where you know somebody has had way too much to drink, they can't function and yet they think they're just fine and yet you're taking their keys and you would not let him go.
>
> * * *
>
> Because if your perception [is] they are on the verge—they're not functioning properly, they're not thinking properly, they're—they've got impairment in their cognitive functioning deciding that they are fine to go ahead and drive. So, when I'm looking at this I'm thinking from [defendant's mother's] perspective when she makes the call.

The trial court then asked whether it was "deciding [the incapacitation issue] from objective evidence after [first responders are] called and they're there to evaluate him or . . . basing it on the individual who is calling," noting that defendant's mother had seen defendant under the influence many times, but found this incident to be unusual enough to call for help.

In providing its decision from the bench, the trial court then stated:

> In making a decision on this matter I'm looking at Black's Law Dictionary, which gives the definition of incapacity. "Any person who is in [sic] impaired by reason or mental illness, mental deficiency, physical illness, or disability, advanced age, chronic use of drugs, chronic intoxication, to the extent he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person who is deemed incapacitated." Now, as pointed out by [the] prosecution[,] the statute in [the prosecutors'] opinion is that the person has to actually be incapacitated. The problem is that that requires the person making a call to have accurately analyzed what they are observing that they are believing isn't causing the person['s] life to be in danger, because of some type of

> incapacity. Here we had the mother calling who by her statements just in the video has seen him high multiple times and when the officers first get there he's somewhat in a not a comatose state but a not very responsive [state] just starring [sic] off in space. She indicates he's been sitting like that all day. In her mind even having seen him or I shouldn't say in her mind, based on what she articulated that she has seen him because she was telling [defendant] you got some bad stuff, you're going to kill yourself if you keep using like you've been using. There were some other comments that she made. I think from her perspective when she makes that call she does so in good faith thinking that he needs help right away and this [is] a mother who has seen her son stoned many times and even tells him you're going to end up dead if you don't quit using the s***. Therefore, I'm going to allow you to withdraw his plea.

The trial court was clearly uncertain as to how it should determine whether defendant was "incapacitated." The court told the prosecution that it would "love" for the issue to be taken up on appeal and wanted "more definition on that incapacity portion." Thus, it does appear that the trial court misapplied the statute when it considered whether defendant's mother called for emergency services "in good faith" in determining whether defendant was "incapacitated" for purposes of Subsection (3)(a) of the good-samaritan law. "[W]hen the Legislature includes language in one part of a statute that it omits in another, it is assumed that the omission was intentional." *People v Lewis*, 503 Mich 162, 165-166; 926 NW2d 796 (2018). Under the clear language of the statute in Subsection (3)(a), the test for immunity is whether the individual was "incapacitated because of a drug overdose," MCL 333.7403(3)(a). Although the term "incapacitated" is not defined in the statute, or by any caselaw, the clear

and unambiguous language does not include the "good faith" perspective of the person seeking help as a determining factor.

This leads us to the second issue the Supreme Court asks us to reconsider—whether a remand is necessary for the trial court to apply the correct standard and determine whether defendant was " 'incapacitated' under MCL 333.7403(3)(a) in the first instance." *Meeker*, 508 Mich at 984.

The prosecution argues that because the trial court never decided the issue of incapacitation, it was not properly before this Court. We disagree. An issue is preserved for appeal if it is addressed to the trial court, irrespective of whether the issue is addressed by the trial court. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Klooster v Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011). In any event, even if the issue had not been preserved, that would not preclude the Court from considering it on appeal. *People v Zitka*, 325 Mich App 38, 48; 922 NW2d 696 (2018).

In this case, the parties fully briefed the issue for the trial court and, as noted, the prosecution argued on appeal that defendant was not incapacitated. As evidenced by this argument, this is not a case in which the record before the trial court was insufficient for it to make a determination regarding incapacitation. See *Morrison*, 328 Mich App at 654-655 (remanding to the trial court where it incorrectly applied the statute and there was insufficient record evidence to determine whether the defendant possessed an amount of drugs "sufficient only for personal use" under MCL 333.7403(3)(a)). There was sufficient evidence in the record to decide the question, and this Court was not precluded from doing so. Therefore, it is not necessary

to remand to the trial court for it to determine in the first instance whether defendant was incapacitated.

Additionally, "[t]his Court will affirm a lower court's ruling when the court reaches the right result, albeit for the wrong reason." *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998). Although the trial court did not specifically state that it found defendant to be incapacitated, it stated that "the charge is dismissed based on the Good Samaritan statute." Only Subsection (3)(a) of the good-samaritan law applies to defendant. However, as noted earlier, there is no caselaw, published or unpublished, construing the term "incapacitated" for purposes of the good-samaritan law. Accordingly, the Court may consult dictionary definitions. *People v Wood*, 506 Mich 114, 122; 954 NW2d 494 (2020). "Incapacitated person" is defined by *Black's Law Dictionary* (11th ed) as "[s]omeone who is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible." "Incapacity" is defined as a "[l]ack of physical or mental capabilities," *id*., and "the quality or state of being incapable"; a "lack of physical or intellectual power or of natural or legal qualifications," *Merriam-Webster's Collegiate Dictionary* (11th ed).

The trial court also relied on *Black's Law Dictionary* for the definition of "incapacity," and it noted that in the body camera video, defendant was not in a "comatose state but a not very responsive [state] just starring [sic] off in space." The record evidence firmly establishes that defendant was impaired by an intoxicant and rendered unfit for normal functioning. The body camera video footage shows that he was conscious and minimally responsive, providing the first responders with his middle name and birth date, and confirming

that 10 dimes made one dollar. He could follow simple commands, and he presented his finger for the first responders to take his pulse and blood oxygen level and his arm for his blood pressure. Defendant was not completely incapacitated in that he was not unconscious; however, the plain language of the statute does not require the individual to be unconscious.

Rather, defendant was incapacitated within the plain meaning of the term and for purposes of Subsection (3)(a). His body language was consistent with someone under the influence of a controlled substance. He was unfocused and stared into space, with wide eyes, his gaze often wandering. He acted as though he saw things unseen by the other people on the porch. He talked to himself, and repeatedly said, "I found it," for no reason. Defendant called 911 while two police officers were standing over him. His mother reported that he had been sitting and staring all day. Defendant and his mother indicated that defendant used "bad meth" or other substances, and everyone except defendant thought that he needed to go to the hospital. When defendant's mother produced drugs and showed them to the first responders, defendant panicked and lunged for the drugs. He then got into a physical altercation with the first responders, biting one, until he was restrained and handcuffed. After he was put in a patrol car, he is heard on the video ranting and yelling to himself.

Thus, a remand is not necessary, defendant was "incapacitated" for purposes of the good-samaritan statute, and the trial court properly permitted

defendant to withdraw his plea and dismissed the possession-of-methamphetamine charge.

Affirmed.

RONAYNE KRAUSE and GADOLA, JJ., concurred with JANSEN, P.J.

WIESNER v WASHTENAW COUNTY COMMUNITY MENTAL HEALTH

Docket No. 355523. Submitted February 9, 2022, at Lansing. Decided February 17, 2022, at 9:20 a.m.

Washtenaw County Community Mental Health appealed in the Washtenaw Circuit Court the decision of an administrative law judge (ALJ) reversing its denial of Kevin Wiesner's request for additional Medicaid funding to achieve his Individualized Plan of Service (IPOS). Petitioner's guardian requested a state fair hearing before an ALJ to appeal respondent's denial. The ALJ concluded that petitioner had shown that respondent's denial was improper because his current funding level was not sufficient to meet the goals of his IPOS. Respondent appealed the ALJ's decision in the circuit court. Petitioner moved for summary disposition and to dismiss, arguing that the circuit court lacked jurisdiction because respondent did not have a right to appeal the decision of the ALJ. The circuit court, Timothy P. Connors, J., denied petitioner's motions, reversed the ALJ's decision, and vacated the ALJ's order. Petitioner appealed.

The Court of Appeals *held*:

1. In order to obtain federal funds for state Medicaid programs, states must provide an opportunity for a fair hearing before the state agency that administers the state's Medicaid program to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness. The Michigan Department of Health and Human Services (MDHHS) is the state agency that administers the Medicaid program in Michigan, and respondent is a community mental health service program that contracts with the MDHHS to provide Medicaid-covered services to participants in respondent's service area. The MDHHS appointed the Michigan Office of Administrative Hearing and Rules (MOAHR) to perform the fair hearings related to Medicaid claims that the MDHHS is required under federal law to provide to Medicaid beneficiaries who receive adverse benefit determinations. However, federal law does not similarly provide agencies, such as respondent, with a right to appeal a fair-hearing decision favorable to a Medicaid beneficiary.

Rather, when a claimant receives a favorable decision, the federal scheme requires immediate corrective action. Respondent claimed that it had the right to appeal the ALJ's decision because it was not "the state" under federal law pursuant to a federal circuit court decision holding that the public managed-care organization that subcontracts with and has oversight over respondent was not an "arm of the state" and therefore was not entitled to immunity under the Eleventh Amendment. Respondent further argued that it was not an arm of the state because its contract with the MDHHS provided that it "shall not" be deemed to be an agent of the state. However, whether respondent is an "arm of the state" for purposes of immunity under the Eleventh Amendment had no bearing on whether respondent stood in the shoes of the MDHHS for purposes of providing or denying Medicaid benefits to beneficiaries.

2. Petitioner argued that because respondent was the local agency through which the MDHHS provided Medicaid benefits and the ALJ's decision was the MDHHS's "final determination" pursuant to agency policy, respondent was bound by the ALJ's decision because the MDHHS could not appeal its own decision. According to respondent, however, the ALJ was a part of the MOAHR, not the MDHHS, so the ALJ's decision was not the decision of the MDHHS. The ALJ was part of the MOAHR, which is an independent agency separate from the MDHHS, but although the MDHHS can authorize ALJs from the MOAHR to perform fair hearings, the MDHHS retained its responsibility to administer the Medicaid program in accordance with state and federal guidelines. The MDHHS also retained final authority to change or modify a particular decision of an ALJ, although its review was limited to conclusions of law. Therefore, the ALJ's decision and order was the MDHHS's final determination of petitioner's request for an increase in his funding. Respondent was bound by the decision of the ALJ because it contracted with the MDHHS to provide Medicaid services to eligible beneficiaries in its service area and appeared to provide the only avenue for participation in the Medicaid programs in which petitioner was engaged. Therefore, because Medicaid programs were the responsibility of the MDHHS, when the MDHHS issued a final decision involving Medicaid beneficiaries in one of its programs, respondent was bound by that decision and could not appeal it.

3. According to respondent, it had a right to appeal the ALJ's decision under Const 1963, art 6, § 28, which provides that final decisions of an administrative officer or agency shall be subject to direct review by the courts "as provided by law." This provision

does not support respondent's argument. "As provided by law" contemplates that the Legislature provides the manner in which judicial review occurs. The Legislature has provided Medicaid applicants and beneficiaries with a right to direct review by the circuit courts of adverse determinations issued by an ALJ on behalf of the MDHHS following a fair hearing. For instance, MCL 400.109c(8) and MCL 400.37 both expressly provide that a Medicaid applicant or beneficiary may appeal a decision by the MDHHS in the circuit court. But neither statute expressly provides a right of appeal to Medicaid entities like respondent. Although the statutes do not preclude such rights, the fact that the Legislature specifically addressed appeals by an aggrieved Medicaid applicant or beneficiary but did not address appeals by an allegedly aggrieved Medicaid entity indicated that such entities lack the right to appeal. Similarly, respondent argued that MCL 600.631 and MCL 24.301 provided agencies with a right to judicial review of an agency's final decision. MCL 600.631, which provides generally for a right to appeal an order or decision of an agency, did not support respondent's argument because other statutes and administrative codes have specifically provided Medicaid applicants and beneficiaries a right of judicial review of an ALJ decision involving Medicaid benefits. Under MCL 24.301, when a "person" has exhausted all administrative remedies and is aggrieved by a final decision or order in a contested case, the decision or order is subject to direct review by the courts. However, even assuming that respondent is a "person" under the statute, it did not have a right to appeal the ALJ's decision in favor of petitioner. The statute provides that a decision or order is subject to direct review "as provided by law," and as discussed, the Legislature expressed an intent to provide a right to judicial review to the aggrieved Medicaid applicant or beneficiary but remained silent regarding appeals by an allegedly aggrieved Medicaid entity like respondent.

Circuit court order reversed and decision and order of the ALJ reinstated.

1. SOCIAL SERVICES – MEDICAID – ADVERSE BENEFIT DETERMINATIONS – RIGHT OF AGENCY TO APPEAL.

MCL 400.109c(8) and MCL 400.37 provide Medicaid beneficiaries and applicants with a right to direct judicial review of adverse benefit determinations issued by an administrative law judge (ALJ) on behalf of the Michigan Department of Health and Human Services (MDHHS), which administers the state Medicaid program; neither statute provides a right of appeal to Medicaid entities acting on behalf of the MDHHS to provide Medicaid

services to beneficiaries; the fact that the Legislature specifically addressed appeals by an aggrieved Medicaid applicant or beneficiary but did not address appeals by an allegedly aggrieved Medicaid entity indicates that such entities lack the right to appeal an ALJ's determination that is favorable to an applicant or beneficiary.

2. SOCIAL SERVICES – MEDICAID – MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES – LOCAL MEDICAID ENTITIES – BENEFIT DECISIONS OF AN ADMINISTRATIVE LAW JUDGE.

The Michigan Department of Health and Human Services (MDHHS) authorizes administrative law judges (ALJs) from the Michigan Office of Administrative Hearings and Rules to perform fair hearings when requested by a Medicaid applicant or beneficiary; although the MDHHS retains final authority to change or modify a decision of an ALJ, its review is limited to conclusions of law; therefore, the MDHHS is bound by an ALJ's decision, and a local entity that acts on behalf of the MDHHS to provide Medicaid services in its service area is also bound by the decision of the ALJ and may not appeal it.

Legal Services of South Central Michigan (by *Nicholas A. Gable*) and National Center for Law and Economic Justice (by *Edward P. Krugman*) for petitioner.

Stefani A. Carter PLLC (by *Stefani A. Carter*) for respondent.

Amicus Curiae:

Abigail K. Coursolle for the National Health Law Program.

Before: CAVANAGH, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM. Petitioner, Kevin Wiesner, appeals by leave granted[1] the circuit court's amended order vacating the decision and order of an administrative law

[1] *Wiesner v Washtenaw Co Community Mental Health*, unpublished order of the Court of Appeals, entered March 26, 2021 (Docket No. 355523).

judge (ALJ) from the Michigan Office of Administrative Hearings and Rules (MOAHR). Respondent, Washtenaw County Community Mental Health, denied petitioner's request for additional funding that petitioner claimed was necessary to achieve his Individualized Plan of Service (IPOS) and subsequently issued a Notice of Adverse Benefits Determination. The ALJ reversed that decision and ordered respondent to reassess petitioner and to authorize sufficient funding to meet all the goals in his IPOS. Respondent appealed in the circuit court, and the circuit court vacated the ALJ's decision and order, concluding that it exceeded the ALJ's scope of authority. Because respondent had no right to appeal the ALJ's decision in the circuit court, we reverse both the circuit court's order vacating the ALJ's decision and order and the circuit court's order denying petitioner's motion for summary disposition premised on the claim that respondent had no right to appeal. The decision and order of the ALJ are reinstated.

I. PERTINENT FACTS AND PROCEEDINGS

The Medicaid program is "generally a need-based assistance program for medical care that is funded and administered jointly by the federal government and individual states." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019). To receive federal Medicaid funds, states must develop a plan consistent with federal requirements. 42 USC 1396-1. Each state must designate "a single State agency to administer or to supervise the administration of the plan[.]" 42 USC 1396a(a)(5); see also 42 CFR 431.10(b)(1) (2019). The Michigan Department of Health and Human Services (MDHHS) is the single state agency responsible for administering Michigan's Medicaid program.

The MDHHS "contracts with regional prepaid inpatient health plans ('PIHPs'), which are public managed care organizations that receive funding and arrange and pay for Medicaid services." *Waskul v Washtenaw Co Community Mental Health*, 979 F3d 426, 436 (CA 6, 2020), citing 42 USC 1396u-2(a)(1)(B); MCL 400.109f. The MDHHS "has supervisory and policymaking authority over the PIHPs and must ensure that PIHPs retain oversight and accountability over any subcontractors. PIHPs subcontract with community organizations that provide or arrange for mental health services for recipients . . . ." *Waskul*, 979 F3d at 436-437. Respondent subcontracts with the PIHP responsible for southeast Michigan, Community Mental Health Partnership of Southeast Michigan, which also has authority over community mental health agencies in Lenawee, Livingston, and Monroe Counties.

Michigan offers funding and support to qualifying individuals with disabilities to help them live independently in their home communities instead of in institutionalized care facilities. *Waskul*, 979 F3d at 435-436. This program is called Community Living Support (CLS) and is authorized by a Medicaid waiver from the federal government called the Habilitation Supports Waiver (HSW). *Id*. The CLS program furthers participants' "self-determination by allowing them to structure their own support services based on their medical needs." *Id*. at 436. The HSW is financed through "capitation procedures," which "means that the federal government provides [PIHPs] . . . with a fixed amount of funding for each person participating in the CLS program, regardless of how many services the entity ultimately provides to the recipient. The PIHP then determines how to allocate these funds to recipients." *Id*. at 437.

Individuals who choose to receive CLS services go through a "person-centered planning process," which results in an IPOS and a corresponding budget for CLS services. *Id*. "The IPOS describes the services that have been deemed 'medically necessary' for each recipient based on criteria defined in Michigan's Medicaid Provider Manual." *Id*. (citation omitted). The budget ostensibly reflects the costs of the services and supports necessary to implement the IPOS. *Id*. "The individual then enters a 'self-determination arrangement' with their local community mental health service program." *Id*. (citation omitted). Under a self-determination arrangement, individuals decide how to spend their budget to meet their IPOS goals. *Id*. at 437-438. The individual is responsible for "hiring, scheduling, and paying staff, as well as selecting, arranging, and paying for services, supports, and treatments listed in the IPOS. A fiscal intermediary actually holds the funds and pays bills directed to them." *Id*. at 438. "Budgets for CLS services are calculated by multiplying how many hours of services a participant's IPOS calls for by a specific rate." *Id*.

Petitioner is a severely challenged Medicaid recipient who receives CLS services under a self-determination agreement. In March 2019, petitioner's mother and guardian asked petitioner's supports coordinator at respondent for additional funds to hire higher-skilled staff and pay them $15 an hour. Respondent denied the request on the basis that there had been no change in petitioner's condition or behavior since his most recent CLS budget had been set, and therefore, the increased funds were not medically necessary. Respondent affirmed its denial in an internal review. Subsequently, petitioner's guardian requested a state fair hearing.

The ALJ presiding over the hearing concluded that petitioner had proved by a preponderance of the evidence that respondent's denial had been improper and that the current CLS authorization was insufficient to meet the goals of petitioner's IPOS. The ALJ acknowledged that it had "no authority to order [respondent] to pay Petitioner a specific CLS rate, or to increase the CLS rate, but rather can only determine whether the CLS authorization (determined by rate or by hours) is sufficient to meet the goals in Petitioner's IPOS." The ALJ reiterated that the budget was not sufficient. Acknowledging respondent's argument that the current rate was sufficient because there had been no change in petitioner's condition, the ALJ stated that it was "apparent from the extensive record in this matter, including past appeals, that Petitioner's CLS authorization [had] been insufficient for some time, at least since 2015. In other words, if the past authorization was insufficient, [respondent] cannot argue seriously that the current authorization is sufficient because there has been no change in Petitioner's condition."

Respondent appealed the ALJ's decision and order in the circuit court. In a motion for summary disposition brought under MCR 2.116(C)(4) and a motion to dismiss brought under MCR 7.211(C)(2)(a), petitioner argued that the circuit court did not have jurisdiction because respondent did not have a right to appeal. The circuit court denied petitioner's motions and eventually reversed the ALJ's decision and order on the basis that "it [was] beyond the scope of authority of an administrative law judge . . . to rewrite [petitioner's CLS] budget . . . ." Thereafter, an amended order was entered vacating the decision and order of the ALJ and closing the case; this appeal followed.

II. DISCUSSION

Petitioner argues that respondent did not have the right to appeal petitioner's favorable fair-hearing decision in the circuit court. We agree.

We review de novo a circuit court's decision on a motion for summary disposition. *Dextrom v Wexford Co*, 287 Mich App 406, 416; 789 NW2d 211 (2010). To the extent that resolution of this issue involves statutory interpretation, we review de novo whether the circuit court properly interpreted and applied the relevant statutes. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016). 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).

To receive federal Medicaid funds, states must develop a plan consistent with federal requirements. 42 USC 1396-1. Among the requirements for obtaining federal funds for state Medicaid programs is that states must provide "an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness[.]" 42 USC 1396a(a)(3); see also 42 CFR 431.205(b)(1) (2019). As noted, the single state agency responsible for administering the Medicaid program in Michigan is the MDHHS. See 42 USC 1396a(a)(5); 42 CFR 431.10(b)(1) (2019); *Waskul*, 979 F3d at 436. The MDHHS contracts with 10 PIHPs and numerous local community mental health service programs (CMHSPs) to dispense Medicaid benefits. Respondent is a CMHSP under contract with the MDHHS to provide Medicaid-covered services to people who reside in respondent's service area. See *id*. at 436-437.

Under the authority of MCL 400.9(1), the MDHHS appointed the MOAHR to perform the fair hearings related to Medicaid claims. Specifically, the MDHHS "Director has appointed the ALJs of MOAHR for [MDHHS] the authority to hear and issue final decisions in contested cases requested by individual residents, patients, consumers, or beneficiaries." MOAHR, Benefit Services Division, *Administrative Hearing Pamphlet* (2019), § 120, p 1, available at <https://perma.cc/6S6C-XEY7>. Statutes, regulations, and rules relevant to the Medicaid fair hearing in the present case are found in 42 CFR 438.400 through 438.424 (2019) (rules governing appeals from adverse benefit determinations of, among others, managed-care organizations and PIHPs); MCL 24.271 through MCL 24.288 and MCL 24.301 of Michigan's Administrative Procedures Act (APA), MCL 24.201 *et seq*.; and Mich Admin Code, R 792.11001 through R 792.11018. Additional guidance is available in the *State Medicaid Manual*,[2] published by the federal administrator of the Medicaid program, the Centers for Medicare & Medicaid Services, to help states in administering their Medicaid programs,[3] and the MOAHR's *Administrative Hearing Pamphlet*. The relevant provisions in each of these sources are those addressing posthearing procedures.

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[2] Available at <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927> [https://perma.cc/85A3-CUD3].

[3] Our Supreme Court explained in *Hegadorn*, 503 Mich at 249 n 11:

> The manual is not a product of formal rulemaking and does not have the force of law. *Hobbs ex rel Hobbs v Zenderman*, 579 F3d 1171, 1186 n 10 (CA 10, 2009). However, federal courts generally consider the manual to be strong persuasive authority to the extent that it is consistent with the purpose and text of federal statutes. *Id*.; *Hughes v McCarthy*, 734 F3d 473, 478 (CA 6, 2013).

The federal scheme does not provide agencies similarly situated to respondent a right to appeal a fair-hearing decision favorable to a Medicaid beneficiary. Rather, when a fair hearing results in a decision favorable to the Medicaid applicant or beneficiary, the federal scheme requires immediate corrective action. That is, 42 CFR 438.424(a) (2019) provides that if the state fair-hearing officer reversed a managed-care organization's or PIHP's decision to deny, limit, or delay services that were not furnished while the appeal was pending, that entity "must authorize or provide the disputed services promptly and as expeditiously as the enrollee's health condition requires but no later than 72 hours from the date it receives notice reversing the determination." This is consistent with 42 CFR 431.246 (2019), which provides that after fair hearings that do not involve managed-care organizations or PIHPs, if the hearing decision is favorable to the applicant or beneficiary, "[t]he agency must promptly make corrective payments, retroactive to the date an incorrect action was taken . . . ." Likewise, the *State Medicaid Manual* advises that "[t]he hearing authority's decision is binding upon the State and Local agencies." *State Medicaid Manual*, § 2903.3(A), p 2-393.

In support of its claim of right to appeal the ALJ's decision, respondent does not address federal statutes or federal guidance. Instead, respondent notes that petitioner argued that respondent does not have the right to appeal "because for purposes of Medicaid fair hearings, local agencies such as [respondent] *are* the state," but argues contrarily that respondent may appeal because it is not the "state" under federal law. To support its position, respondent relies on the United States Court of Appeals for the Sixth Circuit's determination in *Waskul*, 979 F3d at 443-444, that respon-

dent's regional PIHP was not entitled to immunity under the Eleventh Amendment because it was not an arm of the state. As additional evidence that it is not the state or an arm of the state, respondent notes that its contract with the MDHHS describes the relationship between the MDHHS and the CMHSP as "client and independent contractor" and further states that "[n]o agent, employee, or servant or the CMHSP or any of its subcontractors shall be deemed to be an employee, agent or servant of the state for any reason."

Whether respondent is an "arm of the state" for purposes of immunity under the Eleventh Amendment or whether the relationship between the MDHHS and respondent is that of client and independent contractor has no bearing on whether respondent stands in the shoes of the MDHHS for purposes of providing or denying Medicaid benefits to enrollees. Regarding respondent's relationship to the MDHHS, an independent contractor can be an agent. Restatement of Agency, 2d, § 14N (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."). Moreover, the latter part of the contract provision, stating that the CMHSP (i.e., respondent) is not "an employee, agent or servant of the state for any reason," appears to be an attempt to limit the state's liability for torts committed during the performance of Medicaid services.[4] Respondent stands in the shoes of the MDHHS for purposes of providing Medicaid services in its service area, regardless of whether its arguments that it is not an "arm of the state" under federal law have merit.

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[4] The rest of the contract provision states: "The CMHSP will be solely and entirely responsible for its acts and the acts of its agents, employees, servants, and sub-contractors during the performance of a contract resulting from this contract."

Petitioner asserts that respondent does not have a right of appeal because the ALJ's decision was the MDHHS's "final administrative action" on petitioner's request. The MOAHR states in its *Administrative Hearing Pamphlet*, § 920, p 34, that the decision of an ALJ for the MDHHS involving Medicaid beneficiaries "is the final determination of [M]DHHS." As already indicated, the *State Medicaid Manual* advises at § 2903.3(A) that "[t]he hearing authority's decision is binding upon the State and Local agencies." Petitioner argues that, because the MDHHS is the single state agency responsible for the administration of the Medicaid program, and because the decision from the ALJ was the MDHHS's "final determination" concerning petitioner's request, neither the MDHHS nor respondent, the local agency through which the MDHHS provides Medicaid benefits, can appeal. In other words, the MDHHS cannot appeal its own decision, and respondent is bound by the MDHHS's decision regarding Medicaid beneficiaries in an MDHHS program.

Contrariwise, respondent argues that the ALJ's decision and order is not a decision of the MDHHS because the MOAHR is an independent agency within the Department of Licensing and Regulatory Affairs (LARA) and performs its duties independently of LARA. Because the ALJ was part of the MOAHR, and the MOAHR is an independent agency, the ALJ's decision was not the MDHHS's decision. Respondent's argument is unpersuasive.

It is true that the ALJ is part of the MOAHR, and the MOAHR is an independent agency located within LARA. Nevertheless, although the MDHHS can authorize ALJs of the MOAHR to perform fair hearings, the MDHHS retains its responsibility to administer the Medicaid program in accordance with state and federal

guidelines. As set forth in *State Plan Amendment 16-0120*,[5] the agreement the MDHHS has with LARA is that LARA is responsible for providing administrative hearings, but the MDHHS and LARA "jointly conduct operations to the extent necessary to assure MDHHS control over Medicaid decisions and fair hearings." *Id*. at 15. The ALJs for the MDHHS are neutral decision-makers; in routine matters such as this one, their decisions are the final decisions of the MDHHS. The MDHHS retains final authority to change or modify a particular decision of an ALJ, but such review is limited to conclusions of law. See *id*.; see also MCL 400.9. For these reasons, the January 6, 2020 decision and order of the ALJ, which he signed as "Administrative Law Judge for Robert Gordon, Director, Department of Health and Human Services," was the MDHHS's final determination of petitioner's request for an increase in his CLS funds.

Moreover, respondent was bound by the decision because the MDHHS bears sole responsibility for administering Michigan's Medicaid program, and it fulfills this responsibility by contracting with CMHSPs, such as respondent, which execute the Medicaid program in their service areas. Respondent provides the Medicaid services and supports available under the MDHHS programs to eligible enrollees who live in respondent's service area, and it appears to provide the only avenue for participation in the particular Medicaid programs in which petitioner is engaged. Medicaid programs are the responsibility of the MDHHS, as the single state agency, and therefore, when the MDHHS

[5] Centers for Medicare & Medicaid Services, *State Plan Amendment 16-0120* (April 1, 2016), available to download at <https://www.michigan.gov/mdhhs/inside-mdhhs/budgetfinance/264/state-plan-amendments> [https://perma.cc/7GSX-ACSX].

issues a final decision involving Medicaid beneficiaries in one of its programs, respondent is bound by that decision and may not appeal it.

Respondent contends that numerous authorities support its right to an appeal. Respondent first asserts that its right to appeal is guaranteed by Michigan's Constitution, Const 1963, art 6, § 28, which provides in relevant part that "[a]ll final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law." This provision is of little help to respondent. " '[A]s provided by law' contemplates that the Legislature will provide the manner in which judicial review shall occur." *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 94; 803 NW2d 674 (2011). As discussed in the following paragraphs, the Legislature has provided Medicaid applicants or beneficiaries a right to direct review by the circuit court of adverse decisions issued by an ALJ for the MDHHS after a fair hearing. Further, it was the MDHHS's obligation toward petitioner as a Medicaid beneficiary that was at stake in the hearing, not any "private rights" that respondent might have. Const 1963, art 6, § 28 does not support respondent's assertion of a right of appeal.

Respondent next asserts that it has a right to appeal because the ALJ's decision and order included a "Notice of Appeal" stating that "[a] party may appeal this Order in circuit court within 30 days of the receipt date." MCL 24.205(h) defines "party" as "a person or agency named, admitted, or properly seeking and

entitled of right to be admitted, as a party in a contested case."[6] The ALJ's notice at the end of the decision is curious and contradictory to provisions in the administrative code that provide judicial review only to Medicaid applicants or beneficiaries. And we will not conclude that information regarding the options for subsequent review tacked on to the end of a hearing decision outweigh the constitutional, statutory, and administrative authorities that limit judicial review to Medicaid applicants or beneficiaries.

Respondent further asserts that its right to judicial review is supported by Mich Admin Code, R 792.11017, which provides:

> Decisions are appealable to the circuit court in the following manner:
>
> (a) Public assistance decisions are appealable to the circuit court within 30 days of receipt of the decision as to matters of law pursuant to the social welfare act, 1939 PA 280, 400.1 to 400.122.
>
> (b) Other decisions are appealable as provided by applicable governing statute.

Relevant to the instant case, MCL 400.109c(8) states:

> An eligible person who is receiving home- or community-based services under this section,[7] and who is dissatisfied with a change in his or her plan of care or a denial of any home- or community-based service, may demand a hearing as provided in [MCL 400.9], and subsequently may appeal the hearing decision to circuit court as provided in [MCL 400.37].

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[6] The Notice of Appeal also stated: "A party may request a rehearing or reconsideration of this Order . . . ."

[7] Petitioner receives services under the HSW, which is a home- and community-based program.

MCL 400.9 requires the director of the MDHHS to promulgate rules for fair hearings and authorizes the director to appoint a hearing authority to perform such hearings; it does not address how the parties to the fair hearing may proceed after a decision is issued. MCL 400.37 provides that an applicant or recipient for assistance whose application for assistance is disallowed or who is dissatisfied with the amount of assistance received or to be received may demand a hearing as provided for in MCL 400.9 or MCL 400.65. If the applicant or recipient is unsatisfied with the result of the hearing, he or she "may appeal to the circuit court of the county in which he resides, which court shall have power to review questions of law involved in any final decision or determination of the state department." MCL 400.37. MCL 400.65 requires county social service boards to "prescribe rules and regulations for the conduct of hearings within the county department, and provide adequate procedure for a fair hearing of appeals and complaints by any applicant for or recipient of aid, relief, or assistance under the jurisdiction of the board."

MCL 400.109c(8) and MCL 400.37 expressly provide that a Medicaid applicant or beneficiary may appeal a decision by the MDHHS to the circuit court. Yet neither statute expressly provides a right of appeal to Medicaid entities such as respondent. In fairness, neither statute expressly precludes such a right. However, given that the Legislature specifically addressed appeals by an aggrieved Medicaid applicant or beneficiary but remained silent regarding appeals by an allegedly aggrieved Medicaid entity is an indication that the latter is without rights of appeal.

Respondent also relies on MCL 600.631, which provides 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.

This statute is of no help to respondent because, as already indicated, statutes, administrative codes, and the APA have specifically provided Medicaid applicants and beneficiaries a right of judicial review of an ALJ's decision in a case involving Medicaid benefits. See MCL 400.109c(8); MCL 400.37; Mich Admin Code, R 792.11017. Therefore, to the extent that there is a conflict between these statutes and MCL 600.631, the more specific provisions prevail over the more general provision. *Ter Beek v City of Wyoming*, 495 Mich 1, 22; 846 NW2d 531 (2014).

Finally, respondent contends that MCL 24.301 of the APA provides for judicial review of an agency's final decision in contested cases as follows:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law.

The parties agree that this is a contested case.[8] They disagree, however, on whether respondent is a "person"

[8] A "contested case" is "a proceeding, including rate-making, price-fixing, and licensing, in which a determination of the legal rights, duties, or privileges of a named party is required by law to be made by an

for purposes of MCL 24.301. The APA uses "person" to mean "an individual, partnership, association, corporation, limited liability company, limited liability partnership, governmental subdivision, or public or private organization of any kind other than the agency engaged in the particular processing of a rule, declaratory ruling, or contested case." MCL 24.205(i). Petitioner argues that respondent is not a "person" as defined by the APA because, for purposes of the fair hearing, "[respondent] *is* 'the State.' " As already discussed, respondent relies on the Sixth Circuit's determination in *Waskul*, 979 F3d at 443-444, that respondent's regional PIHP was not an arm of the state to argue that respondent is not the state or an arm of the state. Respondent seems to imply that because it is not an arm of the state, and given the aforementioned provisions in its contract, respondent is a "person" for purposes of MCL 24.301. For reasons already stated, respondent's arguments are unpersuasive.

Equally unpersuasive is petitioner's argument that respondent is not a "person" as defined by the APA because respondent is the "agency" whose " 'particular processing' of [petitioner's] request for a rate increase" was challenged in the fair hearing. However, respondent is not an agency for purposes of MCL 24.205. The APA defines "agency" to mean "a state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203(2); see also Mich Admin Code, R 792.10103(e). Respondent is a component of the Washtenaw County government. It is the county agency that contracts with the MDHHS to provide Medicaid benefits to eligible enrollees in its

agency after an opportunity for an evidentiary hearing." MCL 24.203(3); see also Mich Admin Code, R 792.10103(g).

service area, but it is not an "agency" as defined by the APA and the administrative code.

However, even assuming for the sake of argument that respondent is a "person" for purposes of MCL 24.301, we still cannot conclude that the statute supports that respondent had a right to appeal the ALJ's decision in favor of petitioner. MCL 24.301 states that when a "person" has exhausted all administrative remedies, yet remains "aggrieved by a final decision or order in a contested case," that decision or order is "subject to direct review by the courts *as provided by law*." (Emphasis added.) As we have already pointed out, those statutes that address a right to judicial review of an administrative decision in the Medicaid context reflect the Legislature's intent to provide a right to review to the Medicaid applicant or beneficiary, but have remained silent with regard to agencies such as respondent. Given that the Legislature, in drafting various statutes, specifically addressed appeals by an aggrieved Medicaid applicant or beneficiary, while remaining silent regarding appeals by an allegedly aggrieved Medicaid entity like respondent, we conclude that the statutes reflect the Legislature's intent that the latter have no right of appeal.

In light of our resolution of this dispositive issue, we need not consider petitioner's other issues on appeal.

Because respondent had no right to appeal the ALJ's decision in the circuit court, we reverse both the circuit court's order vacating the ALJ's decision and order and the circuit court's order denying petitioner's motion for summary disposition. The ALJ's decision and order are reinstated.

Reversed. The decision and order of the ALJ are reinstated.

CAVANAGH, P.J., and JANSEN and RIORDAN, JJ., concurred.

CITY OF HIGHLAND PARK v STATE LAND BANK AUTHORITY

Docket No. 355948. Submitted February 8, 2022, at Lansing. Decided February 17, 2022, at 9:25 a.m.

The city of Highland Park brought an action in the Court of Claims against the State Land Bank Authority, alleging that it had failed to pay for drainage and stormwater runoff treatment services as required by city ordinance on several hundred parcels it owned within plaintiff's city limits. Defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10), arguing that it was entitled to partial summary disposition because it had become a landowner of all but five of the subject properties involuntarily through tax reversion and foreclosure under the Land Bank Fast Track Act (LBFTA), MCL 124.751 *et seq*., and was not subject to plaintiff's charges because, under MCL 124.764(4), it retained the governmental immunity available to the foreclosing entities, namely the state of Michigan and the Wayne County Treasurer. Defendant further argued that it was entitled to summary disposition of the claims that arose before October 13, 2016, because plaintiff failed to file a timely notice of intent. Plaintiff also moved for summary disposition under MCR 2.116(C)(10), arguing that it was required by law to charge for water treatment services, that its drainage and stormwater charges were presumptively reasonable, and that its charges were not an unconstitutional tax. The Court of Claims, CHRISTOPHER M. MURRAY, J., denied defendant's motion insofar as it was predicated on governmental immunity, granted defendant's motion in relation to the portion of plaintiff's claim that was time-barred, and granted plaintiff's motion for summary disposition. Defendant claimed an appeal of the part of the court's order denying its claim of governmental immunity.

The Court of Appeals *held*:

1. Defendant's arguments did not concern the application of governmental immunity and were therefore outside of the scope of defendant's appeal by right. The Court of Appeals has jurisdiction over appeals from a final judgment or final order of the Court of Claims as defined in MCR 7.202(6). MCR 7.202(6)(a)(*v*) provides that an order denying a motion for summary disposition

based on a claim of governmental immunity is a final order. And MCL 124.764(4) provides that, after an involuntary transfer of a tax-reverted property, a land bank is deemed to have assumed any governmental immunity or other legal defenses available to the foreclosing entity. However, governmental immunity pertains to statutory immunity from tort liability, and plaintiff's claim for unpaid charges for drainage and stormwater services sounded either in contract or quasi-contract. Under either characterization, governmental immunity would not bar plaintiff's claim. The opinion and order of the Court of Claims was not otherwise a final order as defined by MCR 7.202(6), and defendant did not file an application for leave to appeal under MCR 7.205. The Court of Appeals exercised its discretion to decide the matter as on leave granted.

2. The Court of Claims properly ruled that *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380 (2014), was inapplicable to plaintiff's charges for the provision of utility services. *Harbor Watch* held that the defendant county treasurer was prohibited by statute from paying condominium assessments from proceeds of the sales of tax-reverted properties and that the county treasurer lacked the legal authority to enter into an agreement to pay such assessments. In this case, the charges at issue involved the provision of utility services rather than condominium assessments, and unlike the defendant in *Harbor Watch*, defendant was not statutorily barred from paying plaintiff's charges. Defendant's reading of *Harbor Watch* as holding that the defendant could not be held liable for assessments when it was performing a statutory obligation would improperly narrow the decision to that conclusory statement, which was unsupported by antecedent legal analysis. Defendant's assertion that it should prevail under the theory raised in *Harbor Watch* that a foreclosing governmental unit could not be forced to commit an ultra vires act was unsupported and thus abandoned. Further, the unpublished opinion from the federal district court on which defendant relied to support its contention that its status as an involuntary landowner shielded it from plaintiff's charges under *Harbor Watch* offered little persuasive guidance because that court did not undertake a detailed analysis of *Harbor Watch*, having held it inapplicable to the defendant's duty to disclose information under the relevant ordinance. Finally, requiring defendant to pay plaintiff's charges was consistent with the text of, and did not thwart the purposes of, the LBFTA. Defendant's broad discretion under the LBFTA was not analogous to the statutory restriction on spending at issue in *Harbor Watch*, and its statutory discretion included the legal authority to enter into

an agreement to pay for utility services. For these reasons, defendant could not assert that it was being forced to commit an ultra vires act.

3. The Court of Claims did not err by ruling that plaintiff was barred from providing free services for stormwater charges to public corporations, that defendant was a public corporation under the RBA, that plaintiff treated stormwater runoff generated by defendant's properties, and that defendant benefited from that service. Under MCL 141.118(1), a provision of the Revenue Bond Act (RBA), MCL 141.101 *et seq*., public corporations generally may not receive a free service, and the RBA defines "public corporation" under MCL 141.103(a) to include entities that exist for the benefit of the public and are devoted to a public purpose. Defendant's assertion that the court disregarded defendant's immunity as an involuntary landowner under the LBFTA was based on defendant's interpretation of *Harbor Watch*, which the court correctly rejected, and defendant did not identify any other source of immunity from, or defense to, plaintiff's charges. Defendant's argument that foreclosing governmental units are not considered public corporations was not supported by the applicable statutory language. And defendant did not analyze the text of the statutes, or otherwise provide any rationale, to support its apparent position that a "treasurer of a county" acting on behalf of the county is not included within the definition of "county" or that an authority created by the Legislature does not fall within the meaning of "the state." Defendant's argument that requiring a county treasurer to pay drainage and stormwater charges for tax-reverted properties would be an ultra vires act because of the restrictions imposed by the GPTA was unsupported by authority and thus abandoned. Further, contrary to defendant's argument, the Court of Claims did not create an unnecessary conflict between the LBFTA and the RBA by ruling that plaintiff was barred from providing free drainage and stormwater services to defendant. Defendant asserted that, if both statutes address defendant's liability to pay for local charges, then the immunity conferred by MCL 124.764(4) created an exemption to the prohibition of municipalities' providing free services under the RBA. But defendant did not show that MCL 124.764(4) provided it with immunity or any other legal defense to local charges, and defendant's interpretation of those statutes overlooked MCL 124.764(1) and MCL 124.764(2), which indicate that defendant is otherwise subject to generally applicable local ordinances.

Affirmed.

STATUTES – LAND BANK FAST TRACK ACT – STATE LAND BANK AUTHORITY – INVOLUNTARILY ACQUIRED PROPERTY – DRAINAGE AND STORMWATER TREATMENT ASSESSMENTS – GOVERNMENTAL IMMUNITY.

The State Land Bank Authority may be required to pay for drainage and stormwater runoff treatment services as required by local ordinance on parcels that it acquired involuntarily through tax reversion and foreclosure under the Land Bank Fast Track Act, MCL 124.751 *et seq*.; actions to recover such payment sound in contract or quasi-contract rather than tort and thus are not barred by the governmental immunity available to the foreclosing entities and retained by the State Land Bank Authority under MCL 124.764(4).

Morganroth & Morganroth, PLLC (by *Mayer Morganroth*, *Jeffrey M. Thomson*, and *Pamela K. Burneski*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Erik A. Graney*, Assistant Attorney General, for defendant.

Before: CAVANAGH, P.J., and JANSEN and RIORDAN, JJ.

PER CURIAM. In this action that involves the Land Bank Fast Track Act (LBFTA), MCL 124.751 *et seq*., defendant appeals as of right an order entered by the Court of Claims to the extent that it denied defendant's motion for partial summary disposition based on a claim of governmental immunity. We affirm.

I. FACTUAL BACKGROUND

According to the complaint, plaintiff owned and operated a combined sewer system that transported stormwater runoff and sanitary sewage to a regional wastewater treatment facility. Plaintiff alleged that defendant owned more than 300 properties within plaintiff's city limits and that those properties generated a significant amount of drainage and stormwater runoff that entered plaintiff's combined sewer system.

According to an affidavit provided by defendant, defendant had owned 464 parcels within plaintiff's city limits since August 1, 2016, and only five of them were not tax-reverted. According to the affidavit, the tax-reverted parcels were transferred to defendant after tax foreclosure by the state of Michigan or the Wayne County Treasurer.

In July 2016, plaintiff enacted a "Drainage and Stormwater Billing Ordinance," which required property owners within plaintiff's city limits to pay for drainage and stormwater runoff conveyance and treatment services on the basis of the parcel's size and its "amount of pavement, building, vegetative cover . . . and other general landscaping." In August 2016, plaintiff began billing all property owners within its city limits for drainage and stormwater services, and defendant failed to pay those monthly bills.

In August 2019, plaintiff filed its complaint, alleging "violation of drainage and stormwater billing ordinance." The parties filed cross-motions for summary disposition. Defendant argued that it was entitled to partial summary disposition because it was an involuntary landowner of all but five of the subject properties and thus not subject to local charges because defendant retained the immunity available to the foreclosing entities. Defendant further argued that it was entitled to summary disposition of the claims that arose before October 13, 2016, because plaintiff failed to file a timely notice of intent. Plaintiff argued that it was required by law to charge for water treatment services, that its drainage and stormwater charges were presumptively reasonable, and that its charges were not an unconstitutional tax.

The Court of Claims entered an opinion and order denying defendant's motion insofar as it was predicated on governmental immunity, granting defendant's motion in relation to the portion of plaintiff's claim that was time-barred, and granting plaintiff's motion for summary disposition. Defendant claimed an appeal of the portion of the court's order denying its claim of governmental immunity.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

"A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted, as a matter of law, if no genuine issue of any material fact exists to warrant a trial." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 596-597; 865 NW2d 915 (2014).[1]

> When evaluating a motion for summary disposition under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. . . . Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." [*Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016), quoting *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

"Generally, this Court reviews de novo '[t]he interpretation of statutes and court rules.' " *Simcor Constr,*

[1] Defendant moved for summary disposition under MCR 2.116(C)(7) (immunity), MCR 2.116(C)(8) (failure to state a claim), and MCR 2.116(C)(10), but the Court of Claims considered defendant's motion under MCR 2.116(C)(10) only.

Inc v Trupp, 322 Mich App 508, 513; 912 NW2d 216 (2018), quoting *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008) (alteration in original). "The availability of governmental immunity presents a question of law that is likewise reviewed de novo." *Progress Mich v Attorney General*, 506 Mich 74, 86; 954 NW2d 475 (2020). And "whether this Court has jurisdiction is a question of law that this Court reviews de novo." *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

III. RELEVANT LEGAL PRINCIPLES AND STATUTES

As explained by our Supreme Court:

> The rules of statutory construction are well established. The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. This task begins by examining the language of the statute itself. The words of a statute provide the most reliable evidence of its 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. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.
>
> In interpreting the statute at issue, we consider both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. [*Sun Valley Foods Co v Ward*, 460 Mich 230, 236-237; 596 NW2d 119 (1999) (quotation marks and citations omitted).]

Defendant is a "a public body corporate and politic" created under the LBFTA. MCL 124.765(1). Defendant's purpose is to "acquire, assemble, dispose of, and quiet title" to property, including tax-reverted property, under the LBFTA. MCL 124.752. While the LBFTA places requirements on the use of defendant's funds,[2] MCL 124.764(1) provides that the LBFTA "shall be construed liberally" to effectuate the legislative intent and purposes of the act and that the powers granted under the act "shall be broadly interpreted" to effectuate the legislative purposes of the act.

Under the LBFTA, defendant may acquire real or personal property in a number of ways, including by transfer, foreclosure, and purchase. MCL 124.755(1). Defendant may acquire property from a foreclosing governmental unit under the General Property Tax Act (GPTA).[3] MCL 124.755(3)(b). And defendant may

> hold and own in its name any property acquired by it or conveyed to it by this state, a foreclosing governmental unit, a local unit of government, an intergovernmental entity created under the laws of this state, or any other public or private person, including, but not limited to, tax reverted property and property with or without clear title. [MCL 124.755(4).]

MCL 124.764(4) provides that if tax-reverted property, "the title to which involuntarily vested" in the state or a foreclosing governmental unit under the GPTA or in a qualified city under its charter or ordinances, is transferred to an authority such as defendant,

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[2] MCL 124.758 pertains to the disposition of money received by a land bank, and MCL 124.768 pertains to a land bank fast track fund and the permitted uses of such a fund.

[3] MCL 211.1 *et seq*.

then the transfer "shall be construed as an involuntary transfer of property to the authority." After such a transfer,

> the authority shall be deemed to have assumed any governmental immunity or other legal defenses of this state, the foreclosing governmental unit, or the local unit of government related to the property and the manner in which title to the property was held by this state or the local unit of government. [MCL 124.764(4).]

Under MCL 124.756(1), defendant is authorized to "maintain" and "take all other actions necessary to preserve the value of the property it holds or owns."

The Revenue Bond Act (RBA), MCL 141.101 *et seq*., "authorized a locality to issue a limited type of bond for public improvements that would be repaid through revenue generated solely from the public improvement financed by the bond," *Hartfiel v Eastpointe*, 333 Mich App 438, 447; 960 NW2d 174 (2020) (quotation marks and citation omitted). "Water-supply and sewer systems are among the public improvements authorized under the RBA." *Id*.

IV. GOVERNMENTAL IMMUNITY AND SCOPE OF THE APPEAL

Defendant argues that the Court of Claims erred by ruling that governmental immunity did not bar plaintiff's claim. We conclude that defendant's arguments do not in fact concern the application of governmental immunity and therefore lie outside of the scope of defendant's appeal by right.

"A court must continually question its jurisdiction at every stage of the proceeding." *Hodge v State Farm Mut Auto Ins Co*, 499 Mich 211, 234 n 11; 884 NW2d 238 (2016) (MARKMAN, J., concurring) (quotation marks and citation omitted). "Under the court rules, this

Court has jurisdiction over appeals from a 'final judgment or final order of the circuit court, or court of claims, as defined in MCR 7.202(6) . . . .' " *Chen*, 284 Mich App at 192, quoting MCR 7.203(A)(1). MCR 7.202(6)(a)(*v*) provides that "an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity" is a final order or final judgment. A claim of appeal of a final order or final judgment described by MCR 7.202(6)(a)(*v*) "is limited to the portion of the order with respect to which there is an appeal of right." MCR 7.203(A)(1).

"Sovereign immunity and governmental immunity, while related concepts, are not synonymous." *Hannay v Dep't of Transp*, 497 Mich 45, 58; 860 NW2d 67 (2014). "Sovereign immunity refers to the immunity of the state from suit and from liability, while governmental immunity refers to the similar immunities enjoyed by the state's political subdivisions." *Id*. (quotation marks and citation omitted).

The Supreme Court has recognized that "the state is immune from suit unless, and only to the extent that, it consents to be sued" and that "the original Michigan rule held that the state was immune from all suits except to the extent that it consented to be sued in its courts." *Progress Mich*, 506 Mich at 87 (quotation marks and citation omitted). "The Legislature can, and has, abrogated the state's sovereign immunity by enacting legislation consenting to suit." *Id*. Thus, the doctrine of sovereign immunity in the state is presently "*a creature of the legislature*." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 274; 792 NW2d 798 (2010) (quotation marks and citations omitted).

The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., replaced the " 'preexisting common-law concept of sovereign immunity,' " *Hannay*, 497 Mich at 59, quoting *In re Bradley Estate*, 494 Mich 367, 377-378; 835 NW2d 545 (2013). "The Legislature enacted the GTLA in 1964 after a series of court decisions began to erode the common-law rule of governmental immunity from tort liability." *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 326; 869 NW2d 635 (2015). The "GTLA restores governmental immunity in two ways": by abolishing common-law exceptions to governmental immunity from tort law and by mandating that, except as otherwise provided by the GTLA, governmental agencies are immune from tort liability while engaging in the exercise or discharge of governmental functions. *Id*. at 326-327.

"MCL 691.1407(1) codifies this common-law sovereign immunity concept and limits a governmental agency's exposure to tort liability."[4] *Hannay*, 497 Mich at 59 (quotation marks and citation omitted). The term " 'tort liability' as used in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Bradley*, 494 Mich at 385.

However, the "GTLA does not bar a properly pleaded contract claim." *Id*. at 387. Neither does it bar an unjust-enrichment claim, which "sounds in neither tort nor contract and seeks restitution rather than compensatory damages . . . ." *Wright v Genesee Co*, 504 Mich

[4] The GTLA defines "governmental agency" as "this state or a political subdivision," MCL 691.1401(a); defines "state" to include "this state and its agencies [and] departments," MCL 691.1401(g); and defines "political subdivision" to include "a municipal corporation" and a "county," MCL 691.1401(e).

410, 423-424; 934 NW2d 805 (2019). "Quasi-contract doctrine is itself a subset of the law of unjust enrichment." *Id*. at 421.

Our Supreme Court has observed that "the general rule is that services furnished by one municipality to another municipality are on a contractual basis and the acceptance of services implies a promise to pay therefor at the established rate." *Detroit v Highland Park*, 326 Mich 78, 99; 39 NW2d 325 (1949).

> There are two kinds of implied contracts: One implied in fact, and the other implied in law. The first does not exist unless the minds of the parties meet, by reason of words or conduct. The second is quasi or constructive, and does not require a meeting of minds, but is imposed by fiction of law, to enable justice to be accomplished, even in case no contract was intended. [*Id*. at 100 (quotation marks and citation omitted).]

In the Court of Claims, defendant moved for partial summary disposition of plaintiff's claim for unpaid drainage and stormwater charges for the great majority of the properties defendant owned within plaintiff's city limits. Defendant contended that it was an involuntary owner of those parcels and that therefore, under MCL 124.764(4), it was entitled to the immunity provided to the state and foreclosing governmental units. Defendant cited *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380; 863 NW2d 745 (2014), for the proposition that a foreclosing governmental unit could not be held liable for assessments when performing a statutory obligation.

The Court of Claims concluded that *Harbor Watch* was distinguishable and rejected defendant's argument. The court noted that *Harbor Watch* pertained to condominium assessments and that the decision in that case relied on the conclusion that the county

treasurer was barred by statute from paying for condominium assessments, and it concluded that condominium assessments were not akin to charges for utility services. The Court of Claims explained that the LBFTA did not bar defendant from paying plaintiff's drainage and stormwater charges and that defendant was authorized by the LBFTA to act to preserve the value of the properties it held.

The court further explained that, under the RBA, plaintiff was barred from providing free services for stormwater charges to a public corporation such as defendant and that even if defendant stood in the shoes of a foreclosing entity, those entities also fell within the RBA's definition of public corporation. The court rejected defendant's contention that it did not receive a service from plaintiff on the ground that there was no serious dispute that plaintiff treated stormwater runoff generated by defendant's properties, and it ruled that defendant benefited from that service. Thus, the Court of Claims denied defendant's motion "with respect to defendant's position that it cannot be compelled to pay the charges at issue due to the involuntary transfer of properties it holds."

Defendant filed a claim of appeal under MCR 7.203(A)(1) insofar as the Court of Claims order was a final one under MCR 7.202(6)(a)(*v*) because it denied defendant's motion for partial summary disposition based on a claim of governmental immunity. On appeal, defendant argues that the Court of Claims erred because defendant was entitled to "immunity" from plaintiff's drainage and stormwater charges, the court improperly distinguished *Harbor Watch*, and the RBA did not otherwise defeat defendant's claim of immunity.

In its reply brief, defendant asserts that plaintiff's contention that the governmental immunity conferred by the GTLA applies to only tort liability is unpersuasive because defendant did not invoke the GTLA. Instead, defendant contends that the immunity provided by MCL 124.764(4) is not limited to tort liability under the GTLA and that other "legal defenses" in that subsection include other government-specific defenses such as those set forth in *Harbor Watch*.

We conclude that the substance of defendant's arguments falls outside the scope of the claim of appeal because the arguments do not pertain to a denial of governmental immunity.

MCR 7.202(6)(a)(*v*) unambiguously provides that an order denying a motion for summary disposition based on a claim of governmental immunity is a final order. And the LBFTA provides that, after an involuntary transfer of a tax-reverted property, a land bank "shall be deemed to have assumed any *governmental immunity* or other legal defenses" available to the foreclosing entity. MCL 124.764(4) (emphasis added). Thus, assuming without deciding that the "other legal defenses" referenced in MCL 124.764(4) include other kinds of immunities, an order is a final one under MCR 7.202(6)(a)(*v*) if the order denied a specific claim of governmental immunity. As discussed earlier, governmental immunity pertains to statutory immunity from tort liability. *Hannay*, 497 Mich at 58-59.

Plaintiff's claim for unpaid charges for drainage and stormwater services does not seek to impose tort liability on defendant. Instead, plaintiff's claim could be construed as either a contract claim or, perhaps more fairly, a quasi-contractual claim for restitution. Under either characterization, governmental immunity would not bar plaintiff's claim. See *Bradley*, 494 Mich

at 387; *Wright*, 504 Mich at 421, 423-424. Accordingly, to the extent that defendant asserted governmental immunity in the Court of Claims, defendant cannot show that the court erred by denying defendant's motion for partial summary disposition on that ground, because governmental immunity does not bar contract claims for damages or quasi-contract claims for restitution.

Defendant generally contends that this Court's holding in *Harbor Watch* entitled defendant to immunity from plaintiff's charges, but the term "immunity," governmental or otherwise, does not appear in that opinion, and the case was decided on entirely different grounds. Although defendant shrouds its arguments with the label of immunity, that label is not dispositive. Courts "are not bound by a party's choice of labels because this would effectively elevate form over substance." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 204; 920 NW2d 148 (2018) (quotation marks and citation omitted). Other than defendant's use of the term "immunity," nothing in the substance of defendant's arguments pertains to governmental immunity, and defendant fails to identify the precise nature of the immunity it relies on.

As defendant acknowledges, MCL 124.764(4) confers upon it "other legal defenses" as are available to the state or other foreclosing governmental unit, and thus defendant could have relied on that subsection to argue that the holding in *Harbor Watch* provided it with a legal defense. But defendant's claim of appeal was based on a denial of governmental immunity, and the scope of this appeal is limited to that issue and not a rejection of other legal defenses. See MCR 7.203(A)(1). The opinion and order of the Court of Claims was not otherwise a final order as defined by

MCR 7.202(6), and defendant did not file an application for leave to appeal under MCR 7.205. Therefore, the substance of defendant's arguments is beyond the scope of this claim of appeal.

Nonetheless, we note that, where a claim of appeal fails to trigger this Court's operational jurisdiction on that basis, this Court has the discretion to decide the matter as on leave granted, and it is inclined to do so in the interests of judicial economy when the appeal presents a matter of significant public interest. See *Detroit v Michigan*, 262 Mich App 542, 546; 686 NW2d 514 (2004). Relatedly, this Court may, at its discretion, "permit amendment or additions to the grounds for appeal," MCR 7.216(A)(3), and "enter any judgment or order or grant further or different relief as the case may require," MCR 7.216(A)(7). Thus, we hereby choose to consider the substance of defendant's argument as on leave granted.

V. INVOLUNTARY TRANSFERS AND *HARBOR WATCH*

Defendant contends that, under MCL 124.764(4), it has no obligation to pay plaintiff's drainage and stormwater charges for the properties defendant received through involuntary transfers because this Court held in *Harbor Watch* that foreclosing governmental units were not liable for local charges that were otherwise required by law. Additionally, defendant contends that the Court of Claims erred by distinguishing *Harbor Watch*, by concluding that defendant agreed to pay for plaintiff's drainage and stormwater services, and by relying in part on a portion of *Harbor Watch* that defendant asserts was obiter dictum. Defendant fails to show that the Court of Claims erred.

In *Harbor Watch*, the defendant was a county treasurer who was the temporary owner of multiple tax-

reverted condominium units as a foreclosing governmental unit under the GPTA, and the plaintiff, who was the pertinent condominium association, filed a complaint against the county treasurer because it had not paid the common expenses for the condominium units as required by the applicable bylaws. *Harbor Watch*, 308 Mich App at 381-382. This Court explained that the case presented "the question whether a county treasurer is liable for condominium assessments during the time it holds title to a condominium unit that is subject to forfeiture and foreclosure under the GPTA." *Id*. at 384.

This Court observed that the "GPTA *required* defendant to foreclose on the forfeited units" and that the defendant "cannot be held liable for assessments when it was performing a statutory obligation." *Id*. at 385. This Court rejected the plaintiff's argument that tax foreclosures were voluntary under the GPTA on the ground that the provision the plaintiff relied on was limited to Headlee Amendment purposes.[5] *Id*. at 385-386. This Court agreed with the defendant's assertion that the GPTA provided no mechanism for it to pay the plaintiff's assessments because the payment of condominium assessments was not included on the list of permitted uses of the proceeds from the sale of foreclosed properties, and even if the assessments were considered an allowable maintenance cost permitted under the GPTA, it was undisputed that the sales of the condominiums did not generate enough proceeds to cover the taxes due on the properties, which had the first priority for payment under the GPTA. *Id*. at 386-387.

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[5] The Headlee Amendment to the state Constitution, enacted by voter initiative in 1978, places certain limits on the Legislature's authority to impose costs on local units of government. See Const 1963, art 9, § 29.

This Court further explained that a municipality cannot be legally bound to perform an ultra vires act and that recovery might sometimes be possible under equitable principles where formalities were not followed, but performance was within a defendant's legal authority. *Id*. at 387-388. But this Court concluded that the defendant did "not have the legal authority under the GPTA to pay the condominium assessments" and that an "executory contract of a municipal corporation made without authority may not be enforced . . . ." *Id*. at 388 (quotation marks and citation omitted).

Defendant asserts that *Harbor Watch* applies to the tax-reverted properties involuntarily transferred to it such that it need not pay plaintiff's charges in relation to those properties. We conclude that the Court of Claims properly ruled that *Harbor Watch* was inapplicable to plaintiff's charges for the provision of utility services. As the court noted, *Harbor Watch* pertained to condominium fees that "the defendant never agreed to pay," whereas plaintiff's charges for utility services were based on a municipal ordinance. The court also concluded that defendant—unlike the defendant in *Harbor Watch*, who lacked the legal authority to pay under the GPTA—was not prohibited by the LBFTA from paying plaintiff's charges, and instead the LBFTA authorized defendant to take actions necessary to preserve the value of its properties under MCL 124.756(1). And, as discussed earlier, a municipality's acceptance of service from another municipality implies a promise to pay. See *Highland Park*, 326 Mich at 99.

Thus, the Court of Claims properly concluded that *Harbor Watch* was inapplicable because it pertained to condominium assessments rather than to charges for the provision of utility services, and defendant was not

statutorily barred from paying plaintiff's charges. And defendant's contention that the Court of Claims erroneously concluded that defendant agreed to pay plaintiff's charges is not supported by the text of the court's opinion and order, where the court drew a distinction between condominium assessments and charges for the provision of utility services.

Nonetheless, defendant argues that the Court of Claims erred by distinguishing *Harbor Watch* on the basis of the discussion in that decision of whether the defendant's payment of the assessments would have been an ultra vires act because that discussion was obiter dictum and, alternatively, that it should prevail even if that discussion were not dictum.

"It is a well-settled rule that statements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007) (quotation marks and citation omitted). According to defendant, the essential holding of *Harbor Watch* was that the "GPTA *required* defendant to foreclose on the forfeited units" and that the defendant "cannot be held liable for assessments when it was performing a statutory obligation." *Harbor Watch*, 308 Mich App at 385. But those statements were not supported by antecedent legal analysis, and in fact preceded the remaining analysis where this Court concluded that the defendant was not authorized under the GPTA to pay condominium assessments and could not be forced to perform an ultra vires act. *Id*. at 385-387. Defendant's reading of *Harbor Watch* would improperly narrow the decision to that conclusory statement.

Defendant asserts, in a cursory fashion, that even if the "ultra vires" discussion in *Harbor Watch* is not

obiter dictum, defendant should prevail under the same ultra vires defense that a foreclosing governmental unit could raise. But the Court of Claims noted that defendant never argued that "paying stormwater charges is an ultra vires act," then recognized that, while the GPTA prohibited "the payment of such monies" because of the strict priority list it imposed for payments from funds received by a foreclosing governmental unit, the LBFTA did not otherwise strictly constrain defendant's use of funds.

Defendant does not fully address whether it can properly raise the ultra vires defense despite its powers and discretion under the LBFTA. And defendant provides no binding legal authority in support of its assertion. "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *MOSES, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006). Accordingly, defendant has abandoned this assertion by failing to adequately argue and support it.

Defendant also relies on *Schwab v City of Jackson*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued May 15, 2017 (Case No. 2:14-CV-11072),[6] to support its contention that its status as an involuntary landowner shields it from plaintiff's charges. In *Schwab*, which involved a due-process claim against a county, the court ruled as a threshold determination that, under *Harbor Watch*, the county could not be compelled to comply with a municipal ordinance requiring repair and maintenance, but was otherwise required to comply with the ordinance's disclosure requirements be-

[6] "Caselaw from sister states and federal courts is not binding precedent but may be relied on for its persuasive value." *Haydaw v Farm Bureau Ins Co*, 332 Mich App 719, 726 n 5; 957 NW2d 858 (2020).

cause compliance did not require any expenditure of funds. *Schwab*, unpub op at 3. *Schwab* offers little persuasive guidance because the court did not undertake a detailed analysis of *Harbor Watch*, having held it inapplicable to the defendant's duty to disclose information under the relevant ordinance.

Defendant argues that requiring it to pay plaintiff's charges would thwart the purpose of the LBFTA, because payment of local charges would impede its discretion to dispose of properties for little or no consideration and because the Legislature did not intend to have land banks serve as a source of funds for municipalities. Defendant's argument is unavailing.

MCL 124.764(1) provides that a land bank, in "the exercise of its powers and duties" under the LBFTA, "shall have complete control as fully and completely as if it represented a private property owner and shall not be subject to restrictions imposed on the authority by the charter, ordinances, or resolutions of a local unit of government." Similarly, MCL 124.764(2) provides that, unless permitted by the LBFTA "or approved by an authority, any restrictions, standards, conditions, or prerequisites of a city, village, township, or county otherwise applicable to an authority and enacted after the effective date of this act shall not apply to an authority," but that this "is intended to prohibit special local legislation or ordinances applicable exclusively or primarily to an authority and not to exempt an authority from laws generally applicable to other persons or entities."

Defendant's property, income, and operations "are exempt from all taxation by this state or any of its political subdivisions," MCL 124.754(5), and defendant's income and property "are exempt from all taxes

and special assessments of this state or a local unit of government of this state," MCL 124.763.

> A special assessment is a levy upon property within a specified district. Although it resembles a tax, a special assessment is not a tax. In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes. [*Kadzban v Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993) (citation omitted).]

In summary, the LBFTA specifically exempts defendant from taxes and special assessments, but it does not exempt it from laws generally applicable to other persons or entities. And while defendant contends that requiring it to pay plaintiff's charges thwarts the purpose of the LBFTA, such a requirement is consistent with the text of the act.

Defendant asserts that the Court of Claims eviscerated the broad discretion the LBFTA granted it because that grant of discretion is equivalent "to the statutory prohibition on spending in *Harbor Watch*." But the statutory restrictions discussed in *Harbor Watch* pertained to how the county treasurer was prohibited under the GPTA from paying condominium assessments from proceeds of the sales of tax-reverted properties and how the county treasurer lacked the legal authority to enter into an agreement to pay such assessments. *Harbor Watch*, 308 Mich App at 386-388. Despite defendant's assertion, its broad discretion under the LBFTA is not analogous to a statutory restriction on spending. And, as the Court of Claims properly observed, the broad grant of authority provided to defendant included the legal authority to enter into an agreement to pay for utility services. For these reasons, defendant cannot properly assert that it is being forced to commit an ultra vires act.

VI. APPLICATION OF THE RBA

Defendant argues that the Court of Claims erred by ruling that the RBA prohibited plaintiff from providing a free service to defendant. We disagree.

MCL 141.118(1) provides as follows:

> Except as provided in subsection (2) [which is applicable only to hospitals or health care facilities], free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both, and those charges, when so paid, shall be accounted for in the same manner as other revenues of the public improvement.

The RBA's definition of "public corporation" includes "a county, city, village, township," and "an authority created by or under an act of the legislature . . . ." MCL 141.103(a).

As discussed earlier, the Court of Claims ruled that plaintiff was barred from providing free services for stormwater charges to public corporations, that defendant was a public corporation under the RBA, that there was no serious dispute that plaintiff treated stormwater runoff generated by defendant's properties, and that defendant benefited from that service.

Defendant argues that the court erred by concluding that defendant was required to pay plaintiff's charges under the RBA. Defendant does not challenge the court's ruling that defendant falls under the definition

of a public corporation as defined by the RBA, but it asserts that the court disregarded defendant's "immunity" as an involuntary landowner under the LBFTA. But, as discussed earlier, the court properly rejected defendant's reliance on *Harbor Watch*, and defendant does not identify any other source of immunity from, or defense to, plaintiff's charges.

Defendant argues, in a cursory fashion, that the Court of Claims erred because the RBA's definition of "public corporation" does not include foreclosing governmental units. Defendant's argument is not supported by the text of the RBA or LBFTA.

The LBFTA incorporates the definition of "foreclosing governmental unit" provided by the GPTA. MCL 124.753(f). MCL 211.78(8)(a) provides that a foreclosing governmental unit is either the "treasurer of a county" or the "state if the county has elected . . . to have this state foreclose property . . . forfeited to the county treasurer . . . ." And, as discussed earlier, the RBA's definition of "public corporation" includes a "county" and an "authority" created by the Legislature. MCL 141.103(a). Thus, a foreclosing governmental unit falls under the RBA's definition of "public corporation." And defendant does not offer an analysis of the text of the statutes, or otherwise provide any rationale, for its apparent position that a "treasurer of a county" acting on behalf of the county is not included within the definition of "county," or that an authority created by the Legislature does not fall within the meaning of "the state."

Relatedly, defendant contends that the Court of Claims erred by ruling that a county treasurer would be liable for plaintiff's drainage and stormwater charges. The court rejected defendant's argument that it could "change its stripes" because it received prop-

erties from foreclosing governmental units under the GPTA, then noted that defendant's argument "falsely assum[ed]" that foreclosing governmental units were not included within the definition of "public corporation" under the RBA. The court then concluded that "the foreclosing governmental units" defendant obtained its properties from fell "within the list of entities that make up 'public corporations' under the RBA."

Essentially, defendant's contention is based on its characterization of this Court's holding in *Harbor Watch*, which, as discussed earlier, the Court of Claims properly ruled did not apply to plaintiff's claim against defendant. And to the extent that defendant's contention implies that requiring a county treasurer to pay drainage and stormwater charges for tax-reverted properties would be an ultra vires act because of the restrictions imposed by the GPTA, defendant does not provide any legal authority in support of that implication. Thus, defendant has abandoned any such argument. See *MOSES, Inc*, 270 Mich App at 417.

Defendant argues that the Court of Claims created an unnecessary conflict between the LBFTA and the RBA by ruling that plaintiff was barred from providing free drainage and stormwater services to defendant. But defendant's identification of the supposed conflict consists of a statement that, if both statutes address defendant's liability to pay for local charges, then the immunity conferred by MCL 124.764(4) created an exemption to the prohibition of municipalities' providing free services under the RBA. But defendant has not shown that MCL 124.764(4) provided it with immunity or any other legal defense to local charges, and defendant's interpretation of those statutes overlooks MCL 124.764(1) and MCL 124.764(2), which, as discussed

earlier, indicate that defendant is otherwise subject to generally applicable local ordinances.

Defendant contends that the Court of Claims erred by concluding that defendant was the beneficiary of plaintiff's drainage and stormwater services. Defendant does not directly challenge the court's reasoning that there was no dispute that defendant received a service from plaintiff and that the provision of drainage and stormwater services constituted a service rendered. Instead, defendant asserts that it was not a beneficiary of plaintiff's services because defendant owns property for the public's benefit and is thus devoted to a public purpose, such that the RBA's prohibition of free services is not offended.

The RBA defines "public corporation" under MCL 141.103(a) to include counties, cities, and other entities that exist for the benefit of the public and are devoted to a public purpose, and under MCL 141.118(1) specifically provides that public corporations may not receive a free service. Thus, defendant's assertion is not supported by the text of the RBA, and its interpretation of those provisions would substantially negate the prohibition of free services for public corporations.

Affirmed.

CAVANAGH, P.J., and JANSEN and RIORDAN, JJ., concurred.

In re FARRIS/WHITE

Docket No. 357743. Submitted February 2, 2022, at Detroit. Decided February 24, 2022, at 9:00 a.m.

The Department of Health and Human Services petitioned the Wayne Circuit Court to terminate respondent-father's parental rights to his minor children, AF, MW, and SW. Respondent appeared at the adjudication trial, held via videoconference, on petitioner's petition for temporary custody of AF, MW, and SW but failed to appear at a subsequent adjudication trial on petitioner's amended petition for permanent custody. The amended petition alleged that respondent had sexually abused two of his children's siblings (who were not related to respondent) and requested permanent custody of AF, MW, and SW. Respondent did not appear for any subsequent court proceedings, he did not respond to his attorney's attempts to contact him, and a caseworker was not able to locate him. Following a combined adjudication trial and dispositional hearing, a referee recommended that the trial court exercise jurisdiction with respect to respondent, find that statutory grounds existed to support termination of respondent's parental rights, and find that termination was in the best interests of AF, MW, and SW. The trial court, Edward J. Joseph, J., entered an order in accordance with the referee's recommendations. This appeal followed.

The Court of Appeals *held*:

Under MCR 7.203(A), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a judgment or order from which appeal of right to the Court of Appeals has been established by law or court rule, including an order terminating parental rights, pursuant to MCR 3.993(A)(4). An indigent respondent is entitled to appointment of counsel to represent them on appeal, and the trial court must submit an order to this effect to the Court of Appeals. Under MCR 3.993(D)(3), entry of the order by the trial court constitutes a timely filed claim of appeal. Because the claim of appeal is thus filed by the trial court, whether respondent, as the "aggrieved party," initiated the appellate process in this case depended on whether respondent requested appellate counsel. Respondent did not request ap-

pointed counsel to pursue this appeal. Rather, respondent's trial counsel initiated the appeal when he requested appellate counsel on his client's behalf. After the referee concluded that statutory grounds existed to exercise jurisdiction and that there was clear and convincing evidence to support termination of respondent's parental rights, the referee informed respondent's trial counsel that respondent had the right to appeal, and respondent's trial counsel stated that he would file the paperwork for his client so that in the event that respondent appeared to contest the termination on appeal, his rights would "at least be protected on that issue." On the basis of these facts, given that respondent's trial counsel was not able to communicate with him for several months before the adjudication and that respondent did not appear at the adjudication, an "aggrieved party" did not file the request for appellate counsel; instead, it was initiated by trial counsel. While an attorney often acts as their client's agent, the record was clear that respondent's attorney did not request appellate counsel at respondent's directive. Therefore, the trial court should have rejected the unauthorized request for appellate counsel, and the appeal was subject to dismissal for lack of jurisdiction.

Dismissed.

RONAYNE KRAUSE, J., concurring in the result, agreed that the appeal should have been dismissed but disagreed that the Court of Appeals lacked jurisdiction. Appeals are generally filed by attorneys acting as agents for the aggrieved party. The appeal in this case was filed by appointed counsel on behalf of respondent, who was undoubtedly an aggrieved party; therefore, appellate counsel clearly had the implied authority to file the appeal. However, by failing to communicate with trial counsel or appellate counsel, respondent had waived his right to the appointment of appellate counsel by the time appellate counsel was appointed. Nevertheless, rightly or wrongly, appellate counsel was appointed, and Judge RONAYNE KRAUSE would have concluded that appellate counsel necessarily had the implied authority to claim an appeal by right on behalf of respondent, even in the absence of direction from respondent. However, appellate counsel's authority did not extend to prosecuting the appeal without input from respondent. It was impossible to know whether respondent even wanted to retain his parental rights without his input. Because it was not within appellate counsel's implied or express authority to pursue the appeal beyond the initial filing, Judge RONAYNE KRAUSE would have concluded that the case should have been dismissed because respondent failed to file a brief with the Court of Appeals pursuant to MCR 7.212(A)(1)(a). In distinguishing her analysis

from the majority's, Judge RONAYNE KRAUSE expressed that it was inimical to the core principles of the legal system to foreclose consideration of a matter on the technicality that a document was signed by a party rather than by an attorney.

TERMINATION OF PARENTAL RIGHTS – APPEALS – INDIGENT RESPONDENTS – REQUEST FOR APPOINTMENT OF COUNSEL – "AGGRIEVED PARTY."

Under MCR 3.993(A), an indigent respondent is entitled to appointment of an attorney to represent them on appeal in any appeal by right; in such cases, the trial court must submit the order appointing appellate counsel to the Court of Appeals to timely file a claim of appeal on behalf of the respondent, but the respondent must initiate the appellate process by requesting appellate counsel; when the request for appointed counsel is made by trial counsel without the direction of the respondent, the request was not made by an aggrieved party as required by MCR 7.203(A)(2) and is not an authorized request under the court rules.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Lesley C. Fairrow*, Assistant Attorney General, for the Department of Health and Human Services.

Juvenile Law Group, PLLC (by *Rod Johnson*) for the minor children.

Steven M. Gilbert for respondent.

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

CAMERON, J. Respondent appeals the trial court's order terminating his parental rights to his minor children AF, MW, and SW under MCL 712A.19b(3)(b)(*i*) (parent's act caused physical injury or physical or sexual abuse), (j) (reasonable likelihood the child will be harmed if returned to parent), (k)(*ii*) (criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate), and (k)(*ix*) (sexual abuse of a child or the child's sibling).

For the reasons discussed below, we dismiss for lack of jurisdiction.

I. BACKGROUND

This matter arises from the termination of respondent's parental rights to his three minor children with Portia Lynn Mobley. On August 28, 2020, the Department of Health and Human Services filed a petition for temporary custody of AF, MW, and SW, as well as Mobley's three other minor children. The petition alleged that respondent had failed to protect his children from Mobley's known substance-abuse issues, had failed to remove his children from "deplorable home conditions," and was unable to provide adequate care to his children due to his own substance abuse. Petitioner requested that the trial court place all the children in foster care and exercise jurisdiction.

Respondent did not participate in a preliminary hearing that was held via videoconference. The Children's Protective Services (CPS) investigator testified that she had been unable to contact respondent at his last known address, which appeared to be vacant, or at Mobley's home, which was where respondent often watched the children. The CPS investigator believed that respondent lived with Mobley, which Mobley denied. After hearing testimony, the trial court authorized the petition and the children were placed in foster care. Respondent did not participate in the two pretrial hearings that followed; his first appearance was at the adjudication trial on January 22, 2021, which was also held via videoconference. Respondent asserted that he had been with Mobley when she participated in the previous hearings, so he knew what was "going on," but he had not appeared during the previous videoconference-hearings because two people

could not be "in the camera" at the same time. Respondent's attorney requested a trial, and respondent's adjudication trial was scheduled for March 8, 2021.[1]

Before trial, petitioner filed an amended petition that alleged that respondent had sexually abused AM and PM, two of Mobley's children who are unrelated to respondent.[2] Petitioner requested termination of respondent's parental rights to AF, MW, and SW. Respondent did not appear for the scheduled March 8, 2021 adjudication trial, which was later adjourned, and did not participate in any subsequent court proceedings. Respondent also did not respond to his attorney's attempts to contact him, and the caseworker was unable to locate him.[3] Respondent failed to appear at the combined adjudication and dispositional hearing despite the trial court sending respondent a summons via certified mail. After the close of proofs, the referee recommended that the trial court exercise jurisdiction with respect to respondent, find that statutory grounds

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[1] Following the January 2021 trial, the trial court exercised jurisdiction with respect to Mobley and ordered her to participate in services. At the time respondent's parental rights were terminated, Mobley was still working toward reunification with the children.

[2] AM submitted to a forensic interview during the proceeding, and the interview was recorded. The video of AM's disclosures was admitted into evidence.

[3] The caseworker testified that she had sent certified letters to respondent, that she had attempted to get updated contact information from Mobley, that she had conducted a "true person search," that she had conducted other online "searches," and that she had ensured that respondent was not incarcerated in Michigan. See *Michigan Absent Parent Protocol: Identifying, Locating, and Notifying Absent Parents in Child Protective Proceedings* (2018), § C.3, p 7, available at <https://www.courts.michigan.gov/4a6288/siteassets/court-administration/standardsguidelines/childprotectionjuvdel/michigan-absent-parent-protocol-2018.pdf> [https://perma.cc/5JC9-T6PB]. The caseworker also testified that she had called every known phone number that was associated with respondent. See *id*.

existed to support termination of respondent's parental rights, and find that termination was in AF's, MW's, and SW's best interests. The trial court thereafter entered an order in accordance with the referee's recommendations. This appeal followed.

II. ANALYSIS

The argument on appeal is that termination of respondent's parental rights was improper because the workers failed to make "any type of real effort or even a reasonable effort to contact" respondent and locate him. However, it is first necessary to address a jurisdictional matter. Although this Court's jurisdiction has not been challenged, "[a] court is, at all times, required to question sua sponte its own jurisdiction." *Tyrrell v Univ of Mich*, 335 Mich App 254, 260; 966 NW2d 219 (2020). "Whether this Court has jurisdiction to hear an appeal is a question of law reviewed de novo." *Id*. at 260-261.

MCR 7.203(A)(2) provides that this Court "has jurisdiction of an appeal of right *filed by an aggrieved party* from" "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." (Emphasis added.) MCR 3.993(A)(4) identifies "an order terminating parental rights" as an order that is appealable to this Court by right, and MCR 7.202(4) defines "filing" as "the delivery of a document to a court clerk and the receipt and acceptance of the document by the clerk with the intent to enter it in the record of the court[.]"

"[A]n appeal of right in any civil case must be taken within 21 days," and "[t]he period runs from the entry of:"

> (a) the judgment or order appealed from;

> (b) *an order appointing counsel*;
>
> (c) an order denying a request for appointment of counsel in a civil case in which an indigent party is entitled to appointed counsel, if the trial court received the request within the initial 21-day appeal period; or
>
> (d) an order deciding a post-judgment motion for new trial, rehearing, reconsideration, or other relief from the order or judgment appealed, if the motion was filed within the initial 21-day appeal period or within any further time that the trial court has allowed for good cause during that 21-day period. [MCR 7.204(A)(1) (emphasis added).]

In child protective proceedings, "an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal" "[i]n any appeal as of right[.]" MCR 3.993(A). "A request for appointment of appellate counsel must be made within 14 days after notice of the order is given . . . ." MCR 3.993(D)(1). If the request "is timely filed and the court finds that the respondent is financially unable to provide an attorney, the court shall appoint an attorney within 14 days after the respondent's request is filed." MCR 3.993(D)(2). The order of appointment "must be entered on a form approved by the State Court Administrator's Office [SCAO], entitled 'Claim of Appeal and Order Appointing Counsel[.]' " MCR 3.993(D)(3). The trial court must submit this order to this Court. *Id*. "Entry of the order by the trial court . . . constitutes a timely filed claim of appeal for the purposes of MCR 7.204." MCR 3.993(D)(3).

Because the trial court's entry of the order appointing appellate counsel constitutes "a timely filed claim of appeal," and because the trial court is responsible for submitting that order to this Court, the claim of appeal is filed by the trial court. Consequently, the jurisdictional issue here is whether "an aggrieved party"

initiated the appellate process by requesting appellate counsel.

"An aggrieved party is not one who is merely disappointed over a certain result," but is one who "suffered a concrete and particularized injury." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). "[A] litigant on appeal *must demonstrate an injury arising from . . . the actions of the trial court* . . . rather than an injury arising from the underlying facts of the case." *Id*. at 292 (emphasis added). As stated in *Grace Petroleum Corp v Pub Serv Comm*, 178 Mich App 309, 312; 443 NW2d 790 (1989):

> An appeal can only be taken by parties who are affected by the judgment appealed from. There must be some substantial rights of the parties which the judgment would prejudice. A party is aggrieved by a judgment or order when it operates on his rights and property or bears directly on his interest.

In this case, respondent did not request appointed counsel to pursue this appeal. Instead, respondent's trial counsel initiated this appeal when he requested appointed counsel on his client's behalf. However, the record is clear that trial counsel's request for appointed counsel was not made at the direction of respondent. Specifically, after the referee concluded that statutory grounds existed to exercise jurisdiction, that petitioner had established by clear and convincing evidence that statutory grounds existed to support termination of respondent's parental rights, and that termination was in the children's best interests, the referee informed respondent's counsel:

> [O]f course it's a difficult scenario to represent a client who does not appear or in fact [does] not make himself available for or assisting in his own representation. But all

> things considered I think that you did a good job with regard to the circumstances that were handed to you. And I will get [you] appellate rights . . . [and] I thank and . . . excuse [you] . . . .
>
> But your client . . . has . . . seven days to ask a judge to review this hearing and you also have 14 days to appeal the termination of parental rights to the Michigan Court of Appeals and appellate counsel can be provided if needed and . . . requested.[4]

With regard to this appeal, respondent's trial counsel responded:

> I'll fill out the paperwork and send it and file it today for my client so in the event he does show up his rights will at least be protected on that issue.

Respondent's counsel then executed a request for appellate counsel, ostensibly on behalf of respondent.[5] After the trial court adopted the referee's findings of fact and conclusions of law, the trial court appointed appellate counsel to represent respondent. The trial court submitted the "Claim of Appeal and Order Appointing Counsel" and other required documentation to this Court, and appellate proceedings commenced.

On the basis of these facts, we conclude that "an aggrieved party" did not file the request for appellate counsel. Instead, respondent's trial counsel initiated the appeal by requesting that appellate counsel be appointed for respondent. Pursuant to trial counsel's request, appellate counsel was appointed and the ap-

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[4] It appears that the referee was referring to the 14-day requirement contained in MCR 3.993(D)(1).

[5] Trial counsel used the incorrect SCAO form to request appellate counsel. This should have been apparent to trial counsel and the trial court because the form specifically states that "[t]his form is not to be used for requests and orders for appellate counsel after termination of parental rights. See form JC 84."

peal as of right was filed by the trial court. While "an attorney often acts as his client's agent," *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004), and generally, "a principal is bound by an agent's actions within the agent's actual or apparent authority," *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001), the record is clear that respondent's attorney did not execute the form at respondent's directive. Indeed, trial counsel readily acknowledged that he had not been in communication with respondent for several months at the time he filed the request for appellate counsel.[6] Under these circumstances, the court should have rejected the unauthorized request for appellate counsel.

Because we lack jurisdiction, we must dismiss the instant appeal.[7]

BOONSTRA, P.J., concurred with CAMERON, J.

RONAYNE KRAUSE, J. (*concurring in the result*). I concur with the majority in almost all respects, but I respectfully disagree that this Court lacks jurisdiction. Rather, I would dismiss this appeal for failure to pursue this appeal in conformity with the court rules.

As the majority states, this Court has jurisdiction over appeals of right "filed by an aggrieved party" from

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[6] During oral argument, appellate counsel acknowledged that he had also been unsuccessful in contacting respondent during the pendency of this appeal.

[7] To the extent that we have considered the argument raised on appeal, we conclude that respondent is not entitled to relief. Indeed, it is clear that respondent failed to cooperate despite repeated efforts to contact him during the proceeding. Moreover, given the facts at issue in this case, it is difficult to fathom how termination of respondent's parental rights would not have occurred had respondent participated in the proceedings.

certain judgments and orders. MCR 7.203(A). An "aggrieved party" means, generally, a person whose own interests were actually harmed by the decision of the trial court. *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290-292; 715 NW2d 846 (2006). Because respondent's parental rights were terminated by the trial court, respondent is obviously an "aggrieved party" under the circumstances, and I do not understand the majority to suggest otherwise. Rather, the majority concludes that because the appellate counsel appointed for respondent filed the claim of appeal without respondent's input, the appeal was not "filed *by* an aggrieved party" as required by MCR 7.203(A). I respectfully disagree.

It is relatively uncommon for parties to file their own appeals. Rather, appeals are generally filed and prosecuted by an attorney, who acts as an agent for the aggrieved party. See *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). Therefore, "filed *by* an aggrieved party" essentially means, in reality, "filed by an aggrieved party *or by an attorney representing the aggrieved party*." The authority of an attorney "may be governed by what he is expressly authorized to do as well as by his implied authority." *Id*. Because this appeal was filed by an attorney who was appointed on behalf of respondent for the express purpose of appealing from the trial court's decision, in combination with the jurisdictional nature of timing requirements and the commonality of attorneys claiming appeals on behalf of their clients, I would conclude that appellate counsel here clearly had the implied authority to file the appeal in this matter.

I understand why the majority concludes that appellate counsel should not have been appointed. Because respondent did participate in the proceedings at one

point and was aware that trial counsel had been appointed on his behalf, he may have been entitled to assume that his trial counsel would stay the course despite respondent's absence. See *In re Collier*, 314 Mich App 558, 571-572; 887 NW2d 431 (2016). However, notwithstanding respondents' right to representation, respondents bear some responsibility for pursuing that right, and that right may be waived through respondents' conduct. See *In re Hall*, 188 Mich App 217, 221-222; 469 NW2d 56 (1991) (discussing former MCR 5.915(B)(1), which is now substantively located at MCR 3.915(B)(1)). By the time appellate counsel was appointed, respondent had clearly waived any right to such an appointment. Nevertheless, it is commendable that the trial court and the attorneys sought to protect respondent's rights by appointing appellate counsel and filing this appeal. Furthermore, critically, the appointment actually occurred. Having been appointed, whether rightly or wrongly, appellate counsel necessarily had the implied authority to claim an appeal by right on behalf of respondent, even in the absence of express direction from respondent. Therefore, I consider it irrelevant whether the appointment was proper, and I would conclude that this appeal was "filed by an aggrieved party" within the meaning of MCR 7.203(A).

Conversely, as the majority also points out, appellate counsel was unable to contact respondent during the pendency of this appeal. Trial counsel had likewise been unable to contact respondent for several months by the time trial counsel filed a request for appellate counsel, so appellate counsel did not even have secondhand direction from respondent. I cannot conclude that appellate counsel's implied authority extended to prosecuting the appeal without *any* input whatsoever from an absent client, and respondent may not rely on the

appointment of appellate counsel to avoid participating in the appeal. Indeed, in the absence of any input from respondent, it is impossible to know whether respondent even *wants* to retain his parental rights—or, as was speculated in the trial court, whether respondent is even still alive.

I note that appellate counsel's efforts to pursue this appeal were commendable. However, I would conclude that it was *not* within appellate counsel's implied authority to pursue the appeal beyond the initial filing; and with no input from respondent, pursuing the appeal was also not within appellate counsel's express authority. I would therefore treat respondent's *brief* as not having truly been filed on his behalf. In other words, I believe this Court should treat respondent as having failed to comply with the requirement of MCR 7.212(A)(1)(a) that "[t]he appellant shall file . . . a brief with the Court of Appeals . . . ." As a result, I believe that the appeal should be dismissed pursuant to MCR 7.216(A)(10) for "failure of the appellant . . . to pursue the case in conformity with the rules."

I recognize that the majority and I arrive at the same outcome, and our paths to that outcome may appear to be a distinction without a difference. However, I regard the distinction as of grave importance, because a lack of jurisdiction deprives this Court of the power to consider the matter at all and is therefore deeply fundamental. I consider it inimical to the core principles of our legal system to foreclose consideration of a matter on what is effectively a pure technicality of whether a document was signed by a party personally or by an attorney who had been expressly appointed for the purpose of appeal. Even though respondent waived any right to representation, parental rights are nevertheless of the utmost importance, and as noted, it was

commendable that the trial court and the attorneys did what they could to protect those rights in the event that respondent turned up later. Because timing is essential to this Court's jurisdiction over an appeal by right, protecting respondent's rights required prompt action. Although ultimately futile in this case, because respondent in fact never reappeared, I would not foreclose the possibility by holding that this Court lacked jurisdiction. In all respects other than the specific grounds for dismissing this appeal, I concur with the majority.

BURTON v STATE OF MICHIGAN

Docket No. 356195. Submitted February 9, 2022, at Lansing. Decided February 24, 2022, at 9:05 a.m.

Plaintiff, Danny Burton, brought an action in the Court of Claims under the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*., which provides that a wrongfully imprisoned individual who satisfies the WICA's statutory requirements is entitled to compensation from defendant, the state of Michigan. In 1987, plaintiff was convicted of first-degree murder and possession of a firearm during the commission of a felony (felony-firearm); he was sentenced to life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. It was eventually proven that plaintiff was innocent, and his convictions and sentences were vacated in December 2019. In January 2020, plaintiff commenced this WICA action. Solomon Radner, an attorney who had assisted in proving plaintiff's innocence in the criminal proceeding, represented plaintiff in the WICA action. The Court of Claims, CYNTHIA DIANE STEPHENS, J., entered a stipulated order awarding plaintiff compensation of $1,612,646.28. With regard to statutory attorney fees under MCL 691.1755(2)(c), plaintiff moved for attorney fees of $50,000. Plaintiff explained that Radner expended substantial time obtaining his release from prison but only expended about seven hours on the "WICA case" itself. Plaintiff further explained that he and Radner had entered into a contingency agreement before the instant action was filed, under which Radner would be entitled to "the lesser of $50,000 or 10% of the total amount awarded" to plaintiff. Defendant argued that under MCL 691.1755(2)(c), only those hours expended in the WICA action itself were compensable, not the hours expended in the underlying criminal case. The Court of Claims subsequently entered two orders allowing plaintiff an opportunity to produce a record establishing his entitlement to attorney fees. Plaintiff argued that the contingency agreement between plaintiff and Radner should govern the award. The Court of Claims ultimately ruled that plaintiff was entitled to attorney fees of $10,000. Defendant moved for reconsideration, and the court denied the motion. Defendant appealed, arguing that application of the framework

set forth in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016), was necessary for calculating reasonable attorney fees.

The Court of Appeals *held*:

MCL 691.1753 of the WICA provides that an individual convicted under the laws of this state and subsequently imprisoned in a state correctional facility for one or more crimes that they did not commit may bring an action for compensation against this state in the Court of Claims. MCL 691.1755(2)(c) provides that a successful WICA plaintiff is entitled to reasonable attorney fees incurred in an action under the WICA and that all of the following apply to attorney fees under the WICA: (*i*) the court shall not award attorney fees unless the plaintiff has actually paid the amount awarded to the attorney; (*ii*) it is not necessary that the plaintiff pay the attorney fees before an initial award under the WICA; instead, the court may award attorney fees on a motion brought after the initial award; (*iii*) the attorney fees must not exceed 10% of the total amount awarded under MCL 691.1755(a) and (b) or $50,000.00, whichever is less, plus expenses; and (*iv*) an award of attorney fees under the WICA may not be deducted from the compensation awarded the plaintiff, and the plaintiff's attorney is not entitled to receive additional fees from the plaintiff. In *Pirgu*, the Supreme Court set forth factors to assist trial courts in determining the reasonableness of attorney fees: (1) the experience, reputation, and ability of the lawyer or lawyers performing the services, (2) the difficulty of the case, i.e., the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly, (3) the amount in question and the results obtained, (4) the expenses incurred, (5) the nature and length of the professional relationship with the client, (6) the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer, (7) the time limitations imposed by the client or by the circumstances, and (8) whether the fee is fixed or contingent. *Pirgu* explained that the triggering operative language for the application of the *Pirgu* framework is the Legislature's instruction that an attorney is entitled to *a reasonable fee*. Michigan courts have regularly applied the *Pirgu* framework to statutes that refer to "reasonable attorney fees." In this case, the operative language of MCL 691.1755(2)(c) provides that a successful WICA plaintiff is entitled to "[r]easonable attorney fees incurred in an action under this act." Accordingly, the *Pirgu* framework applies to the WICA, and the trial court abused its discretion by awarding plaintiff $10,000 in attorney fees without applying the *Pirgu* framework in its order. Application of the *Pirgu* framework

requires consideration of the reasonable hourly rate customarily charged in the locality for similar services multiplied by the reasonable number of hours expended in the case to arrive at a baseline figure and then consideration of the eight-factor list identified in *Pirgu*. Additionally, the language "[r]easonable attorney fees incurred in an action under this act" contemplates only hours expended in the WICA action itself, not the underlying criminal case. Consequently, on remand, the trial court was directed to multiply the reasonable hourly rate charged in the locality for similar services by the reasonable number of hours that Radner expended in the WICA action to reach a baseline figure, and then the trial court was directed to expressly consider the *Pirgu* factors to determine whether an increase or decrease from the baseline figure is warranted. Finally, also pursuant to the *Pirgu* framework, the trial court was informed that it may consider additional relevant factors in its discretion.

Court of Claims judgment awarding plaintiff $10,000 in attorney fees vacated; case remanded to the Court of Claims.

STATUTES – WRONGFUL IMPRISONMENT COMPENSATION ACT – REASONABLE ATTORNEY FEES – FRAMEWORK FOR CALCULATING REASONABLE ATTORNEY FEES.

MCL 691.1755(2)(c) of the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*., provides that a successful WICA plaintiff is entitled to reasonable attorney fees incurred in an action under the WICA; the framework for determining reasonable attorney fees set forth in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269 (2016), applies to an award of attorney fees under MCL 691.1755(2)(c).

Johnson Law, PLC (by *Solomon M. Radner*) for Danny Burton.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Gallant Fish*, Assistant Attorney General, for the state of Michigan.

Before: CAVANAGH, P.J., and JANSEN and RIORDAN, JJ.

RIORDAN, J. This case arises under the Wrongful Imprisonment Compensation Act (the WICA), MCL 691.1751 *et seq*. Defendant appeals as of right the

judgment of the trial court awarding plaintiff attorney fees of $10,000 under MCL 691.1755(2)(c) of that act.[1] The issue before us is whether the framework set forth in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269; 884 NW2d 257 (2016), for calculating reasonable attorney fees applies to such fee determinations under the WICA. We conclude that it does. Accordingly, we vacate the trial court's judgment and remand to that court for further proceedings.

I. BACKGROUND FACTS

In 1987, plaintiff was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in connection with the shooting death of Leonard Ruffin. He was sentenced to serve terms of life in prison for the murder conviction and two years' imprisonment for the felony-firearm conviction. In 2011, a nonprofit organization that provides investigative support to wrongfully convicted individuals began investigating plaintiff's case. Attorney Solomon Radner assisted the investigation. It was eventually proven that plaintiff is actually innocent of the crimes for which he was wrongfully convicted, and in December 2019, the Wayne Circuit Court entered a stipulated order providing that "Mr. Burton's convictions and sentences in this matter are hereby vacated, and all related charges are hereby dismissed."

In January 2020, plaintiff commenced the instant action under the WICA, which provides that a wrongfully imprisoned individual who satisfies the statutory requirements therein is entitled to compensation from

[1] The trial court also awarded plaintiff compensation for his wrongful imprisonment, but that award is not at issue on appeal.

defendant.[2] Radner also represented plaintiff in the WICA action. In June 2020, the Court of Claims entered a stipulated order awarding plaintiff compensation of $1,612,646.28. With regard to statutory attorney fees under MCL 691.1755(2)(c) for a successful WICA plaintiff, the order stated as follows:

> The parties shall submit to the Court a stipulated order concerning reasonable attorney fees and costs under MCL 691.1755(2)(c) within thirty (30) days of the date of entry of this order. If the parties do not present such a stipulated order to the Court within thirty (30) days, this Court shall set this matter for a hearing to determine the amount of reasonable attorney fees and costs under MCL 691.1755(2)(c), and the Court may in its discretion require the submission of legal memoranda in support of the parties' respective positions.

In August 2020, plaintiff filed his motion for reasonable attorney fees of $50,000, the statutory limit under MCL 691.1755(2)(c)(*iii*). In an accompanying brief, plaintiff explained that Radner expended substantial time obtaining his release from prison but only expended about seven hours on the "WICA case" itself because defendant agreed that he was entitled to compensation. Plaintiff further explained that he and Radner entered into a contingency agreement before the instant action was filed, under which Radner would apparently be entitled to "the lesser of $50,000 or 10% of the total amount awarded" to plaintiff.[3] Plaintiff argued that the trial court should award him $50,000 in attorney fees because the contingency

[2] See MCL 691.1755.

[3] The contingency agreement has not been produced for the record, but Radner represents on appeal that he offered to produce it to the trial court for an *in camera* review.

agreement was "reasonable" in light of Radner's efforts to establish his innocence in the underlying criminal case.

Defendant responded that the proper calculation of "[r]easonable attorney fees" under MCL 691.1755(2)(c) requires application of the principles set forth in cases such as *Pirgu* and *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), which essentially provide that such fees are determined by multiplying the reasonable number of hours expended on the case with a reasonable hourly rate, subject to adjustment through consideration of certain relevant factors.[4] Defendant argued that under MCL 691.1755(2)(c), only those hours expended in the WICA action itself were compensable, not the hours expended in the underlying criminal case. Defendant contended that the trial court should deny plaintiff's request for attorney fees in its entirety because he failed to apply the *Pirgu* framework.

In October 2020, the trial court entered an order allowing plaintiff to produce a record establishing his entitlement to attorney fees:

> Plaintiff's counsel has filed a request for attorney fees of [$]50,000, citing a contingency fee arrangement with his client. Counsel has declined to attach a billing statement, an affidavit averring the hours invested in this litigation, his customary billing rate, specific years of experience, locality rates, or any information upon which this court may determine a reasonable fee award, other than the existence of a contingency fee agreement. He has not attached even that agreement. Based upon this filing the Court could exercise its discretion and make no award. However, the Court will allow Plaintiff's counsel to supple-

[4] Determining a reasonable attorney fee by multiplying the reasonable number of hours expended on the case with a reasonable hourly rate is known as the "lodestar method." See *Smith*, 481 Mich at 547 (CAVANAGH, J., dissenting).

> ment his papers on or before October 17, 2020, with any supplemental responses due by October 27, 2020.

In response, plaintiff filed a supplemental brief that summarily addressed the factors identified by the trial court but only attached minimal supporting documentation to his brief. Defendant again asked the trial court to deny plaintiff's request for attorney fees in its entirety because he failed to satisfy his burden of establishing entitlement to those fees. However, the trial court once again allowed plaintiff an opportunity to produce a record:

> Per the Court's October 8th, 2020 Order, plaintiff's counsel was allowed to supplement his papers on or before October 17, 2020, with any supplemental responses due by October 27, 2020. The Court has reviewed the papers filed and finds that the Plaintiff has failed to address the *Lodestar* factor [sic] or present any record of hours expended in this matter despite this court's earlier order. If the Plaintiff fails to address the *Lodestar* factors and offer records of hours expense by Monday, November 16th, 2020, the court will disallow all attorney fees.

Plaintiff promptly filed his second supplemental brief as allowed by the trial court, explaining that a straightforward application of the lodestar method provided for attorney fees of $7,078.50.[5] However, plaintiff argued, the trial court should nonetheless award him attorney fees of $50,000 because Radner's work on the underlying criminal case was a "special and rare circumstance[]." Defendant responded that plaintiff was not entitled to any attorney fees because

[5] Plaintiff identified this number by multiplying the hours that Radner and his staff expended on the WICA action, 15.73, with Radner's requested hourly rate, $450.

he consistently failed to meaningfully apply the *Pirgu* framework or, alternatively, that he was only entitled to attorney fees of $1,099.

The trial court ultimately ruled that plaintiff was entitled to attorney fees of $10,000, reasoning as follows:

> Plaintiff has been afforded two opportunities to perfect his prayer for a $50,000.00 fee. While plaintiff avers the *Lodestar* factors are inapplicable, he has admitted that using what he, as an officer of the court, states is his $450.00 hourly fee, yields a product of $7,078.50. This would account for approximately 16 hours, (15.73) hours, invested on this matter prior to settlement. Counsel has stated that he believes this is the "rare" and exceptional case warranting an hourly rate of over $3,000.00 per hour or a fee equal at this hourly rate for over seven times the hours actually invested in this case. He has stated that if an evidentiary hearing were held, he could establish the merit on this enhancement. He has not, however, filed a Motion for such a hearing.
>
> This court values the expertise of counsel for both parties. HOWEVER, AN ENHANCEMENT OF THIS MAGNITUDE IS BEYOND RARE, IT IS NEARLY UNPHATHOMABLE [sic]. The court, however, will extend counsel the opportunity to request such a hearing accompanied by a witness list on or before Friday, December 11, 2020, or accept this court's award of $10,000.00.

Plaintiff did not request such a hearing, apparently accepting the attorney fees of $10,000. Defendant, however, moved for reconsideration, arguing that plaintiff artificially inflated the number of hours that Radner worked on the WICA action by repeatedly failing to properly support his request for attorney fees with legal analysis and documentation, thereby extending the litigation. The trial court denied the motion.

Defendant now appeals, arguing that the trial court erred by awarding attorney fees to plaintiff without applying the *Pirgu* framework. According to defendant, plaintiff only is entitled to attorney fees in the amount of $466. Plaintiff has responded, arguing that the *Pirgu* framework does not apply to an award of "[r]easonable attorney fees" under MCL 691.1755(2)(c) and that, instead, the contingency agreement between plaintiff and Radner should govern the award.

II. STANDARD OF REVIEW

"Issues of statutory interpretation are reviewed de novo." *Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). In addition, "[w]e review a trial court's determination of the reasonableness of requested attorney fees for an abuse of discretion." *Zoran v Cottrellville Twp*, 322 Mich App 470, 475; 913 NW2d 359 (2017) (quotation marks and citation omitted).

III. ANALYSIS

Before the WICA became effective on March 29, 2017, "people who were wrongfully imprisoned by the state of Michigan had no recourse against it for compensation" because the state was protected by sovereign immunity. *Sanford v Michigan*, 506 Mich 10, 15; 954 NW2d 82 (2020). Thus, "[t]he WICA is an express waiver of the state's sovereign immunity." *Id*. In this regard, MCL 691.1753 provides as follows:

> An individual convicted under the law of this state and subsequently imprisoned in a state correctional facility for 1 or more crimes that he or she did not commit may bring an action for compensation against this state in the court of claims as allowed by this act.

MCL 691.1755(1) provides that a wrongfully imprisoned individual may recover compensation from defendant by proving the following by clear and convincing evidence:

> (a) The plaintiff was convicted of 1 or more crimes under the law of this state, was sentenced to a term of imprisonment in a state correctional facility for the crime or crimes, and served at least part of the sentence.
>
> (b) The plaintiff's judgment of conviction was reversed or vacated and either the charges were dismissed or the plaintiff was determined on retrial to be not guilty. However, the plaintiff is not entitled to compensation under this act if the plaintiff was convicted of another criminal offense arising from the same transaction and either that offense was not dismissed or the plaintiff was convicted of that offense on retrial.
>
> (c) New evidence demonstrates that the plaintiff did not perpetrate the crime and was not an accomplice or accessory to the acts that were the basis of the conviction, results in the reversal or vacation of the charges in the judgment of conviction or a gubernatorial pardon, and results in either dismissal of all of the charges or a finding of not guilty on all of the charges on retrial.

Further, subject to certain exceptions not relevant here, MCL 691.1755(2) provides that a successful plaintiff is entitled to the following compensation:

> (a) Fifty thousand dollars for each year from the date the plaintiff was imprisoned until the date the plaintiff was released from prison, regardless of whether the plaintiff was released from imprisonment on parole or because the maximum sentence was served. For incarceration of less than a year in prison, this amount is prorated to 1/365 of $50,000.00 for every day the plaintiff was incarcerated in prison.

* * *

> (c) Reasonable attorney fees incurred in an action under this act. All of the following apply to attorney fees under this act:
>
> (*i*) The court shall not award attorney fees unless the plaintiff has actually paid the amount awarded to the attorney.
>
> (*ii*) It is not necessary that the plaintiff pay the attorney fees before an initial award under this act. The court may award attorney fees on a motion brought after the initial award.
>
> (*iii*) The attorney fees must not exceed 10% of the total amount awarded under subdivisions (a) and (b) or $50,000.00, whichever is less, plus expenses.
>
> (*iv*) An award of attorney fees under this act may not be deducted from the compensation awarded the plaintiff, and the plaintiff's attorney is not entitled to receive additional fees from the plaintiff.

"Michigan follows the 'American rule' with respect to the payment of attorney fees and costs." *Haliw v Sterling Hts*, 471 Mich 700, 706; 691 NW2d 753 (2005). "Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Id*. at 707. MCL 691.1755(2)(c) of the WICA is one such exception, providing that the trial court "shall" award to a successful plaintiff "[r]easonable attorney fees incurred in an action under this act."

In *Smith*, 481 Mich 519, our Supreme Court interpreted MCR 2.403(O)(6)(b), which provided that in certain cases, a party that rejects a case evaluation and receives an unfavorable verdict at trial must pay to the prevailing party "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of

the case evaluation."[6] The lead opinion explained that determining "a reasonable attorney fee" first requires the trial court to multiply a "reasonable hourly rate by the reasonable hours billed [to] produce a baseline figure." *Id*. at 533 (opinion by TAYLOR, C.J.).[7] Next, the Court instructed that the trial court should consider the six factors identified in *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), and the eight factors identified in MRPC 1.5(a) "to determine whether an up or down adjustment is appropriate." *Smith*, 481 Mich at 529-531 (opinion by TAYLOR, C.J.).

Eight years later, in *Pirgu*, 499 Mich at 271, our Supreme Court considered "whether the framework for calculating a reasonable attorney fee set forth in [*Smith*] applies to attorney fee determinations under MCL 500.3148(1) of the no-fault insurance act."[8] The Court concluded that the *Smith* framework did apply to such determinations, reasoning as follows:

> Although § 3148(1) is phrased differently than MCR 2.403(O)(6)(b), those differences are not material to determining whether the *Smith* framework applies. The plain language of the statute and the court rule both speak in terms of a reasonable fee. The operative language triggering the *Smith* analysis is the Legislature's instruction that an attorney is entitled to *a reasonable fee*. . . . Because the

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[6] MCR 2.403 was recently amended to omit this provision.

[7] The lead opinion in *Smith* was authored by Chief Justice TAYLOR and joined by Justice YOUNG. Justice CORRIGAN, joined by Justice MARKMAN, concurred with the lead opinion in all but one respect, which does not implicate the present matter before us. Thus, although there was no majority opinion of the Court, Chief Justice TAYLOR's opinion is controlling in the instant case.

[8] MCL 500.3148(1) provided that "[a]n attorney is entitled to a reasonable fee . . . in an action for personal or property protection insurance benefits which are overdue . . . if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment."

> plain language of § 3148(1) speaks in terms of awarding a "reasonable fee," we conclude that the *Smith* framework governing reasonable fee determinations is equally applicable in this context. [*Id*. at 279.]

Further, the Court distilled the *Wood* and MRPC 1.5(a) factors into a single list to assist trial courts:

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

In this case, the operative language of MCL 691.1755(2)(c) provides that a successful WICA plaintiff is entitled to "[r]easonable attorney fees incurred in an action under this act." We agree with defendant that the *Pirgu* framework is applicable to this statute.

As explained in *Pirgu*, the triggering operative language for the application of the *Pirgu* framework "is the Legislature's instruction that an attorney is entitled to *a reasonable fee*." *Pirgu*, 499 Mich at 279. MCL 691.1755(2)(c) refers to "[r]easonable attorney fees," which is plainly an instruction that an attorney representing a successful WICA plaintiff is entitled to a reasonable fee. It is unlike, for example, MCL 15.271(4)

of the Open Meetings Act (OMA), MCL 15.261 *et seq*., which provides that a successful OMA plaintiff is entitled to "court costs and actual attorney fees for the action."

We have regularly applied the *Pirgu* framework, or its predecessor *Smith* framework, to statutes that refer to "reasonable attorney fees." For example, in *Cadwell v Highland Park*, 324 Mich App 642, 655 & n 2; 922 NW2d 639 (2018), we applied the *Pirgu* framework to MCL 15.364 of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., which provides that "[a] court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the court determines that the award is appropriate." Similarly, in *Powers v Brown*, 328 Mich App 617, 621; 939 NW2d 733 (2019), we applied the *Pirgu* framework to MCL 600.2919a(1), which provides that a person damaged by statutory conversion "may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees[.]" And in *Kennedy v Robert Lee Auto Sales*, 313 Mich App 277, 294-295; 882 NW2d 563 (2015), we applied the *Smith* framework to MCL 445.911(2) of the Michigan Consumer Protection Act, MCL 445.901 *et seq*., which provides that "a person who suffers loss . . . may bring an action to recover actual damages or $250.00, whichever is greater, together with reasonable attorneys' fees."[9] Our conclusion today is consistent with such cases, in which the statutory language "reasonable attorney fees" communicates that the *Pirgu* framework should presumptively be applied unless additional language suggests otherwise.

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[9] MCL 445.911(2) was subsequently amended, but the changes are immaterial to the substance of the statute. See 2020 PA 296.

We acknowledge that MCL 691.1755(2)(c) refers to "[r]easonable attorney fees" that are "incurred," thereby arguably signaling that any fees that are actually incurred by a successful WICA plaintiff are recoverable, assuming that the fees are "reasonable." However, we have applied the *Pirgu* framework to the previous version of MCR 2.114(E),[10] which provided that the trial court may order a party to pay "the amount of the reasonable expenses incurred because of the filing of the [frivolous] document, including reasonable attorney fees." See *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 147-149; 946 NW2d 812 (2019). Thus, the mere fact that MCL 691.1755(2)(c) refers to "[r]easonable attorney fees" that are "incurred" by the successful WICA plaintiff does not preclude application of the *Pirgu* framework.

Plaintiff argues that this case is controlled by *Dep't of Transp v Randolph*, 461 Mich 757; 610 NW2d 893 (2000). We disagree. In that case, our Supreme Court interpreted MCL 213.66(3), which provided that certain successful litigants in a condemnation proceeding were entitled to "reimbursement in whole or in part to the owner by the agency of the owner's reasonable attorney's fees . . . . The reasonableness of the owner's attorney fees shall be determined by the court." See *id*. at 761.[11] Our Supreme Court rejected application of the lodestar method to MCL 213.66(3), explaining that "the focus of the reasonableness determination clearly is on the *owner's* attorney fees." *Id*. at 766. *Randolph* is distinguishable from this case because the statute in that case referred to "reimbursement" of "the owner's attorney fees." This language directed the trial court to focus on the attorney fees specifically incurred and

[10] MCR 2.114 has since been repealed.

[11] MCL 213.66 was amended by 1996 PA 474 and 2006 PA 370.

paid by the property owner. See *id*.; see also *Smith*, 481 Mich at 537 (opinion by TAYLOR, C.J.) ("In *Randolph*, we specifically noted that MCL 213.66(3) requires consideration of whether actual fees are reasonable, and that this is different from fee-shifting statutes that simply authorize the trial court to award 'reasonable attorney fees' without regard to the fees actually charged."). Here, in contrast, MCL 691.1755(2)(c) does not include language such as "the plaintiff's attorney fees" or "actual attorney fees" to signal that the specific fees actually incurred and paid by the successful WICA plaintiff are the presumptive baseline.[12]

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[12] Plaintiff argues that MCL 691.1755(2)(c) creates a "reimbursement" scheme whereby the successful WICA plaintiff must first pay the agreed-upon attorney fees to his or her counsel, and then counsel must repay those fees to the plaintiff and await an award from the trial court. Thus, plaintiff argues, the agreed-upon attorney fees—so long as they are reasonable—must be awarded by the trial court based on a round-trip, illusory exchange of funds. We disagree.

While we acknowledge that MCL 691.1755(2)(c) is not a model of clarity, we do not interpret that provision as requiring a symbolic exchange between the successful WICA plaintiff and his or her counsel. Instead, the most reasonable understanding of MCL 691.1755(2)(c) is that the trial court must first identify the amount of "[r]easonable attorney fees" under the *Pirgu* framework to which the plaintiff is entitled. Then, under MCL 691.1755(2)(c)(*i*), the plaintiff must pay that amount to his or her counsel. Once the plaintiff does so, the trial court affirmatively awards that amount to him or her under MCL 691.1755(2)(c). In other words, while plaintiff is correct that MCL 691.1755(2)(c) requires reimbursement, the reimbursement is for "[r]easonable attorney fees" under WICA, not actual attorney fees that are "reasonable" as determined elsewhere by the plaintiff and his or her counsel.

This scheme ensures that the plaintiff receives precisely the amount of compensation for the wrongful imprisonment to which he or she is entitled under the WICA regardless of attorney fees incurred elsewhere. The plaintiff cannot receive even a temporary windfall from the award of attorney fees because those fees must first be paid to counsel under MCL 691.1755(2)(c)(*i*). And the plaintiff cannot suffer a reduction in compensation because, under MCL 691.1755(2)(c)(*iv*), "[a]n award of

Regardless, plaintiff argues that, for public-policy reasons, the trial court should include an attorney's work on the underlying criminal case in calculating the "[r]easonable attorney fees" awardable to a successful WICA plaintiff under MCL 691.1755(2)(c). Plaintiff acknowledged at oral argument that such an outcome would "ideally" be required by the Legislature, but he nonetheless maintains that because the Legislature has not clearly done so, we should establish caselaw to that effect. However, as commendable as the efforts of plaintiff's counsel were in righting the wrong committed against plaintiff, a court "may not award attorney fees . . . solely on the basis of what it perceives to be fair or on equitable principles." *Reed v Reed*, 265 Mich App 131, 166; 693 NW2d 825 (2005). This type of policy consideration is for the Legislature to make, not the judiciary. Thus, to the extent that plaintiff's policy argument would require us to reject the *Pirgu* framework, we decline to adopt it and leave it to the Legislature to do so if it chooses.

We note that plaintiff conceded, in both the trial court and this Court, that the italicized language "[r]easonable attorney fees *incurred in an action* under this act" contemplates only hours expended in the WICA action itself, not the underlying criminal case. For example, in his October 16, 2020 brief, plaintiff stated as follows: "Plaintiff readily admits, and included in his original motion, that the attorney fees he would be entitled to under a strict *Lodestar* analysis, will be extremely limited to only the work done on the WICA case itself." Similarly, in his brief on appeal, plaintiff states as follows: "Counsel and his staff

attorney fees under this act may not be deducted from the compensation awarded the plaintiff, and the plaintiff's attorney is not entitled to receive additional fees from the plaintiff."

worked for just shy of five years on securing Mr. Burton's release . . . ***all of which*** was before the filing of the instant WICA action, and therefore ***none of which*** is time spent on the instant WICA action for purposes of attorney fees." Therefore, as plaintiff concedes, we will consider the "reasonable number of hours" expended in the WICA matter before us, for the purposes of the *Pirgu* framework, which does not include any hours plaintiff's counsel expended in the underlying criminal case. Based on plaintiff's position, whether WICA, as written, encompasses these types of fees is left for another day.

Having concluded that the *Pirgu* framework applies to an award of "[r]easonable attorney fees" under MCL 691.1755(2)(c), we further conclude that the trial court abused its discretion by awarding plaintiff $10,000 in attorney fees without applying the *Pirgu* framework in its order. Accordingly, further proceedings in the Court of Claims are warranted. See *Pirgu*, 499 Mich at 282 ("In order to facilitate appellate review, the trial court should briefly discuss its view of each of the factors above on the record and justify the relevance and use of any additional factors."). Application of that framework, as the trial court implicitly recognized in its earlier orders, requires consideration of "the reasonable hourly rate customarily charged in the locality for similar services" multiplied by "the reasonable number of hours expended in the case to arrive at a baseline figure" and the eight-factor list identified in *Pirgu*. See *id*. at 281-282. Consequently, on remand, the trial court should multiply the reasonable hourly rate charged in the locality for similar services by the reasonable number of hours that Radner expended in the WICA action to reach a baseline figure, and then the trial court must expressly consider the *Pirgu* factors to determine whether an increase or decrease

from the baseline figure is warranted. In addition, the trial court may consider "additional relevant factors" in its discretion. See *id*. at 282.

IV. CONCLUSION

The *Pirgu* framework applies to an award of attorney fees under MCL 691.1755(2)(c), and the trial court abused its discretion by awarding attorney fees to plaintiff without an express application of that framework. Accordingly, we vacate the judgment of the trial court awarding plaintiff $10,000 in attorney fees and remand to that court for further proceedings that are consistent with our opinion.[13] We do not retain jurisdiction.

CAVANAGH, P.J., and JANSEN, J., concurred with RIORDAN, J.

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[13] Defendant argues that we should decide the amount of attorney fees to which plaintiff is entitled on our own accord. However, given the novel legal issues involved in this case, we conclude that a remand to the trial court is more appropriate.

PEOPLE v PROPP (ON REMAND)

Docket No. 343255. Submitted January 3, 2022, at Lansing. Decided February 24, 2022, at 9:10 a.m. Leave to appeal sought.

Robert L. Propp was convicted following a jury trial in the Saginaw Circuit Court of first-degree premeditated murder, MCL 750.316(a)(1). The victim, defendant's ex-girlfriend and the mother of his child, was found dead in her own bed. Defendant, who had spent the night with the victim, gave the police several conflicting accounts of what had happened in the preceding hours; however, it was undisputed that the victim had died by neck compression. Before trial, defendant moved for funds to retain an expert in the area of erotic asphyxiation, claiming that the testimony was necessary to support his claim that the victim's death was accidental. The court, Darnell Jackson, J., denied the motion, reasoning that the record did not support that theory. The prosecution then moved to introduce evidence of defendant's prior acts of domestic violence against his ex-wife; the majority of the evidence came in the form of statements the victim had made to friends and family members concerning her relationship with defendant. The court granted the prosecution's motion in its entirety, and the jury ultimately found defendant guilty as charged. The Court of Appeals, METER and FORT HOOD, JJ. (MURRAY, C.J., concurring), affirmed defendant's conviction. 330 Mich App 151 (2019). In affirming the trial court's denial of defendant's motion for funds to retain an expert, the Court of Appeals reasoned that because defendant sought appointment of an expert to assert the "affirmative defense" that the victim had died accidentally, he was required—but had failed—to additionally demonstrate a substantial basis for the defense. In affirming the trial court's decision to admit other-acts evidence, the Court of Appeals concluded that admission of domestic-abuse other-acts evidence under MCL 768.27b(1), was only limited by MRE 403, not by any other rules related to the admission of evidence. Defendant appealed, and the Supreme Court granted the application. 506 Mich 939 (2020). In a unanimous opinion by Justice BERNSTEIN, the Supreme Court reversed in part and vacated in part the Court of Appeals opinion and remanded the case to the Court of Appeals for further consideration. 508 Mich 374 (2021).

In so doing, the Supreme Court concluded that the Court of Appeals erred by applying the wrong standard of review to defendant's request for expert assistance and by failing to consider other rules of evidence when determining the admissibility of prior acts.

On remand, the Court of Appeals *held*:

1. The due-process analysis in *Ake v Oklahoma*, 470 US 68 (1985), governs the issue of whether a criminal defendant is entitled to the appointment of an expert witness at government expense. In turn, the reasonable-probability standard set forth in *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), is the appropriate standard for courts to apply in determining whether an indigent criminal defendant has made a sufficient showing to be entitled to expert assistance at government expense under *Ake*'s due-process analysis. In particular, a defendant must show the trial court that there exists a reasonable probability that (1) an expert would be of assistance to the defendant and (2) denial of expert assistance would result in a fundamentally unfair trial. In this case, the Court of Appeals adopted then Chief Judge MURRAY's analysis in his concurring opinion to conclude that defendant satisfied the first part of the reasonable-probability standard because defense counsel provided a sufficient demonstration of a substantial basis for the defense by informing the trial court that the medical examiner's testimony would be that the victim died from strangulation, that defendant and the victim had previously been a couple, that erotic asphyxiation is a somewhat unknown defense in Michigan, that the proposed expert would be able to testify about the practice of erotic asphyxiation, and that individuals can die through the practice. However, no error requiring reversal occurred on this issue because it was not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial. The testimony of the prosecution's expert (that the expert recognized the practice of erotic asphyxiation and that the victim's death could have resulted from that practice), in conjunction with defendant's testimony about the circumstances surrounding the victim's death (that he killed her accidentally while practicing erotic asphyxiation), presented the jury with a full and complete picture regarding the circumstances surrounding the victim's death. In addition, the essence of the defense was not so technical or complex that testimony from an expert would have been particularly helpful to the defense or the jury; the proposed expert's testimony was to inform the jury of the defense; and that information was ably conveyed to the jury by defendant and his trial counsel without an independent defense expert.

Accordingly, the trial court did not err by denying defendant's motion to appoint an expert witness on the subject of erotic asphyxiation.

2. Defendant set forth numerous instances of alleged hearsay statements that were admitted at trial. Although some of the statements identified by defendant qualified as hearsay, several did not, and it was proper for the trial court to admit the remainder either for nonhearsay purposes or under the MRE 803(3) exception, which addresses then-existing mental, emotional, or physical conditions. In particular, even if certain testimony qualified as hearsay, all the victim's statements regarding defendant's pattern of stalking, threats, and domestic violence were admissible under that rule as evidence concerning the victim's state of mind, as well as her fear of defendant. To the extent that a few of the victim's cited statements might have qualified as inadmissible hearsay that could not have been admitted for such nonhearsay purposes, defendant failed to rebut the presumption that the error was harmless. Accordingly, defendant failed to demonstrate that it was more likely than not that the trial court's purported evidentiary error was outcome-determinative.

Affirmed.

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

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

ON REMAND

Before: MURRAY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM. In *People v Propp*, 330 Mich App 151; 946 NW2d 786 (2019) (*Propp I*), we affirmed defendant's conviction and sentence of life imprisonment without the possibility of parole for first-degree pre-

meditated murder.[1] The Supreme Court granted defendant leave to appeal, *People v Propp*, 506 Mich 939 (2020), and issued a decision reversing in part, and vacating in part, this Court's opinion, and remanding for further consideration, *People v Propp*, 508 Mich 374, 378, 387; 976 NW2d 1 (2021) (*Propp II*). Specifically, the Court sent back the following issues for us to resolve:

> We conclude that the Court of Appeals erred by applying the wrong standard to review defendant's request for expert assistance and by failing to consider other rules of evidence when determining the admissibility of prior acts. Accordingly, we vacate Part II of the judgment of the Court of Appeals addressing due process, reverse Part IV of the judgment of the Court of Appeals addressing the application of MCL 768.27b, and remand to that same court for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. [*Propp II*, 508 Mich at 387.]

We again affirm defendant's conviction and sentence.

In the interest of judicial efficiency, we assume the reader is familiar with the facts as laid out in *Propp I*, 330 Mich App at 156-159 (opinion of the Court), and the reasoning and conclusions of the Supreme Court in *Propp II*. Our decision below is made in light of both prior decisions.

As a threshold consideration, because the Supreme Court held that it was reversing the analysis in Part IV of this Court's opinion "addressing the application of MCL 768.27b," *Propp II*, 508 Mich at 387, we are not required to reconsider defendant's argument—which was also analyzed in Part IV of *Propp I*—"that testimony from his ex-wife that defendant sexually assaulted her during the course of their marriage was

[1] The panel was partially split on the reasoning. Compare *Propp*, 330 Mich App at 159-183, with *id.* at 184-188 (MURRAY, C.J., concurring).

inadmissible under MRE 403," *Propp I*, 330 Mich App at 181-183. Rather, viewing the Supreme Court's remand instructions in context, the two issues on remand are (1) whether defendant is entitled to a new trial as a result of the trial court's denial of his motion to appoint an expert witness at state expense and (2) whether the trial court committed error requiring reversal by admitting certain hearsay statements concerning "other acts" of stalking or domestic violence committed by defendant. We now turn to those issues.

I. FAILURE TO APPOINT AN EXPERT AT STATE EXPENSE

For the reasons stated in then-Chief Judge MURRAY's concurrence in *Propp I*, we hold that the trial court did not commit error entitling defendant to a new trial by denying defendant's motion to appoint an expert in erotic asphyxiation at state expense.[2]

In *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018), the Court addressed two fundamental legal questions: (1) "what law applies to [a] defendant's claim that the trial court violated his due process rights when it denied his request for the appointment

[2] We first ensure that the issue has been properly preserved. In his motion to appoint an expert witness at state expense, defendant did not expressly cite any supporting constitutional provision, but he did argue that the appointment of an expert was necessary for him to "hav[e] a fair opportunity to present his defense[.]" Consequently, under a forgiving approach to issue-preservation, the instant due-process issue is subject to review "under the standard for preserved constitutional error." See *People v Kennedy*, 505 Mich 1031 (2020) (reversing this Court's holding that a due-process challenge like the one at bar was unpreserved—and thus subject to plain-error review—and remanding for this Court's "reconsideration under the standard for preserved constitutional error"). Under that standard, if an error occurred, the prosecution has the burden of proving, beyond a reasonable doubt, that the error was harmless. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

of a[n] . . . expert" and (2) "what showing [a] defendant must make to be entitled to the appointment of the expert." With regard to the first of those issues, the Supreme Court decided that *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985), "sets forth the due process analysis that a court must use when an indigent criminal defendant claims he or she has not been provided the basic tools of an adequate defense and therefore did not have an adequate opportunity to present his or her claims fairly within the adversarial system." *Kennedy*, 502 Mich at 218 (quotation marks, citation, and brackets omitted). However, turning to the second inquiry, the Supreme Court recognized that *Ake* is not particularly helpful:

> Although *Ake* governs requests by an indigent criminal defendant for the appointment of an expert at government expense, the [United States] Supreme Court has not explained how this showing must be made. This question is critical. Until an expert is consulted, a defendant might often be unaware of how, *precisely*, the expert would aid the defense. If, in such cases, the defendant were required to prove in detail with a high degree of certainty that an expert would benefit the defense, the defendant would essentially be tasked with the impossible: to get an expert, the defendant would need to already know what the expert would say. At the same time, the defendant's bare assertion that an expert would be beneficial cannot, without more, entitle him or her to an expert; otherwise, every defendant would receive funds for experts upon request. [*Id*. at 225-226 (citations omitted).]

In answering this question, the Court adopted the "reasonable probability" standard from *Moore v Kemp*, 809 F2d 702 (CA 11, 1987), under which

> "[a] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon

> demand. 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. Thus, if a defendant wants an expert to assist his attorney in confronting the prosecution's proof—by preparing counsel to cross-examine the prosecution's experts or by providing rebuttal testimony—he must inform the court of the nature of the prosecution's case and how the requested expert would be useful. At the very least, he must inform the trial court about the nature of the crime and the evidence linking him to the crime. By the same token, if the defendant desires the appointment of an expert so that he can present an affirmative defense, such as insanity, he must demonstrate a substantial basis for the defense, as the defendant did in *Ake*. In each instance, the defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed. In addition, the defendant should inform the court why the particular expert is necessary. We recognize that defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide. We do believe, however, that defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." [*Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712.]

"In particular," the Supreme Court emphasized, " 'a defendant must show the trial court that there exists a reasonable probability *both* that an expert would be of assistance to the defense *and that denial of expert assistance would result in a fundamentally unfair*

trial.' " *Kennedy*, 502 Mich at 228 (emphasis added), quoting *Moore*, 809 F2d at 712.

In *Propp I*, 330 Mich App at 184-185, the concurring judge analyzed the issue as follows:

> [W]ith respect to the appointment of a defense expert witness at the state's expense, I would conclude that defendant satisfied the first part of the "reasonable probability" standard from [*Moore*], adopted by the Supreme Court in [*Kennedy*]. . . .
>
> Several courts have recognized that the process of evaluating the "reasonable probability" standard is a "dynamic one" that is, naturally, very case specific. *Moore v State*, 390 Md 343, 369; 889 A2d 325 (2005). This case is neither heavy on the facts nor on the science or legal theories presented. In both defendant's motion and supporting brief, as well as at the motion hearing, defense counsel informed the trial court about "the nature of the crime and the evidence linking [defendant] to the crime," *Kennedy*, 502 Mich at 227, quoting *Moore*, 809 F2d at 712 (quotation marks omitted), by indicating that defendant was being prosecuted for murder and that his defense was that he accidentally killed the victim through erotic asphyxiation. Defense counsel also . . . inform[ed] the trial court that the medical examiner's testimony would be that the victim died from strangulation, that defendant and the victim had previously been a couple, that erotic asphyxiation is a somewhat unknown defense in Michigan, that the proposed expert would be able to testify as to the practice of erotic asphyxiation, and that individuals can die through the practice.[3] Although this information is not nearly as detailed as that provided by the defendant

[3] Defendant's trial counsel also informed the trial court that the defense had located a specific psychologist that it wished to retain as its expert in this area. See *Moore*, 809 F2d at 712 ("[T]he defendant's showing must also include a specific description of the expert or experts desired; without this basic information, the court would be unable to grant the defendant's motion, because the court would not know what type of expert was needed.").

> in [*Ake*], the *Ake* Court specifically noted that it was not expressing an "opinion as to whether any of these factors . . . , alone or in combination, is necessary to make this finding." Because a reading of *Ake*, *Moore*, and *Kennedy* does not lead to the conclusion that defendant's burden of production is an overly burdensome one, I would hold that defendant satisfied the first portion of the reasonable-probability standard adopted in *Kennedy*.
>
> However, as the majority concluded, in the end it is not reasonably probable that the denial of this expert assistance resulted in a fundamentally unfair trial. *Kennedy*, 502 Mich at 227. As ably recounted by the majority, in front of the jury the prosecution's expert recognized the practice of erotic asphyxiation and that the victim's death could have resulted from that practice. This testimony, in conjunction with defendant's testimony about the circumstances surrounding the victim's death, presented the jury with a full and complete picture regarding the circumstances surrounding the victim's death, or at least defendant's version as to how it occurred. See *Stephens v Kemp*, 846 F2d 642, 646-647 (CA 11, 1988). As a result, no error requiring reversal occurred on this issue. [*Propp I*, 330 Mich App at 184-185 (MURRAY, C.J., concurring) (fourth alteration in original).]

We agree and adopt that analysis in full. In addition, we note that, although the practice of erotic asphyxiation may have been unfamiliar—or entirely unknown—to certain jurors, the essence of the defense was not so technical or complex that testimony from an expert would have been particularly helpful to the defense or the jury. See *Propp II*, 508 Mich at 382 (observing that the defense at issue here is not an affirmative defense at all, but rather a variety of "accident" argument that simply seeks to undermine the intent element for murder). As defendant's trial counsel admitted at the hearing on the motion to appoint an expert, the proposed expert's testimony was not intended to tell "the jury . . . what happened," but

rather to inform "the jury that this is this young man's defense, and this is what he says happened." But at trial, that very information was ably conveyed to the jury by defendant and his trial counsel *without* an independent defense expert. And, no additional expert testimony was necessary to explain such a simple concept to the jury—i.e., that defendant was claiming that he did not intend to kill the victim and that he must have done so accidentally while restricting her airflow (at her request) during a consensual sexual encounter. For these reasons, we hold that the trial court did not commit any error entitling defendant to a new trial by denying his motion to appoint a defense expert on the subject of erotic asphyxiation.

II. HEARSAY

We again first look to whether the issue has been preserved. At the outset of defendant's trial, he was granted a standing objection with regard to any hearsay statements introduced as a result of the trial court's pretrial ruling regarding the admissibility of such statements under MCL 768.27b(1). Thus, this issue is preserved. See *People v Hamilton*, 501 Mich 1075 (2018).

As observed in *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013):

> A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo. Likewise, interpretation of a court rule is a question of law that we review de novo. [Citations omitted.]

Under the harmless-error rule set forth in MCL 769.26, it is presumed that preserved, nonconstitutional error—such as evidentiary error—is harmless,

and to overcome that presumption the appellant bears the burden of demonstrating, on the strength of the entire record, "that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 493, 495-496, 502; 596 NW2d 607 (1999).

"In general, hearsay—an out-of-court statement offered to prove the truth of the matter asserted—may not be admitted into evidence. MRE 801; MRE 802." *People v Green*, 313 Mich App 526, 531; 884 NW2d 838 (2015). As noted in *Propp I*, 330 Mich App at 188 & n 4 (MURRAY, C.J., concurring), at oral argument before this Court the prosecution conceded that at least *some* hearsay evidence was seemingly admitted at trial, though the prosecution continued to assert that the vast majority of the alleged hearsay statements identified by defendant had been properly admitted for a variety of reasons or did not entitle defendant to appellate relief. Specifically, the prosecution argued that most of the alleged hearsay statements were nonassertive (i.e., were not "hearsay" in the first instance); that they were properly admitted for nonhearsay purposes (i.e., for reasons other than proving the truth of the matter asserted); or that they did not warrant relief for defendant on appeal because they had been introduced by defense counsel—not the prosecution—at trial. The prosecution also argued that, to the extent that defendant sought to "challenge[] alleged hearsay . . . *in general*," he had abandoned any claim of error with regard to statements he failed to identify "with particularity" in his brief on appeal. Finally, the prosecution argued that, with regard to any inadmissible hearsay that was introduced at trial, defendant had failed to carry his burden under the harmless-error test of demonstrating that it was more likely than not that the error was outcome-determinative.

In reply, defendant argued, among other things, that the alleged hearsay statements *had* been "clearly set forth" in his initial brief on appeal. For purposes of clarification, however, defendant provided the following list:

- Vivian Colvin testified that Ms. Thornton "told me that he had choked her in her sister's bathroom[.] . . . He had her neck like that and had her against the wall, and she had told me that she was afraid she was going to pass out because she was starting to see spots or stars and he eventually let her go. . . . She told me that he told her then, see how easy it would be for me to shut you up."
- When asked if Ms. Thornton indicated to her that Mr. Propp had physically assaulted her on any other occasions, Vivian Colvin testified that "a lot of it was done, she stated, where Willow couldn't see, like, he would pull the back of her hair, like at the bottom of the back of your hair and say things to her where Willow couldn't see what they were doing. I did another time see bruises on her arm, and jokingly, because I already knew what was going on, I said what happened there Melissa?"
- Deanne Hollingshead testified that police told her that they had found Mr. Propp around the block from her house with a knife after she saw someone attempting to pry into her bathroom window and called the police.
- Stefanie Thornton testified that Mr. Propp "told [Ms. Thornton] that they needed to hang out, or else he was going to take Willow from her."
- Erika Betts testified that Ms. Thornton told her that she and Mr. Propp were not getting back together after having broken up, and that "if I don't cooperate with him, he threatens me that I won't see my daughter, Willow, again, he'll keep her from me, and, you know, I'm afraid of what he might do."

- Stefanie Thornton testified that Ms. Thornton moved out "because [Mr. Propp] had a drug problem and money problems, and he had stolen from her."
- Rikki-Jo Cunningham testified that Ms. Thornton moved out of the house she shared with Mr. Propp "[b]ecause I was told that he had a coke problem."
- Stefanie Thornton testified that "sometimes [Ms. Thornton] would try to leave and [Mr. Propp] would take her keys and her phone and he wouldn't give them back, and on a couple of occasions, he threw them out in the road."
- Stefanie Thornton testified "one time Melissa called me over because he had broken a bunch of dishes in the kitchen and Willow swallowed a piece of glass."
- Stefanie Thornton testified that "right after Willow was born, he shook up a bunch of 2-liters of pop and sprayed them all over the house. And she had just had a C-section, so I came over and I cleaned it up."
- Stefanie Thornton testified Ms. Thornton "called me and told me she was really upset, crying, because he threw [Ms. Thornton's infinity lights] off of their balcony."
- Stefanie Thornton testified, "one day I was at work, and my mom called me and said that Rob had took Melissa's phone from her, and Melissa had to go to Delta that night for school, and she was scared that Melissa would be without a phone [] in a snowstorm."
- Stefanie Thornton testified that Mr. Propp once admitted to Ms. Thornton that he left his young children unattended at night while he was apparently out stalking her.
- Cameron Dietrich testified that he had multiple conversations with Ms. Thornton about Mr. Propp stalking her.
- Rikki-Jo Cunningham testified that Mr. Propp, "would constantly be texting her and calling her

> nonstop," and that Ms. Thornton "said she saw his vehicle pass a couple of times," when they were at a bar together.
>
> - Stefanie Thornton testified that while she was with Ms. Thornton in Detroit, Mr. Propp "called her from the time we left until the time we got back," because, "he was upset because he thought she was dressed inappropriately."
> - Angela Thornton testified that Ms. Thornton told her that Mr. Propp had driven through the alley near White's Bar where Angela and Ms. Thornton were having a drink.
> - Deanne Hollingshead testified that Mr. Propp once "picked a fight with my uncle because he wouldn't tell him where I went." Ms. Hollingshead also testified that Mr. Propp once went to her grandmother's house looking for her, and her grandmother told him that she may be at her aunt's house in Chicago, so Mr. Propp showed up at her aunt's house in Chicago looking for her, but she was not there either. [Record citations omitted; alteration in original.]

As an initial consideration, several of the above-listed statements are instances of hearsay within hearsay—that is, they are the victim's out-of-court assertions concerning other out-of-court assertions allegedly made by defendant. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." MRE 805. However, as argued by the prosecution, any out-of-court statements made by defendant did not constitute hearsay because they qualify as admissions by a party opponent. See MRE 801(d)(2); *People v Herndon*, 246 Mich App 371, 408; 633 NW2d 376 (2001). Thus, as to any instances of "hearsay within hearsay," the proper focus is whether *the victim's*

out-of-court statement constituted inadmissible hearsay.

As another initial consideration, this Court is not bound by the prosecution's confession of error or its interpretation of the court rules governing hearsay. See *People v Perry*, 317 Mich App 589, 601; 895 NW2d 216 (2016) ("[W]e are not beholden to the prosecution's concession and conclude that the plain language of the statute permits multiple convictions for uttering multiple notes during only one transaction."). Here, although *some* of the statements that defendant identified qualify as hearsay, several do not, and it was seemingly proper for the trial court to admit the remainder either for nonhearsay purposes or under the exception set forth by MRE 803(3) ("Then Existing Mental, Emotional, or Physical Condition.").[4]

To begin with, several of the alleged hearsay "statements" are either questions—e.g., "[S]ee how easy it would be for me to shut you up[?]"—or are seemingly *in-court* testimony about various events given by eyewitnesses with firsthand knowledge—e.g., Colvin's testimony about seeing bruises on the victim's arm in the past. For spoken words to qualify as an assertive "statement" under the hearsay rules, those words must contain an assertion of fact that is—when made—"[]capable of being true or false." *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 205; 579

[4] MRE 803(3) provides:

> Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

NW2d 82, mod in part on other grounds 458 Mich 862 (1998); see also *People v Stewart*, 397 Mich 1, 9-10; 242 NW2d 760 (1976), reh gtd on other grounds 400 Mich 540 (1977) (observing that "nonassertive acts or conduct are not an exception to the hearsay rule—rather, they are not hearsay in the first place"); accord *United States v Rivera*, 780 F3d 1084, 1092 (CA 11, 2015) (holding that neither "non-assertive statements that are incapable of being true or false" nor "statements that are indisputably false" qualify as hearsay). Questions are not assertions of fact, and Michigan does not recognize the "implied assertion" theory that has been adopted in some other jurisdictions. See *Stewart*, 397 Mich at 9-10; *Jones*, 228 Mich App at 205.

Moreover, even if they otherwise qualified as hearsay, all of the victim's statements regarding defendant's pattern of stalking, threats, and domestic violence were admissible as evidence concerning the victim's state of mind—and her fear of defendant—under MRE 803(3). See *People v Ortiz*, 249 Mich App 297, 310; 642 NW2d 417 (2002) ("Evidence of the victim's state of mind, evidence of the victim's plans, which demonstrated motive (the ending of the marriage and the tension between the victim and defendant), and evidence of statements that defendant made to cause the victim fear were admissible under MRE 803(3)."). Accord *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995). Such statements were also admissible for several valid nonhearsay purposes, including the effect that they might have had in motivating defendant to kill the victim. See *id*. at 450, 453 ("In the case at hand, marital discord, motive, and premeditation are all at issue. Thus, the statements of the victim-wife are admissible to show the effect they had on the defendant-husband. This testimony will not

offend the hearsay rule because it does not constitute hearsay.").

Finally, to the extent that a few of the victim's cited statements might have qualified as inadmissible hearsay that could not have been admitted for such nonhearsay purposes—e.g., Cunningham's testimony that she was "told that [defendant] had a coke problem"—defendant has failed to rebut the presumption that any such error was harmless. See *Lukity*, 460 Mich at 493, 495-496. Aside from such statements, "the evidence otherwise properly admitted was more than adequate for the jury to convict defendant." *Propp I*, 330 Mich App at 188 (MURRAY, C.J., concurring). Moreover, hearsay evidence of defendant's drug use was merely cumulative. At trial, defendant openly admitted that he had a problem with substance abuse and that he had used cocaine on the evening of the victim's death. Hence, on the strength of the entire record, we conclude that defendant has failed to demonstrate that it is more likely than not that the trial court's purported evidentiary error was outcome-determinative.

Affirmed.

MURRAY, P.J., and K. F. KELLY and BORRELLO, JJ., concurred.

TOWNSHIP OF HOPKINS v STATE BOUNDARY COMMISSION

Docket No. 355195. Submitted January 4, 2022, at Lansing. Decided February 24, 2022, at 9:15 a.m.

The Township of Hopkins and the Township of Wayland filed a complaint in the Court of Claims alleging that the State Boundary Commission (the Commission) had violated the state boundary commission act (SBCA), MCL 123.1001 *et seq*., by processing an annexation petition without promulgated rules in place regulating that procedure. In 2018, the Commission repealed all rules governing its operations and did not promulgate new rules. Instead, the Commission operated under published, nonbinding guidelines that provided an overview of the annexation process governed by the SBCA and that explained the legal-sufficiency proceeding held by the Commission pursuant to the SBCA to determine whether the technical requirements of the act were satisfied. Plaintiffs asked the court to issue a preliminary and permanent injunction prohibiting the Commission from processing the petition at issue until the Commission promulgated rules in accordance with the SBCA and the Administrative Procedures Act, MCL 24.201 *et seq*. The Commission moved for summary disposition, asserting that its failure to promulgate rules did not prejudice plaintiffs. The Court of Claims, CHRISTOPHER M. MURRAY, J., granted the commission's motion, concluding that plaintiffs had failed to show prejudice resulting from the lack of rules promulgated by the Commission and that injunctive relief was not appropriate. Plaintiffs appealed.

The Court of Appeals *held*:

1. The plain language of MCL 123.1004 provides that the Commission "shall" make rules and regulations and prescribe procedures that it finds "necessary or desirable" to enable it to carry out the intent and purpose of the SBCA. Although the Commission has no discretion to make a rule when that rule is necessary or desirable, determining whether a rule is "desirable" inherently involves the judgment of the Commission. The Legislature granted the Commission less discretion regarding the making of rules that are "necessary" within the meaning of the SBCA. "Necessary" can be defined in different ways depending on

the context in which it is used. Under the statutory provision at issue, when the absence of a particular rule or regulation undermines the Legislature's intent and purpose in enacting the law, the Commission has no discretion and must promulgate that rule.

2. Plaintiffs argued that the Court of Claims should have enjoined the Commission from processing any annexation petitions until the Commission promulgated rules because the lack of such rules resulted in "arbitrary sham proceedings." The informational guidelines provided by the Commission described the process the Commission followed to consider annexation petitions and provided information regarding the requirements of the SBCA. The informational guidelines did not have the force or effect of law, did not serve in place of promulgated rules, and could not reasonably be characterized as arbitrary because they were obviously grounded in the SBCA, indicating the Commission's intent to adhere to the statutory requirements and procedures. Therefore, there was no need for promulgated rules or regulations to govern the meeting held by the Commission to determine the legal sufficiency of the annexation petition at issue. The Legislature established a detailed and comprehensive scheme for resolving boundary petitions, including requirements for the legal-sufficiency meeting. The Commission put the various requirements into readily understandable guidelines, but the guidelines did not add to or contradict the statutory requirements. Additionally, with respect to the legal-sufficiency meeting, there did not appear to be any rules, regulations, or procedures that were necessary but missing.

3. When determining whether to grant injunctive relief, a court should consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction issued. In this case, because the Commission did not violate the SBCA when it failed to promulgate rules and regulations, plaintiffs could not prevail on the merits of their claim. Plaintiffs also did not establish that they would suffer irreparable harm without injunctive relief. Therefore, plaintiffs did not establish the first two factors in support of their claim for injunctive relief, and their claim failed as a matter of law. Additionally, plaintiffs did not argue that a court could require the Commission to adopt and promulgate rules to carry out its statutory duties. Relevant

> caselaw indicates that not only must a litigant seeking injunctive relief establish that an agency has a statutory obligation to promulgate rules, but they must also demonstrate that the failure to do so caused the litigant prejudice by denying them notice and opportunity to present their position before a final decision has been made. In this case, administrative proceedings were ongoing, and no final decision had been made. Because plaintiffs did not establish that they were prejudiced by the Commission's failure to promulgate rules or set forth what any missing rule would entail or how it would affect their case, the Court of Claims did not abuse its discretion by denying plaintiffs' request for injunctive relief.
>
> Affirmed.

Bauckham, Sparks, Thall, Seeber & Kaufman, PC (by *T. Seth Koches* and *Robert E. Thall*) for Township of Hopkins and Township of Wayland.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Elizabeth Watza* and *Patrick Fitzgerald*, Assistant Attorneys General, for the State Boundary Commission.

Amicus Curiae:

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey*, *Stephen J. Rhodes*, and *Christopher S. Patterson*) for Michigan Townships Association.

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

PER CURIAM. Plaintiffs, Township of Hopkins and Township of Wayland, appeal as of right the Court of Claims' order granting summary disposition under MCR 2.116(C)(10) in favor of defendant, the State Boundary Commission (the Commission). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. THE COMMISSION

Before 1968, various provisions of the Home Rule City Act (HRCA), MCL 117.1 *et seq*., governed the incorporation, consolidation, or alteration of city boundaries. In 1968, the Legislature enacted the state boundary commission act (SBCA), MCL 123.1001 *et seq*., which created the Commission with authority to govern the incorporation and consolidation of cities and villages. In 1970, the Legislature amended the HRCA to grant the Commission authority over annexation procedures under the HRCA. Two years later, the Legislature amended the SBCA by adding MCL 123.1011a, expressly establishing the Commission's jurisdiction over annexation petitions and resolutions.

The Commission is comprised of three "state members" appointed by the governor to serve three-year terms, MCL 123.1002, and two "county members" appointed by the presiding probate judge of a county to serve on the Commission when it considers boundary adjustments for territory within that county, MCL 123.1005. MCL 123.1004 authorizes the state members to promulgate rules and regulations and prescribe procedures for carrying out the purposes of the SBCA, in relevant part, as follows:

> The state members shall make rules and regulations and prescribe procedures necessary or desirable in carrying out the intent and purpose of this act, including forms of petitions for municipal boundary adjustments, and the documents, maps and supporting statements deemed to be necessary, establish rules for public hearings, for the submission of supplementary documents and statements, and governing the holding of elections where necessary.

MCL 123.1004 further provides that the rules and regulations must be promulgated in accordance with the Administrative Procedures Act (APA), MCL 24.201 *et seq*.[1]

The Commission promulgated rules and regulations under the SBCA, but in February 2017 it issued a notice for a public hearing on the rescission of those rules because it felt that they went beyond the scope of the SBCA. The Commission rescinded the rules in May 2018 and it has not promulgated rules to replace them; however, it has posted on the Internet informational guidelines[2] describing the Commission's annexation process, which includes holding three meetings. To start, the three state members conduct a "legal sufficiency meeting" in Lansing to review petitions to determine the appropriateness of annexation. If the state members determine the petition to be legally sufficient, the Commission schedules a public hearing, to be held in the locale of the proposed annexation, for public comment from the affected city, village, and/or township. Following the public hearing, the full Commission meets in Lansing to deliberate and recommend a decision on the petition. The Commission staff contact the appropriate clerks to determine the location and three potential dates for the public hearing before the legal-sufficiency meeting, the clerks confirm the final arrangements for the public hearing within

[1] MCL 123.1004 states that the rules must be promulgated in accordance with 1943 PA 88 and 1952 PA 197, both of which have been repealed and replaced by various provisions of the APA. See MCL 24.311 and MCL 24.312.

[2] The informational guidelines are available on the Department of Licensing and Regulatory Affairs (LARA) website at <https://www.michigan.gov/lara/0,4601,7-154-89334_10575_17394_17565-174311—,00.html> (accessed February 4, 2022) [https://perma.cc/KF47-H7VK].

five days after the legal-sufficiency meeting, comments made at the public hearing are provided to the clerks or their legal representatives, and the parties or their representatives may submit one written rebuttal within 10 days of receipt of the comments. The guidelines also include a link to a document that provides a more detailed description of the process.[3] Among other things, this document states that after the Commission issues its final order, a party may seek judicial review through the circuit court.

B. PLAINTIFFS' DISPUTE

In January 2020, a group of property owners in Allegan County (the petitioners) signed a petition seeking the annexation of 467.45 acres of land from plaintiffs to the city of Wayland. Plaintiffs received notice of the petition by letter dated January 14, 2020. The letter notified plaintiffs that the petition would be reviewed for legal sufficiency at a Commission meeting scheduled for April 29, 2020, directed plaintiffs and the city to complete questionnaires downloaded from the Commission's Internet site, and instructed them that a description of the petition process could also be obtained from that website.

On May 20, 2020, plaintiffs e-mailed the Commission indicating that they were available for a public hearing at the Hopkins Elementary School gymnasium on August 18, 19, or 20, 2020. The following day, plaintiffs received a response stating that the venue and possible hearing dates would be presented to the commissioners at the legal-sufficiency meeting and that, "[i]f the petition is found sufficient, it will then be

[3] LARA, *Annexation Procedure* <https://www.michigan.gov/documents/lara/LARA_Annexation_Procedure_695952_7.pdf> (accessed February 4, 2022) [https://perma.cc/AD2P-P97Y].

up to the commissioners to decide where and when the public hearing will take place based upon what options each municipality provided." At a virtual meeting convened on June 4, 2020, the Commission reviewed the petition to determine its legal sufficiency under MCL 123.1008[4] and unanimously found the petition

[4] MCL 123.1008 provides:

(1) The commission shall review proposed incorporations considering the criteria established by section 9.

(2) If the commission finds that a petition does not conform to this act, to Act No. 278 of the Public Acts of 1909, as amended, or Act No. 279 of the Public Acts of 1909, as amended, to the extent that the requirements are not superseded by this act, or to the rules of the commission, it shall certify the nonconformance, stating the reasons for the nonconformance, and return the petition to the person from whom it was received with the certificate.

(3) At least 60 days but not more than 220 days after the filing with the commission of a sufficient petition proposing incorporation, the commission shall hold a public hearing at a convenient place in the area proposed to be incorporated. At the public hearing the reasonableness of the proposed incorporation based on the criteria established in this act shall be considered. If section 6 prohibits the commission's acting on a petition because 1 or more petitions or resolutions have priority the time period provided in this section shall commence on the date upon which the prohibition ceases.

(4) The commission shall give notice of the hearing in the manner required by section 4a(1) and by publication in a newspaper of general circulation in the area at least 7 days before the date of the hearing, and by certified mail to the clerks of municipalities and townships affected, at least 30 days before the date of the hearing. After the commission has entered its order for a public hearing on an incorporation proposal, neither the sufficiency nor legality of the petition shall be questioned in a proceeding.

legally sufficient. MCL 123.1009 specifies the criteria the Commission must consider when reviewing proposed boundary changes.[5]

On July 10, 2020, plaintiffs filed a "Verified Complaint for Injunctive Relief" in the Court of Claims alleging that MCL 123.1004 required the Commission to promulgate rules and regulations and prescribe procedures, but the Commission repealed all rules governing its operations in 2018 and failed to promulgate new rules. Plaintiffs alleged that the Commission instead operated under guidelines that were not promulgated pursuant to the SBCA or the APA. Plaintiffs

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[5] MCL 123.1009 provides:

> Criteria to be considered by the commission in arriving at a determination shall be:
>
> (a) Population; population density; land area and land uses; assessed valuation; topography, natural boundaries and drainage basins; the past and probable future urban growth, including population increase and business, commercial and industrial development in the area. Comparative data for the incorporating municipality, and the remaining portion of the unit from which the area will be detached shall be considered.
>
> (b) Need for organized community services; the present cost and adequacy of governmental services in the area to be incorporated; the probable future needs for services; the practicability of supplying such services in the area to be incorporated; the probable effect of the proposed incorporation and of alternative courses of action on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached; the probable increase in taxes in the area to be incorporated in relation to the benefits expected to accrue from incorporation; and the financial ability of the incorporating municipality to maintain urban type services in the area.
>
> (c) The general effect upon the entire community of the proposed action; and the relationship of the proposed action to any established city, village, township, county or regional land use plan.

alleged that the Commission had failed to inform them that it processed annexation petitions pursuant to guidelines that had not been promulgated pursuant to MCL 123.1004 and the APA. Plaintiffs asserted that they submitted timely written responses to the Commission's questionnaire, attended the remote meeting held on June 4, 2020, and intended to submit evidence that the petition lacked legal sufficiency because parcels located within Hopkins Township were not contiguous with the city of Wayland. Plaintiffs alleged that they were not given an opportunity to be heard before the Commission voted on the petition's legal sufficiency. Noting that a public hearing on the proposed annexation had been scheduled for August 19, 2020, plaintiffs alleged that, although MCL 123.1009 provided criteria for determining whether to approve an annexation petition, no rules regulated the procedure for a public hearing or the submission of documentary evidence at the hearing. Plaintiffs requested that the Court of Claims issue a preliminary and permanent injunction prohibiting the Commission from processing annexation Petition Number 20-AP-01 until the Commission promulgated rules in accordance with the provisions of the SBCA and through the APA.

On August 17, 2020, plaintiffs' counsel e-mailed the Commission, inquiring whether a public hearing was scheduled for August 19, 2020. The Commission responded that "[a]t this time, no public hearing has been scheduled. The executive orders are still in effect. You will be notified when the public hearing is scheduled."

In lieu of answering the complaint, the Commission moved for summary disposition on the ground that *Midland Twp v State Boundary Comm*, 64 Mich App 700, 712; 236 NW2d 551 (1975) (*Midland I*), held that

the Commission's failure to promulgate rules did not prejudice the plaintiffs. The Commission admitted that it had rescinded its rules and regulations in 2018, but asserted that until it adopted new rules, it operated under published, nonbinding guidelines, as well as the provisions of the SBCA. The Commission stated that its online guidelines provided a step-by-step overview of the statutorily governed annexation process and explained that the legal-sufficiency proceeding determined whether the technical requirements of the SBCA were satisfied. The Commission contended that plaintiffs had failed to cooperate in scheduling a public hearing. The Commission also argued that plaintiffs lacked standing to seek a declaratory judgment under MCR 2.605(A)(1) because the grant of the annexation petition concerned a contingent future event that might never occur, the SBCA provides no statutory right of action, and plaintiffs had failed to exhaust their administrative remedies. Further, the Commission argued that plaintiffs' complaint was premature because the Commission had not yet issued a final determination regarding the annexation petition, and final decisions under the SBCA may only be reviewed in the circuit court. The Commission also contended that plaintiffs had no vested right or legally protected interest in their boundaries, citing *Midland Twp v State Boundary Comm*, 401 Mich 641, 664; 259 NW2d 326 (1977) (*Midland II*).

The Commission also argued that plaintiffs were not entitled to injunctive relief because they had not suffered any prejudice, citing *Midland I*, 64 Mich App at 712, and *In re Turner*, 108 Mich App 583; 310 NW2d 802 (1981), and would not suffer any prejudice because they had received notice of the proceedings and had the opportunity to participate. Noting that the complaint did not allege any present or future damages or par-

ticularized injury or that defendant had acted in bad faith, the Commission contended that the balance of the equities favored its position.

On September 14, 2020, the Commission notified plaintiffs that a public hearing would be held on October 14, 2020, at the Wayland Union High School.[6] Plaintiffs responded to the Commission's motion for summary disposition the following day, arguing that the SBCA unequivocally required the Commission to promulgate rules and regulations necessary to process annexation petitions. Plaintiffs contended that they had "a valid legal argument that would have resulted in rejection of the annexation petition pursuant to MCL 123.1008 for lack of legal sufficiency" but were given no opportunity to be heard before the June 4 legal-sufficiency determination, "resulting in prejudice and irreparable harm against the Townships[.]" Plaintiffs also argued that they suffered irreparable harm because of the Commission's failure to promulgate rules which caused confusion and allowed the Commission to proceed in violation of the SBCA. Further, plaintiffs asserted that they were subjected to "an arbitrary and capricious sham proceeding causing a waste of scarce public resources."

Plaintiffs noted that the Commission had initially promulgated rules in 1977, amended those rules in 2013, and repealed them in 2018. Plaintiffs contended that the plain and unambiguous language of the SBCA required the Commission to promulgate rules and regulations pursuant to the APA. They asserted that the Commission had not informed the parties that guidelines were published and available before the

[6] A Notice of Public Hearing issued later by the Commission rescheduled the public hearing on the petition for annexation for November 10, 2021, at the Hopkins Elementary School gymnasium.

legal-sufficiency meeting. Plaintiffs argued that the Commission's guidelines were not available to the parties before that meeting and that no discussion occurred during the meeting regarding the legal sufficiency of the petition. Additionally, plaintiffs contended that MCL 123.1012(2) required parcels considered for annexation to be contiguous to a city, MCL 123.1008 required the Commission to reject a petition that is not legally sufficient, plaintiffs were never given an opportunity be heard on this issue, and the Commission never discussed plaintiffs' objections at the hearing. According to plaintiffs, they were prejudiced by the failure to promulgate rules because no binding process governed the conduct of hearings or the presentation of evidence.

Respecting their request for injunctive relief, plaintiffs argued that the four factors stated in *Mich State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152; 365 NW2d 93 (1984), favored their request because they were likely to prevail on the merits of their claim, they would suffer irreparable injury if the court did not issue an injunction, the Commission would suffer little or no harm from issuance of an injunction, and an injunction would cause no harm to the public interest. Regarding standing, plaintiffs argued that an actual controversy existed because the Commission operated in violation of the SBCA by not functioning under promulgated rules, plaintiffs had a substantial interest in the Commission's compliance with the statutory requirements, and the Commission had not cited any binding legal authority precluding an aggrieved party from filing a claim for injunctive relief against an administrative agency. Plaintiffs contended further that their claim was ripe for judicial review because the controversy was not hypothetical, given that they suffered prejudice when the legal-sufficiency

meeting was held without promulgated rules regulating the proceeding. Plaintiffs requested that the court deny the Commission's motion for summary disposition or, in the alternative, grant them summary disposition under MCR 2.116(I)(2).

In its reply, the Commission contended that plaintiffs had not been injured by the absence of promulgated rules because the Commission had provided them with written notice of the proceedings, invited them to submit a questionnaire and attend the legal-sufficiency meeting, and plaintiffs would have additional opportunities to participate before and during the public hearing. Citing *Midland II*, 401 Mich at 674, the Commission argued that annexation proceedings are not contested cases and that plaintiffs had no vested rights or legally protected interest in their boundaries; therefore, plaintiffs failed to establish any prejudice to a substantial right as required under the APA. The Commission contended that the procedures described in its informational guidelines complied with the provisions of the SBCA, plaintiffs cited no caselaw supporting their request for an injunction, and litigants are required to exhaust their administrative remedies before seeking equitable relief from a court. The Commission argued that plaintiffs had no independent right to sue it in the Court of Claims but had the right to judicial review in circuit court after a final administrative decision, pursuant to § 18 of the SBCA, MCL 123.1018.

On October 1, 2020, the Court of Claims issued an opinion and order granting the Commission's motion for summary disposition under MCR 2.116(C)(10).[7] On the basis of its review of the minutes of the June 4,

[7] The complaint and other documents filed in the Court of Claims name both Hopkins Township and Wayland Township as plaintiffs.

2020 legal-sufficiency meeting, the court found that the Commission had reviewed and discussed the petition for annexation and that plaintiff's counsel "argued on plaintiff's behalf that the parcels at issue were not contiguous." Respecting the Commission's standing and ripeness arguments, the court explained that plaintiffs' complaint did not challenge an anticipated final decision on the annexation petition. The court found that plaintiffs had a substantial interest in litigating the Commission's failure to promulgate rules and were not required to exhaust administrative remedies; therefore, plaintiffs had standing. Despite finding that plaintiffs had standing and that the matter was ripe for judicial review, the court, nevertheless, granted the Commission's motion for summary disposition on the ground that plaintiffs had failed to demonstrate any prejudice or harm resulting from the lack of rules. Citing *In re Turner* and *Midland I*, the court explained that plaintiffs were unable to show prejudice in light of the factual record in this case and the SBCA's "comprehensive statutory scheme." Noting that plaintiffs had been permitted to argue that the parcels at issue were not contiguous with the city of Wayland and that they had been invited to participate in the public hearing scheduled for October 14, 2020, the Court of Claims ruled that plaintiffs failed to demonstrate the existence of a genuine issue of material fact regarding prejudice.

The Court of Claims analyzed the text of MCL 123.1004 and explained that the statute required the Commission to promulgate only those rules that it considered necessary or desirable. The court observed that plaintiffs had not argued that the court could

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However, the court's opinion and order named only Hopkins Township as plaintiff and referred to "plaintiff" in the singular.

require the Commission to decide whether it was necessary or desirable to promulgate rules. The court also noted that although MCL 24.238 provided a mechanism for plaintiffs to request that the Commission promulgate rules, plaintiffs had not employed that mechanism and had not suggested any specific rules to be promulgated. The court concluded that "[t]he availability of other forms of relief further undercut[] the viability of plaintiff's request for injunctive relief." The court, therefore, granted the Commission summary disposition. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a court's decision on a motion for summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "De novo review means that we review the legal issue independently, without required deference to the courts below." *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 417; 934 NW2d 805 (2019). A motion brought 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). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record reveals an issue upon which reasonable minds might differ. *Id*. On appeal, a reviewing court must consider the pleadings, admissions, and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Whether the SBCA requires defendant to promulgate rules govern-

ing annexation proceedings is an issue of law. We review de novo both issues of law and issues regarding statutory interpretation. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 406; 751 NW2d 443 (2008).

We review for an abuse of discretion a court's decision whether to grant injunctive relief. *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274; 856 NW2d 206 (2014). A court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes. *In re Guardianship of Brosamer*, 328 Mich App 267, 275; 936 NW2d 870 (2019).

III. ANALYSIS

Plaintiffs contend that the Court of Claims erred by holding that MCL 123.1004 does not require the Commission to promulgate rules in order to process annexation petitions and by ruling that plaintiffs were not prejudiced by the Commission's failure to promulgate such rules. We disagree.

A court's primary task when interpreting a statute is to " 'discern and give effect to the intent of the Legislature.' " *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014), quoting *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). A court first examines the plain language of the statute, reading statutory provisions "in the context of the entire act, giving every word its plain and ordinary meaning." *Driver v Naini*, 490 Mich 239, 247; 802 NW2d 311 (2011). Statutory provisions may not be read in isolation, *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010), and courts must avoid a construction of the statute that renders any portion of it surplusage or nugatory, *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 361; 917 NW2d 603 (2018).

When statutory language is clear and unambiguous, the statute must be applied as written, with no further judicial construction. *Ally Fin Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018).

MCL 123.1004 provides in relevant part:

> The state members shall make rules and regulations and prescribe procedures necessary or desirable in carrying out the intent and purpose of this act, including forms of petitions for municipal boundary adjustments, and the documents, maps and supporting statements deemed to be necessary, establish rules for public hearings, for the submission of supplementary documents and statements, and governing the holding of elections where necessary. . . . The rules and regulations of the commission shall be promulgated in accordance with the provisions of the [APA].

The plain language of MCL 123.1004 requires the Commission to make rules and regulations and prescribe procedures it finds necessary or desirable to enable it to carry out the intent and purpose of the SBCA. The Legislature's use of the term "shall" "indicates a mandatory and imperative directive," *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 114; 845 NW2d 81 (2014), and denotes a nondiscretionary command from the Legislature to the Commission, *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). The Legislature has directed the Commission in no uncertain terms to make a rule or regulation or prescribe a procedure[8] when such a rule, regulation, or

[8] The Legislature did not define "rule," "regulation," or "procedure" in the SBCA. It did, however, make the Commission subject to the APA. MCL 123.1004. The APA explains what a "rule" and a "regulation" are, see MCL 24.207, and while the APA does not similarly explain what a "procedure" is, the context of MCL 123.1004 seems clear that a "procedure" is akin to a "rule" under the APA. This is not a critical issue here, however, so further analysis of the matter is not warranted.

procedure is "necessary or desirable in carrying out the intent and purpose" of the act. MCL 123.1004. Our attention must turn, therefore, to what the terms "necessary" and "desirable" mean here.

Addressing the second term first, whether a rule, regulation, or procedure is "desirable" involves an inherent aspect of judgment by the body charged with carrying out the intent and purpose of the act. See *NL Ventures VI Farmington, LLC v Livonia*, 314 Mich App 222, 231-232; 886 NW2d 772 (2016). For instance, a particular rule may not be needed to implement the act fully, but the rule might nevertheless be viewed as helpful because it reduces an otherwise costly administrative burden on a resident or municipality. The Legislature cannot anticipate each and every instance in which a particular rule, regulation, or procedure might be desirable in one sense or another, and therefore it has deferred this authority to the Commission.

Regarding the statute's directive to make rules, regulations, or procedures that are "necessary," the Legislature did not grant the Commission unfettered discretion. Admittedly, the term "necessary" can have different meanings, depending on the specific context. It can mean "required" or "indispensable"; alternatively, it can mean merely "appropriate" or "suitable." See, e.g., *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 626-630; 583 NW2d 215 (1998) (discussing the different meanings of the term and referencing *Black's Law Dictionary* (5th ed)); OED Online, *necessary* <https://www.oed.com/view/Entry/125629> (defining "necessary," in relevant part, as "[i]ndispensible, vital, essential; requisite"). Thus, context is key.

There are several features of this statute that confirm a stricter reading of the term "necessary." First, the Legislature did not qualify this use of "necessary"

with the term "reasonably" or another similar adjective, which might have implied that the Legislature did, in fact, intend to grant greater discretionary judgment to the Commission. See *Port Huron*, 229 Mich App at 626-630. Second, just a few words after the use of "necessary" at issue here, the Legislature did qualify another use of the term "necessary"—i.e., the Commission has the authority to promulgate a rule, regulation, or procedure respecting written records "*deemed* to be necessary." MCL 123.1004 (emphasis added). To "deem" something means to judge it; in this context, the Legislature expressly granted the Commission the authority to judge whether a particular type of record is necessary for the Commission to implement the act. See *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 181-182; 615 NW2d 702 (2000). The Legislature's use of the qualified "deemed to be necessary" phrase with respect to written records stands in stark contrast to the Legislature's use of the unqualified term "necessary" with respect to those rules, regulations, or procedures needed to carry out the intent and purpose of the act. Finally, the Legislature had already granted the Commission discretion to promulgate "desirable" rules, regulations, or procedures; had it meant for "necessary" to mean merely "appropriate" or "suitable," then there would have been no need to add the largely, if not wholly, redundant term "or desirable." While belts-and-suspenders are not unknown to the Legislature, courts generally presume that the Legislature does not embrace redundancies.

Under MCL 123.1004, the Commission has discretion to promulgate a particular rule, regulation, or procedure that it judges desirable. But when the absence of a particular rule, regulation, or procedure undermines the Legislature's very intent and purpose

for enacting the law, the Commission has no discretion —that rule, regulation, or procedure is necessary and must be promulgated. Put another, way, if something vital or indispensable is missing from a regulatory scheme, then this logically implies that the regulatory scheme is deficient in some core, fundamental way. With its use of the terms "shall" and "necessary," the Legislature has commanded the Commission to promulgate a regulatory scheme that carries out the act's intent and purpose.

Accordingly, we conclude that the Legislature did not intend to grant discretion to the Commission respecting whether the latter must promulgate rules, regulations, or procedures when they are necessary. In the context of MCL 123.1004, the Legislature made clear that the Commission has no discretion regarding promulgating necessary rules, regulations, or procedures, and whether it violated this duty is a question of law over which this Court likewise grants the Commission no discretion. See *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 88; 832 NW2d 288 (2013).

This case called upon the Court of Claims to interpret MCL 123.1004. We hold that the court appropriately discerned the Legislature's intent as expressed in the plain language of the statute. Plaintiffs argue that this Court should peremptorily reverse the Court of Claims' summary-disposition decision and enjoin the Commission from processing any annexation petitions until the Commission promulgates rules. According to plaintiffs, the Commission currently operates under informational guidelines which result in arbitrary sham proceedings "that allow[] an administrative agency to basically change or dictate the process as it proceeds." We disagree.

The APA "applies to all agencies and agency proceedings not expressly exempted." MCL 24.313. An "agency" is defined as a "state department, bureau, division, section, board, commission, trustee, authority or officer, created by the constitution, statute, or agency action." MCL 24.203(2). There is no dispute that the Commission is a state agency. The APA defines a "rule" to include "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency . . . ." MCL 24.207. A "rule" does not include a "guideline" "that in itself does not have the force and effect of law but is merely explanatory." MCL 24.207(h). The APA defines "guideline" as "an agency statement or declaration of policy that the agency intends to follow, that does not have the force or effect of law, and that binds the agency but does not bind any other person." MCL 24.203(7). The APA prescribes how agencies adopt guidelines, MCL 24.224 and MCL 24.225, and specifies that "[a]n agency shall not adopt a guideline in lieu of a rule," MCL 24.226.

Analysis of the "informational guidelines" submitted to the Court of Claims and to this Court that are posted on the Internet by the Commission indicates that they describe the process the Commission follows related to annexation petitions and provide information explaining the extensive statutory requirements set forth in the SBCA with citations of the applicable statutory provisions. The informational guidelines provide clarity to petitioners and other interested parties about how the statutorily outlined process takes place under the SBCA and how the Commission performs its work as required under the SBCA. The informational guidelines are not a declaration of policy nor do they have

the force and effect of law. They appear to be a reasonable and understandable summary of the requirements set forth in the SBCA and outline the process required by statute. These nonbinding informational guidelines cannot reasonably be characterized as arbitrary because they are obviously grounded in the SBCA and indicate the Commission's intent to adhere to the statutorily specified requirements and procedures. Further, because they are grounded in the SBCA and do not suggest or permit deviation from the SBCA, the Commission cannot be accused of rendering its decisions in arbitrary sham proceedings. Moreover, the informational guidelines nowhere indicate that they serve in lieu of rules. Rather, they plainly indicate that they serve as guidance for persons to understand the process of annexation and on how to carry out that process efficiently and correctly without confusion.

Because of the detailed statutory process set forth in the SBCA, we conclude there was no need for promulgated rules, regulations, or procedures respecting the legal-sufficiency meeting. The Legislature set forth a detailed, comprehensive scheme for resolving boundary petitions, including requirements for the legal-sufficiency meeting. See, e.g., MCL 123.1008(2); MCL 78.4(1). The Commission has helpfully put the various requirements into readily understandable guidelines, but these do not add to or contradict the requirements that are already found in the statute. The guidelines are not, in other words, unpromulgated rules-in-disguise in violation of the APA, MCL 24.226. And, at least with respect to the legal-sufficiency meeting, there do not appear to be any rules, regulations, or procedures that are necessary but missing. Accordingly, we find no merit to plaintiffs' arguments in this regard.

Plaintiffs also argue that the Court of Claims erred by ruling that they were not entitled to injunctive relief because they failed to establish that they suffered prejudice when the Commission processed Annex Petition 20-AP-01 without any promulgated rules. We disagree.

In *Davis v Detroit Fin Review Team*, 296 Mich App 568, 613-614; 821 NW2d 896 (2012), this Court summarized the applicable principles and the analysis required when considering a claim for injunctive relief:

> As this Court has recognized, an injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. This Court has identified four factors to consider in determining whether to grant a preliminary injunction:
>
> > (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.
>
> Stated another way, injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. [Quotation marks, citations, and brackets omitted.]

In this case, because the Commission did not violate the SBCA by not promulgating rules or regulations, plaintiffs cannot prevail on the merits of their claim. Further, under the circumstances presented in this case, plaintiffs have not and cannot establish irreparable harm. Because plaintiffs cannot establish the

first two factors to support their claim for injunctive relief, their claim fails as a matter of law.

In its opinion and order granting defendant summary disposition, the Court of Claims noted that plaintiffs provided no argument regarding whether the court could compel the Commission to adopt and promulgate rules for carrying out its statutory duties. In this Court, the Commission likewise contends that plaintiffs have not cited any binding caselaw supporting the proposition that this Court can require the Commission to promulgate rules under MCL 123.1004. Plaintiffs contend that there is no remedy to address the prejudice caused by the Commission's failure to promulgate rules other than injunctive relief. Plaintiffs, however, cannot establish that the Commission has a statutory obligation to promulgate rules that are neither necessary nor desirable. Both the SBCA and the APA provide for judicial review of a final agency decision. MCL 123.1018; MCL 24.301 through MCL 24.306.

An early nonbinding case decided by this Court, *Mich State Chamber of Commerce v Secretary of State*, 122 Mich App 611; 332 NW2d 547 (1983), is instructive.[9] In it, this Court addressed an agency's failure to promulgate rules before undertaking its statutory duties under the Michigan Campaign Finance Act, MCL 169.201 *et seq*. *State Chamber of Commerce*, 122 Mich App at 614-615. Unlike this case, the Secretary of State had a nondiscretionary duty to promulgate rules implementing the act in accordance with the APA under MCL 169.215(1)(e). However, instead of promul-

[9] Cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), but they may be considered as persuasive authority. *Aroma Wines & Equip, Inc v Columbian Dist Servs, Inc*, 303 Mich App 441, 453 n 4; 844 NW2d 727 (2013).

gating rules in accordance with the APA, the Secretary of State published a document entitled "Guidelines for Corporate Separate Segregated Funds." *State Chamber of Commerce*, 122 Mich App at 615. Although the Secretary of State did not promulgate the document as rules or guidelines under the APA, the Secretary of State announced the intention to enforce the act in conformity with the document. *Id*. Following that announcement, the plaintiffs filed an action in circuit court seeking declaratory and injunctive relief to prevent enforcement of the act pursuant to the published document. *Id*. On appeal, a panel of this Court ruled that the circuit court lacked jurisdiction over the plaintiffs' suit, explaining that "[t]he absence of any rules, guidelines, or declaratory rulings binding on the parties prevents the judiciary from exercising jurisdiction over this cause. No legislative provision allows for an action against the state for the purpose of contesting the merits of an agency's nonbinding interpretation of a statute." *Id*. at 616-617.

In *West Bloomfield Hosp v Certificate of Need Bd*, 452 Mich 515; 550 NW2d 223 (1996), our Supreme Court addressed an agency's failure to promulgate a state-medical-facilities plan before undertaking its statutory duties. With the enactment of 1972 PA 256, the Legislature created a system whereby a permit to build a new hospital facility or modify an existing one could only be granted upon a showing of need within the community, consistent with a state-medical-facilities plan. *West Bloomfield Hosp*, 452 Mich at 520-522. In 1983, after the Department of Public Health denied permits to several applicants, the applicants appealed to the circuit court, which affirmed the denial. *Id*. at 517-519. This Court reversed the circuit court, finding that the failure of the Department of Public Health to adopt a medical-facilities plan denied

the department the authority to grant or deny the applications and concluded that granting the applications served as the appropriate remedy. *Id*. at 519-522. Our Supreme Court reversed this Court, explaining that "[w]hen an agency fails to adopt rules requisite to the processing of an application, and nevertheless conducts a hearing and grants or denies the application, it does not necessarily follow that the agency's decision is automatically invalid or subject to reversal." *Id*. at 524. Instead, a reviewing court "may excuse a procedural deficiency if the rule in question merely assists the agency in the exercise of its discretion and there is no substantial prejudice to the complaining party." *Id*.

In this case, the Court of Claims noted that plaintiffs' complaint requested only injunctive relief, and citing *Midland I*, 64 Mich App 700, and *In re Turner*, 108 Mich App 583, the court observed that "[c]aselaw has held that, in situations where a litigant seeks to question or invalidate agency action based on the agency's failure to promulgate rules, the litigant must demonstrate prejudice from the lack of rules." In *Midland I*, the plaintiffs appealed to the circuit court from decisions granting two petitions for annexation: one filed in 1968, before amendment of the SBCA by 1970 PA 219 that granted the defendant jurisdiction over annexation proceedings, and one filed in 1971. *Midland I*, 64 Mich App at 705. The plaintiffs contended that 1970 PA 219, which established the Commission's jurisdiction over annexations proceedings, was unconstitutional, and they also challenged the Commission's failure to promulgate any rules under the SBCA. The circuit court granted summary disposition in favor of the plaintiffs, concluding that 1970 PA 219 violated Const 1963, art 4, §§ 24 and 25, which require that laws enacted, revised, altered, or amended

may not embrace more than one object which must be expressed in the law's title. *Midland I*, 64 Mich App at 705, 713-714. Although the circuit court considered the Commission's failure to promulgate rules "unfathomable," it found that the plaintiffs had failed to show "how such a failure on the part of the State Boundary Commission has in any way prejudiced them in their presentation of their opposition to said annexation or how such failure adversely affects the decision made by the Boundary Commission." *Id*. at 712. Affirming the circuit court's decision, this Court stated that "it would have been much better if the [Commission] had adopted rules and published them. In the absence of a showing of prejudice by plaintiffs, we agree with the trial court in its reasoning and ruling on this issue." *Id*. at 721-722.

In *In re Turner*, 108 Mich App at 585-587, the petitioner was ordered by an administrative law judge (ALJ) to reimburse the state for mental health services provided to her husband. She appealed first in the probate court and then in the circuit court, both of which affirmed the ALJ's decision. On appeal in this Court by leave granted, the petitioner asserted that she had been denied due process because the respondent-agency had not promulgated rules for determining responsibility for reimbursement. *Id*. at 588-589. This Court found that the proceedings were conducted pursuant to the contested-case provisions of the APA and "afforded the petitioner all the procedural safeguards of due process." *Id*. at 589. This Court affirmed the lower court, citing *Midland I*, and held that the petitioner had failed to show how the absence of rules adversely affected the decision of the ALJ. *Id*. at 589-590.

The Court of Claims in this case cited two additional decisions of this Court in support of its conclusion that plaintiffs must show prejudice from defendant's failure to promulgate rules. In *Vernon v Controlled Temperature, Inc*, 229 Mich App 31, 33-35 & n 1; 580 NW2d 452 (1998), the plaintiff appealed a decision of the Worker's Compensation Appellate Commission directing him to authorize his employer to obtain information from the Social Security Administration pursuant to MCL 418.354(3)(a), which also provided that the Bureau of Worker's Compensation "shall promulgate rules to provide for notification by an employer or carrier to an employee of possible eligibility for social security benefits and the requirements for establishing proof of application for those benefits." This Court rejected the plaintiff's contention that the bureau's failure to promulgate those rules relieved him of the obligation to authorize the release of the information, holding that "[t]he purpose of the unpromulgated rules was satisfied in the present case when plaintiff repeatedly received notice from his employer." *Vernon*, 229 Mich App at 39.

In *Acrey v Dep't of Corrections*, 152 Mich App 554, 556-557; 394 NW2d 415 (1986), the petitioner appealed in the circuit court a decision of the Department of Corrections finding him guilty of major misconduct. The circuit court reversed the department's decision; however, this Court disagreed and reversed the circuit court. *Id*. at 556. This Court rejected the petitioner's argument that MCL 791.254(4) required the department to promulgate rules and that the department's failure to do so rendered void all hearings held by the department, including his misconduct hearing. *Acrey*, 152 Mich App at 560. This Court explained that the hearings division act, MCL 791.251 *et seq*., required "only that the department promulgate rules 'necessary

to implement this chapter.' " *Id*. at 560, quoting MCL 791.54(4). This Court ruled that the hearings held should not be "declared void on the mere possibility that a necessary rule may not have been implemented." *Acrey*, 152 Mich App at 560. "Since petitioner has failed to present facts establishing that a procedure was followed that necessarily had to be implemented by rule, we decline to declare void the decision of the department on this basis." *Id*. at 560-561.

The cases cited and relied upon by the Court of Claims indicate that not only must a litigant seeking injunctive relief establish that an agency has a statutory obligation to promulgate rules, but the litigant must also demonstrate that the failure to do so caused the litigant prejudice by denying the litigant notice and opportunity to present its position before a final decision has been made. Plaintiffs attempt to distinguish these decisions on the ground that, unlike this case, each of the decisions cited by the Court of Claims involved a challenge to a final decision of an administrative agency. However, as the Court of Claims observed, plaintiffs only sought injunctive relief in their complaint and are therefore required to demonstrate prejudice or irreparable harm in any event.

Injunctive relief is an extraordinary remedy. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). A party seeking a preliminary injunction must make "a particularized showing of irreparable harm." *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 225-226; 634 NW2d 692 (2001). A preliminary injunction may not be issued "upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural." *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 149; 809

NW2d 444 (2011), quoting *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). A permanent injunction will issue "only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury." *Janet Travis, Inc*, 306 Mich App at 274.

In this case, the Court of Claims correctly ruled that plaintiffs failed to demonstrate that they were prejudiced by the Commission's not having promulgated rules. Plaintiffs admit that Michigan caselaw provides no examples in which the plaintiffs were prejudiced by the lack of administrative rules. Nevertheless, plaintiffs assert that they have been prejudiced because they claim that there is no binding process or procedure controlling the conduct of hearings, the submission of evidence, how or when to address the commissioners at hearings, or how to raise defenses. Plaintiffs further argue that there are no binding rules outlining the responsibilities of the commissioners, the review of evidence, or whether the Attorney General reviews annexation petitions. Plaintiffs conclude, with no further explanation, that "[t]his is prejudice." As a final example of prejudice, plaintiffs describe a meeting that occurred on September 24, 2020, during which plaintiffs "suspected" that a previous meeting had been held between the Commission and the petitioners.

Analysis of plaintiffs' examples of prejudice reveals that they are speculative and based upon conjectural apprehension of future injury. The Court of Claims properly rejected plaintiffs' contention that they were denied the opportunity to be heard at the June 4 meeting, correctly noting that the minutes of that meeting established that plaintiffs' attorney attended the meeting and presented plaintiffs' argument that the parcels were not contiguous. The court also cor-

rectly ruled that plaintiffs failed to specify what any additional rules might entail or "how they would make a difference in this case." Moreover, the SBCA contains numerous statutory requirements that must be satisfied, including criteria to be considered by the Commission in reviewing petitions. See MCL 123.1009. Further, the SBCA provides for judicial review of the Commission's final decisions, MCL 123.1018. Plaintiffs, therefore, cannot establish that they suffered prejudice because of the Commission's decision to not promulgate rules. The record reflects that plaintiffs have not established any concrete irreparable harm or prejudice stemming from the lack of rules.

With respect to the guidelines that cover subsequent administrative proceedings (e.g., public hearing on the merits of the petition, recommendation meeting), we note that, as explained during the parties' oral argument before this Court, the administrative proceedings are ongoing and there has been no final administrative decision made to date. When a final decision is made, there will be an opportunity for judicial review of the issues, including whether plaintiffs were precluded from presenting their evidence to the Commission. MCL 123.1018. Because plaintiffs failed to establish prejudice from the absence of promulgated rules, the Court of Claims did not abuse its discretion by denying plaintiffs injunctive relief, and it did not err by granting summary disposition in favor of the Commission.

Affirmed.

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

In re SIMONETTA

Docket No. 357909. Submitted January 5, 2022, at Detroit. Decided February 24, 2022, at 9:20 a.m.

The Department of Health and Human Services (DHHS) filed a petition in the St. Clair Circuit Court, Family Division, seeking to terminate at the initial dispositional hearing respondent's parental rights to MS under MCL 722.638(1)(a)(*iii*), asserting that MS had suffered severe physical abuse by respondent because (1) MS's meconium tested positive for two different opioids and tetrahydrocannabinol (THC), (2) respondent had admitted to using marijuana and taking a Norco pill for a toothache before MS's birth, and (3) respondent had previously been involved in a Children's Protective Services action in which she voluntarily released her parental rights to two other children. After the meconium test results were received, MS was diagnosed with neonatal abstinence syndrome and placed in a special care nursery for observation and monitoring of withdrawal symptoms; MS did not require any medication or medical interventions during that period. Relying on MCL 712A.19a(2) and MCL 722.638(1)(a)(*iii*), the DHHS requested termination of respondent's parental rights at the initial dispositional hearing without first making reasonable efforts to reunify respondent with MS. After the hearing, the court, Elwood L. Brown, J., terminated respondent's parental rights without requiring the DHHS to provide services to her. Respondent appealed. The Court of Appeals, CAVANAGH, P.J., and SERVITTO and CAMERON, JJ., affirmed in an unpublished per curiam opinion issued February 18, 2021 (Docket No. 354081), reasoning that respondent's consumption of marijuana and opioids while pregnant resulted in a life-threatening injury. On appeal, the Supreme Court vacated, in part, the Court of Appeals' decision and ordered that on remand, the trial court either order petitioner to provide services to respondent or articulate a factual finding based on clear and convincing evidence that aggravated circumstances existed such that services were not required. 507 Mich 942 (2021). On remand, the trial court again determined that reunification efforts were not warranted, finding that respondent's ingestion of opiates and THC during her pregnancy—which resulted in MS being diag-

nosed with neonatal abstinence syndrome, going through withdrawal, and potentially experiencing lifelong complications from exposure to the drugs in utero—constituted "severe physical abuse" under MCL 722.638; on the basis of those findings, the trial court again terminated respondent's parental rights. Respondent appealed.

The Court of Appeals *held*:

1. The goal of DHHS is to reunify families. Thus, reasonable efforts to reunify a child and family must be made in all cases, except in those involving the aggravated circumstances set forth in MCL 722.638(1)(a). In other words, absent aggravating circumstances, the DHHS has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights. Relevant here, MCL 722.638(1)(a)(*iii*) provides that aggravated circumstances exist when a parent has abused the child and the abuse included battering, torturing, or other severe physical abuse. MCL 722.638, which is part of the Child Protection Law, MCL 722.621 *et seq*., defines "child" as a person under 18 years of age. The Michigan Probate Code, MCL 710.21 *et seq*., similarly defines "child" as an individual less than 18 years of age. And a fetus is not a child in the context of a statute criminalizing first-degree child abuse in which "child" is defined as a person who is less than 18 years of age and who is not emancipated by operation of law. Because the word "fetus" is used in a number of civil and criminal laws, the Legislature's omission of a fetus from the Probate Code's definition of "child" should be viewed as purposeful. Thus, construed together, the aggravating circumstances identified in MCL 722.638(1)(a)(*iii*)—battering, torture, or other severe physical abuse—pertain to children living outside the womb, not to fetuses. The definition of "child" recognizes that drug use during pregnancy does not automatically mean that a mother will abuse her child after birth. Stated differently, maternal drug use during pregnancy does not establish an aggravated circumstance under MCL 722.638(1)(a)(*iii*) because a fetus is not a "child." The trial court therefore erred by finding that petitioner established an aggravated circumstance on the basis that respondent used opiates and marijuana while pregnant with SM and by terminating respondent's parental rights on that basis.

2. Under MCR 3.977(E)(3), to justify termination of a parent's rights at the initial dispositional hearing, a court must find on the basis of clear and convincing legally admissible evidence that the facts alleged are true, that at least one statutory ground for termination has been established, and that termination is in the child's best interests. Petitioner did not introduce any evidence

that respondent's opioid use during pregnancy harmed MS. Instead, it appeared that petitioner's decision to deny services was based on respondent's previous voluntary termination of her parental rights to two other children and a desire to punish respondent for her drug use. Accordingly, the record did not contain clear and convincing evidence that MS suffered severe physical abuse under MCL 722.638(1)(a)(*iii*), and the trial court erred by holding otherwise.

Order vacated and case remanded.

RONAYNE KRAUSE, J., concurring, agreed with the majority that respondent's parental rights could not be terminated under MCL 722.638(1)(a)(*iii*) on the basis of her drug use while pregnant because a fetus is not a "child" under the Child Protection Law or under the Probate Code. Because that conclusion was dispositive, Judge RONAYNE KRAUSE would not have considered whether the evidence would otherwise have supported a finding of severe physical abuse under the statute.

PARENT AND CHILD – CHILD PROTECTIVE PROCEEDINGS – TERMINATION OF PARENTAL RIGHTS – AGGRAVATED CIRCUMSTANCES – WORDS AND PHRASES – "CHILD."

A respondent's parental rights may be terminated at the initial dispositional hearing without first receiving services aimed at reunification if the Department of Health and Human Services establishes that the child has been abused and the abuse included one or more of the aggravated circumstances listed in MCL 722.638(1)(a), including severe physical abuse of the child; maternal drug use during pregnancy does not constitute severe physical abuse of a child because a fetus is not a child.

Michael D. Wendling, Prosecuting Attorney, and *Melissa J. Keyes*, Senior Assistant Prosecuting Attorney, for petitioner.

Timothy R. Juengel for respondent.

Before: GLEICHER, C.J., and BORRELLO and RONAYNE KRAUSE, JJ.

GLEICHER, C.J. The circuit court terminated respondent-mother's parental rights to her daughter, MS, without providing reasonable efforts aimed at

reunification. The issue presented is whether respondent's prenatal use of opioids and marijuana permitted petitioner to withhold services on the ground that the child had been subjected to an "aggravated circumstance," specifically "severe physical abuse." MCL 712A.19a(2); MCL 722.638(1)(a)(*iii*).

Maternal drug use during pregnancy does not give rise to an aggravated circumstance permitting the termination of parental rights under any circumstances because a fetus is not a "child" under the Probate Code, MCL 710.21 *et seq*. The circuit court additionally erred by construing the evidence as consistent with "severe physical abuse." We vacate the order terminating respondent's parental rights and remand for continued proceedings.

I. PROCEDURAL AND FACTUAL BACKGROUND

Six days after MS's birth in November 2019, the Department of Health and Human Services (DHHS) filed a petition seeking to terminate respondent's parental rights at initial disposition under MCL 712A.19a(2). This subsection of the Probate Code excuses the DHHS from providing reasonable efforts intended to reunify a parent and child 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, . . . MCL 722.638." MCL 712A.19a(2)(a). The petition alleged that a laboratory report revealed that MS's meconium was positive for opiates and tetrahydrocannabinol (THC) and that respondent had admitted to using marijuana and taking a "Norco" for a toothache before MS's birth. The DHHS contended that by using those substances, respondent engaged in "severe physical abuse" of MS under MCL 722.638(1)(a)(*iii*),

which lists as an aggravated circumstance "[b]attering, torture, or other severe physical abuse." The petition further alleged that respondent previously had been involved in a Children's Protective Services (CPS) action during which she voluntarily released her parental rights to twins.

A referee conducted an adjudication trial at which Dr. Xinyue Pan, a pediatrician, testified regarding MS's newborn condition and care. Dr. Pan verified that MS's meconium reflected exposure to two different opioids and THC.[1] When the laboratory reported these findings, MS was immediately removed from her mother's room and placed in a special care nursery for "at least five days for monitoring of withdrawal symptoms." Dr. Pan's working diagnosis was "Neonatal Abstinence Syndrome." She explained that babies withdrawing from opioids are "scored" according to different "symptoms." MS's scores were low, "usually one to five" out of an upper limit of 15, and she did not require any medication or medical interventions of any kind.

Dr. Pan did not offer any specific testimony regarding MS's symptoms of opioid withdrawal. And although Dr. Pan testified that narcotic exposure in utero can lead to developmental delays and "mental health issues," the record contains no evidence that MS sustained any perceptible injury whatsoever, either during her hospitalization or subsequently. To the

[1] Respondent testified that the second opioid detected (hydromorphone) resulted from the administration of Dilaudid before her cesarean section. Unfortunately, respondent's counsel neglected to obtain her medical records, did not call a witness to verify her testimony, and did not question Dr. Pan about the possibility that the medical administration of Dilaudid accounted for the second opiate.

contrary, MS's father and aunt testified that she is doing well and has no special needs.

Despite that no evidence substantiated that MS had been "severely abused," the circuit court terminated respondent's rights without requiring the DHHS to provide her with services. Compounding this error, neither the circuit court nor the referee who conducted the original termination hearing made a specific finding that aggravated circumstances existed. On appeal, respondent contended that reasonable efforts at reunification were required because aggravating circumstances had not been established. This Court affirmed the circuit court, concluding that "respondent's consumption of marijuana and opiates while pregnant . . . resulted in a life-threatening injury . . . ." *In re Simonetta*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2021 (Docket No. 354081), p 5 (*Simonetta I*).

Respondent filed a handwritten application for leave to appeal in the Supreme Court. In a brief order, the Supreme Court vacated the part of the Court of Appeals' decision "holding that the trial court made the requisite judicial determination that respondent subjected [MS] to the circumstances provided for in MCL 722.638(1) and (2), and satisfied the requirements of MCR 3.977(E) necessary to terminate the respondent's parental rights without requiring reasonable efforts at reunification." *In re Simonetta*, 507 Mich 943 (2021) (*Simonetta II*). The Court noted that pursuant to *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010), "[r]easonable efforts to reunify the child and family must be made in all cases except those involving the circumstances delineated in MCL 712A.19a(2)." *Simonetta II*, 507 Mich at 943. The Court therefore ordered the circuit court on remand to "either order that the petitioner provide reasonable services to the

respondent, or articulate a factual finding based on clear and convincing evidence that aggravated circumstances exist such that services are not required." *Id*.

On remand the circuit court found that respondent had "abused [MS] by ingesting multiple opiates and THC during her pregnancy," and that the infant's neonatal-abstinence-syndrome diagnosis, "the withdrawal, and the potential lifelong complications of the exposure to multiple controlled substances constitute[d] severe physical abuse caused by Respondent's drug use." Accordingly, the circuit court determined that reasonable efforts at reunification were not warranted.

Respondent again claimed an appeal. Her appointed appellate counsel filed a four-page brief in this Court. Despite the Supreme Court's order directing the parties' attention to whether respondent had subjected MS to aggravated circumstances under MCL 722.638(1) and (2), respondent's counsel raised no legal argument regarding aggravated circumstances or the failure to provide services. Instead, counsel's argument centered on the *petition*, not the evidence, offering only these two barely comprehensible sentences: "The petitioner then argues that petitioner [sic] is continuing to have issues with substance abuse and mental health. Those are not issues listed in the statute justifying immediate termination without offering services." That's it.

Notwithstanding appellate counsel's grossly inadequate briefing, we hold that respondent's drug abuse during her pregnancy and the ensuing harm to the child do not rise to the level of severe physical abuse. More importantly, maternal drug use does not give rise to "aggravated circumstances" under MCL 722.638

because this statute applies to "severe physical abuse" of a "child," and a fetus is not a "child" as that term is defined in the Probate Code or the Child Protection Law, MCL 722.621 *et seq*. A parent does not come within MCL 722.638 based on predelivery conduct, as such conduct is not, by definition, "abuse" of a "child."

II. THE LEGAL FRAMEWORK

The Legislature has expressed an unmistakable preference that the DHHS offer services to every parent at risk of losing parental rights. Services typically include drug treatment, psychological evaluation and support, and housing assistance. The reasonable-efforts mandate is intended to reinforce and to accentuate the DHHS's goal: reunification. Withholding reasonable efforts is a narrowly drawn exception to the legislative preference that the DHHS actively engage with parents to keep families together.

"Reasonable efforts to reunify the child and family must be made in *all* cases except those involving aggravated circumstances . . . ." *Mason*, 486 Mich at 152 (quotation marks and citation omitted). Absent aggravating circumstances, the DHHS "has an affirmative duty to make reasonable efforts to reunify a family before seeking termination of parental rights." *In re Hicks*, 500 Mich 79, 85; 893 NW2d 637 (2017). "As part of these reasonable efforts, the [DHHS] must create a service plan outlining the steps that both it and the parent will take to rectify the issues that led to court involvement and to achieve reunification." *Id*. at 85-86.[2]

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[2] Many opinions issued by this Court incorrectly state that the DHHS "is not required to provide reunification services when termination of parental rights is the agency's goal." See, e.g., *In re Moss*, 301 Mich App 76, 91; 836 NW2d 182 (2013), quoting *In re HRC*, 286 Mich App 444, 463;

"Aggravated circumstances" are limited to six events or occurrences in the life of a "child." MCL 722.638(1)(a) provides that "aggravated circumstances" exist when a parent "has *abused* the *child* . . . and the abuse included 1 or more of the following":

> (*i*) Abandonment of a young child.
>
> (*ii*) criminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate.
>
> (*iii*) Battering, torture, or other severe physical abuse.
>
> (*iv*) Loss or serious impairment of an organ or limb.
>
> (*v*) Life threatening injury.
>
> (*vi*) Murder or attempted murder. [*Id*. (emphasis added).]

Most of these circumstances are likely to be the subject of criminal prosecutions. They represent demonstrably violent or indisputably abusive conduct that causes long-lasting harm. The record does not support that MS sustained *any* consequences of respondent's prenatal use of controlled substances. But that is not the only reason that MCL 722.638(1) does not apply here. MCL 722.638(1)(a)(*iii*) does not apply to the "abuse" of a fetus because a fetus is not a "child" as that term is defined in the criminal law or the juvenile code.

III. A FETUS IS NOT A "CHILD" UNDER THE PROBATE CODE

Aggravated circumstances justifying a petition seeking termination of parental rights at initial disposition under MCL 712A.19a(2) are triggered when a parent "has abused the child" in one of the ways delineated in

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781 NW2d 105 (2009). Such statements are contrary to *Mason*, *Hicks*, and *In re Rood*, 483 Mich 73, 98-100; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.), and should be viewed as inaccurate abbreviations of governing precedent.

MCL 722.638(1)(a). That statute is part of the Child Protection Law, MCL 722.621 *et seq*., which defines "child" as "a person under 18 years of age." MCL 722.622(f). Similarly, the Michigan adoption code under the Probate Code defines "child" as "an individual less than 18 years of age." MCL 710.22(j). Neither of these definitions contemplates that a fetus is a "child."

In *People v Jones*, 317 Mich App 416; 894 NW2d 723 (2016), this Court thoughtfully considered whether a statute criminalizing child abuse, MCL 750.136b(2), applied to a mother who used methamphetamine while pregnant and delivered an infant with serious medical problems. In that statutory context (the Michigan Penal Code[3]), the word "child" is defined as "a person who is less than 18 years of age and is not emancipated by operation of law . . . ." MCL 750.136b(1)(a). The statute's definition of "person" is limited to the individual committing the abusive act. MCL 750.136b(1)(d). This Court noted that the definition of "child" "does not refer to fetuses or to conduct that harms a fetus," concluding that "neither the definition of 'child' nor the definition of 'person' found in the statute specifically includes fetuses." *Jones*, 317 Mich App at 422. The Legislature *has* criminalized conduct that specifically harms fetuses, *Jones* points out, in several other statutes. *Id*. at 424-426. "And the Legislature has consistently refrained from expanding the definition of person to include fetuses." *Id*. at 429.

In light of the appearance of the word "fetus" in a number of civil and criminal laws, the Legislature's omission of a fetus from the Probate Code's definition of "child" should be viewed as purposeful. Aside from the definition of "child," other interpretive guides sup-

[3] MCL 750.1 *et seq*.

port that the Legislature did not intend that MCL 722.638 would apply to fetuses.

The individual words of a statute should be read holistically "with a view to their place in the overall statutory scheme." *Davis v Mich Dep't of Treasury*, 489 US 803, 809; 109 S Ct 1500; 103 L Ed 2d 891 (1989). See also *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 351; 952 NW2d 384 (2020) ("This interpretation reflects a holistic reading of the statutory text and gives each provision its appropriate meaning and function."); *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 367-368; 917 NW2d 603 (2018) ("However, we do not read statutory language in isolation and must construe its meaning in light of the context of its use."). When construed together, the aggravating circumstances identified in MCL 722.638(1)(a)(*iii*)—"[b]attering, torture, or other severe physical abuse"—apply to children living outside the womb. In a broader context, the other aggravating circumstances captured in MCL 722.638(1)(a) also pertain to children who have been born, and not fetuses: "[a]bandonment," "[c]riminal sexual conduct involving penetration, attempted penetration, or assault with intent to penetrate," "[l]oss or serious impairment of an organ or limb," "[l]ife threatening injury," and "[m]urder or attempted murder."

This interpretation of the plain language of MCL 722.638(1)(a) coincides with that of the Michigan Department of Health & Human Services, *Children's Protective Services Manual (CPSM)*, PSM 711-4 (February 1, 2017), p 2, available at <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/711-4.pdf#pagemode=bookmarks> (accessed January 25, 2022) [https://perma.cc/6922-LEAH], which defines a "child"

as "[a] person under 18 years of age," and further provides, "Parental substance abuse, positive toxicology or withdrawal in an infant does not in and of itself indicate that child abuse or neglect has occurred or that the infant has been severely physically injured." *CPSM*, PSM 716-7 (September 1, 2020), p 6, available at <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/716-7.pdf#pagemode=bookmarks> (accessed January 25, 2022) [https://perma.cc/K4HV-9KQV]. The manual advises that "[s]ubstance abuse is a mental health disorder and caseworkers should assist the parent/caregiver in accessing relevant supports and services." *Id*. at 1. This corresponds to MCL 712A.19a(2)'s mandate that reasonable efforts be provided to parents who have not harmed their children in any of the ways delineated in MCL 722.638(1)(a), thereby acknowledging that those parents may benefit from skilled intervention and care.

By excluding fetuses from the definition of a "child," our Legislature has recognized that drug use during pregnancy does not automatically mean that a mother will abuse her child after birth. CPS has reached the same conclusion. Ironically, MS's father was a respondent when the child was taken into care and at that time, faced a felony drug charge and had a long history of substance abuse including heroin, methamphetamine, and marijuana use. After receiving extensive services, he was deemed capable of caring for MS. The DHHS's obvious inconsistency regarding parental drug abuse smacks of gender bias.

Aggravated circumstances do not exist in this case as a matter of law, supporting vacation of the termination of respondent's parental rights on that ground alone.[4]

IV. THE EVIDENCE DOES NOT SUPPORT "SEVERE PHYSICAL ABUSE"

The usual standard of proof in termination-of-parental-rights cases is a preponderance of the evidence. But to justify termination of parental rights at initial disposition and without reasonable efforts at reunification, a court must find "on the basis of clear and convincing legally admissible evidence" that the facts alleged are true, that at least one statutory ground for termination has been established, and that termination is in the child's best interests. MCR 3.977(E)(3).

The record does not contain clear and convincing evidence that MS was "severely abused." As discussed, the DHHS failed to introduce any evidence supporting that respondent's opioid use harmed MS. Rather, the evidence demonstrates that MS was placed in a special care nursery only after her meconium tested positive for opioids, not because she exhibited signs or symp-

[4] We acknowledge that in *In re Rippy*, 330 Mich App 350, 357-359; 948 NW2d 131 (2019), this Court upheld a termination of parental rights at the initial disposition based on an assumption that a mother's prenatal drug use was an aggravated circumstance. However, the majority in *Rippy*, *id*. at 359 n 2, declined to consider whether a "fetus" falls within the definition of a "child" as contemplated in MCL 722.638(1), and therefore reached no binding opinion on that question. Although neither trial nor appellate counsel specifically preserved the issue in this case, we may exercise our discretion to address it. This is a matter of statutory interpretation that we review de novo, and the facts necessary to our resolution are of record. See *Frericks v Highland Twp*, 228 Mich App 575, 585; 579 NW2d 441 (1998); *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 311; 497 NW2d 595 (1993).

toms of neonatal abstinence syndrome. And if MS did, in fact, have such symptoms, the DHHS failed to place them in evidence.

The record strongly supports that the DHHS's decision to deny respondent services was based on respondent's previous voluntary termination of her parental rights to her twins (an improper basis for denying services) and a desire to punish respondent for her drug use. According to the CPSM, however:

> The purpose of [CPS] is to ensure that children are protected from further physical or emotional harm caused by a parent or other adult responsible for the child's health and welfare and that families are helped, when possible, to function responsibly and independently in providing care for the children for whom they are responsible. [*CPSM*, PSM 711-1 (November 1, 2013), p 1, available at <https://dhhs.michigan.gov/OLMWEB/EX/PS/Public/PSM/711-1.pdf#pagemode=bookmarks> (accessed January 25, 2022) [https://perma.cc/CA6F-XBWB].]

The Legislature shares this goal. By requiring reasonable efforts to reunify families except in circumstances in which a child has been severely harmed by deliberate postdelivery conduct, the statutes governing child welfare proceedings recognize that the ultimate objective of the law is to strengthen families, not to tear them apart. And it should go without saying that a policy of terminating parental rights based on maternal drug abuse only discourages pregnant women from seeking prenatal care.

Respondent is entitled to receive services designed to help her combat her drug use, to assist her in locating safe housing, and to allay the other concerns that surfaced before her rights were punitively terminated and her needs never addressed.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BORRELLO, J., concurred with GLEICHER, C.J.

RONAYNE KRAUSE, J. (*concurring*). I concur entirely with the majority's reasoning and conclusion that a fetus is not a "child" under the Child Protection Law, MCL 722.621 *et seq*., or under the Probate Code, MCL 710.21 *et seq*. Therefore, as the majority concludes, it is definitionally impossible to commit severe physical abuse of a fetus under MCL 722.638(1), and it is, in turn, definitionally impossible to subject a fetus to "aggravated circumstances" under MCL 712A.19a(2)(a). Because that conclusion is dispositive, I concur with the result reached by the majority for that reason alone, and I would not consider or express any opinion whether the evidence would otherwise support a finding of "severe physical abuse."

PEGASUS WIND, LLC v TUSCOLA COUNTY

Docket No. 355715. Submitted February 8, 2022, at Detroit. Decided February 24, 2022, at 9:25 a.m. Leave to appeal sought. Oral argument ordered on the application 511 Mich 977 (2023).

Pegasus Wind, LLC, brought an action in the Tuscola Circuit Court against Tuscola County, appealing the decision of intervenor, the Tuscola Area Airport Zoning Board of Appeals (the AZBA), to deny eight variance applications for wind turbines within the Tuscola Area Airport zoning area. In June 2019, Pegasus sought variances with the AZBA for 33 wind turbines near the Tuscola Area Airport. The AZBA denied the variance applications. Pegasus appealed in the Tuscola Circuit Court, and the court reversed the AZBA's decision. In October 2019, Pegasus submitted eight additional variance applications—the variances at issue in this appeal—for the construction of eight additional wind turbines; Pegasus also submitted the determinations of no hazard by the Federal Aviation Administration (the FAA) for the proposed wind turbines and a letter from the Michigan Department of Transportation confirming that it concurred with the FAA's determinations of no hazard. The AZBA denied Pegasus's request for the eight variances, and Pegasus appealed in the Tuscola Circuit Court. The court, Amy G. Gierhart, J., held that the AZBA's denial was supported by substantial, competent, and material evidence that Pegasus had failed to establish three of the four criteria necessary for a variance. More specifically, the trial court concluded that Pegasus failed to establish that (1) there was a practical difficulty in the literal enforcement of the ordinance, (2) the variances would not be against the public interest and flight-approach protection, and (3) granting the variances would be in accordance with the spirit of the ordinance. However, the court reversed the AZBA's determination that granting the variances would not do substantial justice. The court further concluded that the AZBA's denial of the variances on the basis that the grant of such variances would not be in accordance with the spirit of the ordinance was also supported by substantial evidence. Pegasus moved for reconsideration, and the court denied the motion. Pegasus appealed.

The Court of Appeals *held*:

1. When reviewing a zoning board's denial of a variance, an appellate court must review the record and the board's decision to determine whether it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion. The appellate court reviews the circuit court's determination regarding the findings of a zoning board of appeals to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial-evidence test to the board's factual findings. The substantial-evidence-test standard is the same as the clear-error standard. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made. Substantial evidence is evidence that a reasonable person would accept as sufficient to support a conclusion; while this requires more than a scintilla of evidence, it may be substantially less than a preponderance.

2. An airport zoning board of appeals must grant a variance if the applicant establishes the statutory factors for a variance delineated in the Michigan Airport Zoning Act, MCL 259.431 *et seq*. Under MCL 259.454(1), an airport zoning board of appeals is required to grant a variance if the applicant fulfills all four factors: (1) a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship, (2) the relief granted would not be contrary to the public interest, (3) the relief granted would do substantial justice, and (4) the relief granted would be in accordance with the spirit of the regulations. The Tuscola Area Airport Zoning Ordinance (the Tuscola Ordinance) mandates that the AZBA grant a variance if a petitioner establishes any *one* of the factors, as long as the FAA and the Michigan Aeronautics Commission has issued permits or determinations of no hazard; the Tuscola Ordinance also adds one alternative subfactor regarding flight-approach protection: relief granted would not be contrary to the public interest *and approach protection*.

3. The circuit court's reversal in the previous appeal regarding the 33 wind turbines did not require that it also reverse the AZBA's denial of the eight turbines in the instant case. The eight turbines at issue in this case were in different locations, and the AZBA's decision was made in an entirely different context than its previous denial because Pegasus already had variances approved for 33 turbines. Further, Pegasus failed to provide any legal citation in support of its contention that the outcome of the

previous appeal required the AZBA to authorize the variances or the circuit court to reverse the denials in this case.

4. Use variances permit a use of the land that the zoning ordinance otherwise proscribes, whereas nonuse variances are those variances concerned with the area, height, and setback requirements of structures. Accordingly, Pegasus sought nonuse variances for the construction of the eight wind turbines. The term "practical difficulty" is not defined in the Airport Zoning Act or in the Tuscola Ordinance, and there was no Michigan caselaw interpreting the practical-difficulty factor for purposes of airport zoning. However, under MCL 125.3604(7) of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., only a showing of practical difficulty, and not unnecessary hardship, is required to justify the grant of a nonuse variance. In determining whether a practical difficulty exists, a court must consider whether the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner. However, practical difficulties cannot be self-created. In this case, the circuit court confused practical difficulty with unnecessary hardship; the requirement of showing unique circumstances inherent in the property is not an element of practical difficulty but of unnecessary hardship. Moreover, because the AZBA could not require that Pegasus establish the hardship requirements, the AZBA's contention that all of Pegasus's arguments were financial and, therefore, did not apply to the land could not support its denial of the variances on the basis of practical difficulty. In this case, Pegasus had no use for the land without the variance because its lease agreements all related to the placement and use of turbines. The AZBA relied on the agricultural nature of the parcels to assert continued economic use; however, Pegasus did not own those parcels, and its leases did not permit alternative uses for the properties. Therefore, the denial of the variances rendered Pegasus's lease agreements valueless and prohibited any use of its interest in the various properties.

5. Denial on the basis of the self-created-hardship rule was not mandated. A zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance so as to render it unfit for the uses for which it is zoned. In this case, there was no evidence in the record that the landowners or Pegasus had partitioned, subdivided, or physically altered the parcels in some way that rendered them unfit for their uses.

Neither Pegasus's awareness of the ordinance nor the ability of the landowners to use their properties for agricultural purposes under the current zoning was relevant; the question was whether Pegasus had any use for this land under the current zoning—it did not—and whether entering into the agreements with knowledge that the land was subject to the zoning ordinance rendered these hardships self-created—it did not. Accordingly, none of the AZBA's reasons for concluding that Pegasus failed to establish a practical difficulty was supported by the record, let alone supported by substantial evidence, and the circuit court misapplied the practical-difficulty standard. Therefore, the circuit court erred by affirming this determination.

6. The circuit court erred by affirming the AZBA's determination that the variances would be contrary to the public interest and flight-approach protection. The AZBA's arguments regarding risks created by emergencies and student pilots lacked substantial evidence in the record. Importantly, Pegasus's wind expert explained that even if visual flight rule (VFR) pilots were flying in reduced-visibility conditions, the eight turbines would have no impact on those pilots because the pilots would already have to circumnavigate the existing structures and turbines in the northwest quadrant of the airport. The record did not contain any evidence supporting a finding that the addition of these eight turbines would or could create risks and situations different from what already existed as a result of the numerous wind turbines already built. Therefore, on this record, no reasonable person could conclude that the addition of these eight turbines would create the risks and concerns that the AZBA and the county identified. The circuit court erred when it concluded that the AZBA's determination that Pegasus had not shown that the variances would not impact public safety or flight-approach protection was supported by substantial, competent, and material evidence.

7. Neither the AZBA nor the county addressed the basis of the circuit court's reversal on the issue of substantial justice. By failing to provide any legal argument or analysis, the county effectively abandoned any claim of error on this question. Accordingly, this claim was not reviewed.

8. The circuit court erred when it affirmed the AZBA's determination that the variances were not in the spirit of the ordinance. The spirit of the ordinance at issue was to promote the health, safety, and general welfare of the inhabitants of Tuscola County by preventing the establishment of airport hazards, restricting the height of structures and objects of natural growth,

and otherwise regulating the use of property in the vicinity of the Tuscola Area Airport and providing for the allowance of variances from such regulations. The plain language of the ordinance expressly provides for the provision of variances, rendering the grant of variances within the spirit of the ordinance. In this case, other turbines had received variances, and no evidence was provided that their existence had created any of the purported "future" risks the AZBA used to justify its decision. Because the record did not show any substantial, material, or relevant evidence in support of the AZBA's assertion that the turbines create risks and limitations that somehow do not already exist from all the other turbines, the AZBA's decision was without support, and the circuit court erred by affirming it.

Reversed in part and remanded.

MURRAY, J., dissenting, would have held that the circuit court set forth the correct legal principles governing its review, accurately recounted the arguments and evidence, and reached a conclusion in this close case; therefore, Judge MURRAY could not conclude that the circuit court applied incorrect legal principles or that it misapprehended or grossly misapplied the substantial-evidence test to the AZBA's factual findings. The record before the AZBA did contain testimony and evidence supporting many of its conclusions, including that the wind turbines could cause dangers to pilots experiencing in-flight emergencies and that the placement and height of the wind turbines would cause VFR pilots to fly in a different airspace (Class E airspace, instead of Class G airspace), which triggers different flight visibility requirements and, in turn, can cause a "choke point" for those pilots also seeking to circumnavigate the wind turbines. It also appeared undisputed that when a VFR pilot flies over the wind turbines, the turbines would interfere with the primary radar transmitted from air traffic control. There was evidence setting forth these facts, and these facts supported the reasonable conclusion of the AZBA. Because the record contained evidence supporting these propositions and the AZBA made specific findings on the pertinent factors, the deferential standard of review should have made this case difficult to reverse. Accordingly, the circuit court did not err by affirming the decision of the AZBA, which was entitled to substantial deference, that Pegasus did not establish practical difficulties or unnecessary hardship such that a variance had to be granted.

1. ZONING – MICHIGAN AIRPORT ZONING ACT – AIRPORT ZONING BOARD OF APPEALS – APPLICATIONS FOR VARIANCES.

   Under MCL 259.454(1) of the Michigan Airport Zoning Act, MCL 259.431 *et seq*., an airport zoning board of appeals is required to grant a variance if the applicant fulfills all four factors: (1) a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship, (2) the relief granted would not be contrary to the public interest, (3) the relief granted would do substantial justice, and (4) the relief granted would be in accordance with the spirit of the regulations.

2. ZONING – NONUSE VARIANCES – WORDS AND PHRASES – PRACTICAL DIFFICULTY – SELF-CREATED HARDSHIP.

   Use variances permit a use of the land that the zoning ordinance otherwise proscribes, whereas nonuse variances are those variances concerned with the area, height, and setback requirements of structures; under MCL 125.3604(7) of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., only a showing of practical difficulty, and not unnecessary hardship, is required to justify the grant of a nonuse variance; in determining whether a practical difficulty exists, a court must consider whether the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner; there is no requirement to show unique circumstances inherent in the property to establish practical difficulty; practical difficulties, however, cannot be self-created; a zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land after the enactment of the applicable zoning ordinance so as to render it unfit for the uses for which it is zoned.

Warner Norcross + Judd LLP (by *Jonathan E. Lauderbach*, *Daniel P. Ettinger*, and *Ashley G. Chrysler*) for Pegasus Wind, LLC.

Braun Kendrick Finkbeiner PLC (by *Jamie Hecht Nisidis* and *Clayton J. Johnson*) for Tuscola County.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*) for the Tuscola Area Airport Zoning Board of Appeals.

Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

RICK, P.J. In this zoning dispute, plaintiff, Pegasus Wind, LLC (Pegasus), appeals as of right the Tuscola Circuit Court's order affirming the decision of intervenor, the Tuscola Area Airport Zoning Board of Appeals (the AZBA), to deny eight variance applications for additional wind turbines. For the reasons stated in this opinion, we reverse in part and remand for proceedings that are consistent with this opinion.[1]

I. BACKGROUND

This controversy has an extensive procedural and factual history involving local regulatory authorities' decisions on a wind energy system being built by Pegasus. Pegasus is constructing a commercial wind energy system in Tuscola County. Some of the planned wind turbines are within the Tuscola Area Airport zoning area. Airport Authority owns the airport and is responsible for maintenance and operation of the landing, navigational, and building facilities. See MCL 259.622. The AZBA is responsible for deciding whether to grant variances from airport zoning regulations. See MCL 259.454.

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[1] In deciding this appeal, we reject Tuscola County's argument that this Court lacks jurisdiction because the circuit court judgment is not appealable as of right under MCR 7.203(A)(1)(a). In *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 453 n 1; 957 NW2d 47 (2020), a recently published decision, this Court held that it does have jurisdiction over such an appeal. Therefore, this argument has no merit. See *id*. (holding that this Court had jurisdiction to hear the issue on appeal because the "case involved a decision by [the] County Planning Commission to grant applications for conditional-use permits for construction of windmills. Accordingly, the appeal in the circuit court was not taken from a court or tribunal because the planning commission is not a court and did not act as a tribunal in issuing the permits in question").

On June 11, 2019, Pegasus filed applications for variances with the AZBA for 33 proposed wind turbines near the Tuscola Area Airport. The AZBA denied the variance applications. Pegasus appealed the AZBA's denial of the variances in the circuit court. In November 2019, the circuit court reversed the AZBA's decision.[2]

Relevant to this appeal, on October 22, 2019, Pegasus submitted eight additional variance applications for the construction of eight additional wind turbines. Along with these applications, Pegasus submitted the Federal Aviation Administration's (the FAA) determinations of no hazard (DNH) for the proposed wind turbines and a letter from the Michigan Department of Transportation (MDOT) confirming that MDOT "concurs with the FAA's determination of no hazard" and that MDOT tall-structure permits would be issued for the turbines after the variances were granted. Public hearings regarding the variance applications were held on January 13 and 17, 2020. The AZBA denied Pegasus's request for the eight variances on January 17, 2020.

Pegasus appealed the AZBA's denial in the circuit court. In its September 11, 2020 order, the circuit court held that the AZBA's denial was supported by substantial, competent, and material evidence that Pegasus had failed to establish three of the four criteria necessary to permit the AZBA to grant a variance. More

[2] This Court denied the AZBA's application for leave to appeal this order "for lack of merit in the grounds presented." *Pegasus Wind, LLC v Tuscola Area Airport Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 26, 2020 (Docket No. 351915). Our Supreme Court also denied leave to appeal, *Pegasus Wind, LLC v Tuscola Area Airport Zoning Bd of Appeals*, 506 Mich 941 (2020), and denied a subsequent motion for reconsideration, *Pegasus Wind, LLC v Tuscola Area Airport Zoning Bd of Appeals*, 507 Mich 871 (2021).

specifically, the trial court concluded that Pegasus failed to establish that (1) there is a practical difficulty in the literal enforcement of the ordinance, (2) the variances would not be against the public interest and "approach protection," and (3) granting the variances would be in accordance with the spirit of the ordinance. However, the court reversed the AZBA's determination that granting the variances would not do substantial justice, noting that the record "does not contain evidence that the granting of variances would not do substantial justice" and that "[t]here will be no adverse impact to the airport . . . ." The circuit court further concluded that the AZBA's denial of the variances on the basis that the grant of such variances would not be "in accordance with the spirit of the Ordinance" was also supported by substantial evidence.

Pegasus moved for reconsideration, arguing, in part, that the circuit court's determination that there was evidence supporting the substantial-justice factor, but not the remaining three factors, was internally inconsistent. The circuit court denied the motion.

This appeal followed.

II. STANDARD OF REVIEW

"In general, we review de novo a circuit court's decision in an appeal from a [zoning board of appeals (ZBA)] decision because the interpretation of the pertinent law and its application to the facts at hand present questions of law." *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009) (citations omitted). However, this Court gives "great deference to the trial court and zoning board's findings." *Norman Corp v East Tawas*, 263 Mich App 194, 198; 687 NW2d 861 (2004). The underlying interpretation and application of an ordinance is also reviewed de novo. *Detroit v*

Detroit Bd of Zoning Appeals, 326 Mich App 248, 254; 926 NW2d 311 (2018). As stated in *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 458; 773 NW2d 730 (2009):

> When reviewing a zoning board's denial of a variance this Court must review the record and the board's decision to determine whether it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion. [Cleaned up.]

"This Court reviews the circuit court's determination regarding ZBA findings to determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the ZBA's factual findings." *Hughes*, 284 Mich App at 60 (quotation marks, citation, and brackets omitted). The substantial-evidence-test standard "is the same as the familiar 'clearly erroneous' standard. A finding is clearly erroneous if the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Id*. (citation omitted). "The substantial evidence test also encompasses a quantitative component." *Id*. at 61. " 'Substantial evidence' is evidence that a reasonable person would accept as sufficient to support a conclusion. While this requires more than a scintilla of evidence, it may be substantially less than a preponderance." *Id*. (quotation marks and citation omitted).

III. ANALYSIS

An airport zoning board of appeals must grant a variance if the applicant establishes the statutory factors for a variance delineated in the Michigan

Airport Zoning Act, MCL 259.431 *et seq*. The Tuscola Area Airport Zoning Ordinance (the Tuscola Ordinance) also identifies the factors that the AZBA must apply when considering variance applications. Tuscola Ordinance, § 5.2(G)(2).[3] The Airport Zoning Act provides:

> A person desiring to erect a structure, or increase the height of a structure, or permit the growth of a tree, or otherwise use property in violation of the airport zoning regulations adopted under this act, may apply to the board of appeals, for a variance from the zoning regulations in

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[3] In contrast to the Airport Zoning Act, the Tuscola Ordinance mandates that the AZBA grant a variance if a petitioner establishes any *one* of the factors, as long as the FAA and the Michigan Aeronautics Commission has issued permits or determinations of no hazard. The Tuscola Ordinance also adds one alternative subfactor, regarding flight-approach protection, which reads, in pertinent part:

> In acting upon applications for variance, a variance can be granted on the condition that
>
> The Federal Aeronautics Administration (FAA) and the Michigan Aeronautics Commission (MAC) has issued a permit or determination of non-hazard. . . .
>
> * * *
>
> In addition, variances *shall* be allowed for *any* of the following reasons:
>
> (a) A literal application or enforcement of the regulation would result in practical difficulty or unnecessary hardship.
>
> (b) Relief granted would not be contrary to the public interest *and approach protection*.
>
> (c) Relief granted would do substantial justice.
>
> (d) Relief granted would be in accordance with the spirit of the regulations of this Ordinance.
>
> . . . Nothing in this section shall be construed to permit a use that would conflict with any general zoning ordinance or regulation of any political subdivision applicable to the same area. [Tuscola Ordinance, § 5.2(G)(2) (emphasis added).]

> question. The board of appeals *shall* allow a variance if a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of the regulations. However, a variance may be granted subject to any reasonable condition or condition subsequent that the board of appeals considers necessary to effectuate the purposes of this act. A variance shall not conflict with a general zoning ordinance or regulation of a political subdivision. However, a variance may conflict with a zoning ordinance or regulation adopted exclusively for airport zoning purposes. [MCL 259.454(1) (emphasis added).]

Therefore, under the controlling statute, an airport zoning board of appeals is required to grant a variance if the applicant fulfills all four factors: (1) "a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship," (2) "the relief granted would not be contrary to the public interest," (3) the relief granted "would do substantial justice," and (4) the relief granted would be "in accordance with the spirit of the regulations." MCL 259.454(1).

The Airport Zoning Act and the Tuscola Ordinance do not distinguish "nonuse variances" and "use variances." However, the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., provides some clarity. "Under the *in pari materia* doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 264; 931 NW2d 571 (2019) (quotation marks, citation, and brackets omitted). The Michigan Zoning Enabling Act provides the procedure for a zoning board of appeals, which is analogous to the AZBA under the Airport Zoning Act. See MCL

125.3604. MCL 125.3604(8) provides, "The zoning board of appeals of all local units of government shall have the authority to grant *nonuse variances relating to the construction, structural changes, or alteration of buildings or structures related to dimensional requirements* of the zoning ordinance or to any other nonuse-related standard in the ordinance." (Emphasis added.) This Court has also recognized that "[u]se variances permit a use of the land which the zoning ordinance otherwise proscribes," while "nonuse variances" are those variances concerned with the area, height, and setback requirements of structures. *Nat'l Boatland, Inc v Farmington Hills Zoning Bd of Appeals*, 146 Mich App 380, 387; 380 NW2d 472 (1985).[4] Additionally, MCL 125.3604(7) indicates that the existence of "practical difficulties" is the applicable standard for nonuse variances and "unnecessary hardship" applies to use variances. Considering these principles, Pegasus appears to have sought nonuse variances for the construction of the eight wind turbines.

A. SIMILAR OUTCOMES

Pegasus, although recognizing that the circuit court had an obligation to review the whole record, argues that the outcome of this case should be identical to its previous appeal concerning the circuit court's reversal of the AZBA's denial of the variance requests for 33 wind turbines because the record and arguments are identical. We disagree.

According to our Supreme Court, the Michigan Constitution requires "a thorough judicial review of [an]

[4] "Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority." *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2013).

administrative decision . . . ." *In re Payne*, 444 Mich 679, 693; 514 NW2d 121 (1994) (quotation marks and citation omitted). Review of an administrative decision

> considers the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. Such review must be undertaken with considerable sensitivity in order that the courts accord due deference to administrative expertise and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. [*Id*. (quotation marks and citation omitted).]

Regardless of the similarity to the record in the previous appeal, the record in the instant case is different. The eight turbines in this case were in different locations. Because Pegasus already had variances approved for 33 turbines at the time it sought these variances, the AZBA's decision was made in an entirely different context than its previous denial. Under these circumstances, neither the AZBA's decision nor the circuit court's determination on appeal were prescribed by the previous appeal. Further, Pegasus failed to provide any legal citation to support its contention that the outcome of the previous appeal required the AZBA to authorize the variances or the circuit court to reverse the denials in this case. "When a party merely announces a position and provides no authority to support it," this Court may consider the issue waived. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007). The circuit court's reversal in the previous appeal did not require that it also reverse the AZBA's

denial for the eight turbines in the instant case. Therefore, the trial court did not err in this regard.

B. PRACTICAL DIFFICULTY

As indicated, under the Airport Zoning Act, the AZBA is required to grant a variance "if a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of the regulations." MCL 259.454(1); see Tuscola Ordinance, § 5.2(G)(2). Accordingly, if an applicant makes the proper showing, granting of the variance is not discretionary.

The term "practical difficulty" is not defined in the Airport Zoning Act or in the Tuscola Ordinance, and there is no Michigan caselaw that interprets the practical-difficulty factor for purposes of airport zoning. However, a similar standard was required for use and nonuse variances under MCL 125.585, repealed by 2006 PA 110, which required a showing of " 'practical difficulties or unnecessary hardships in carrying out the strict letter of the ordinance.' " See *Norman Corp*, 263 Mich App at 202.[5] "In general, 'or' is a disjunctive term, indicating a choice between two alterna-

[5] Many of the general zoning cases cited by the circuit court and by the parties on appeal predate the 2006 enactment of the Michigan Zoning Enabling Act. The cases that predate the enactment did not typically differentiate between "practical difficulty" and "unnecessary hardship" because the prior zoning law allowed variances for both reasons. See MCL 125.585, repealed by 2006 PA 110. Since 2006, the term "practical difficulty" applies only to nonuse variances, and the term "unnecessary hardship" applies only to use variances. MCL 125.3604(7). Consequently, the general zoning cases that interpret the former zoning law are not binding but are persuasive regarding the "practical difficulty" factor.

tives . . . ." *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 148; 783 NW2d 133 (2010). Furthermore, under the Zoning Enabling Act, only a showing of practical difficulty, and not unnecessary hardship, is required to justify the grant of a nonuse variance. MCL 125.3604(7); see *Heritage Hill Ass'n, Inc v Grand Rapids*, 48 Mich App 765, 769; 211 NW2d 77 (1973) (holding that only a showing of practical difficulty, and not unnecessary hardship, is required to justify the grant of a nonuse variance).

This Court has held that in determining whether a practical difficulty exists, we consider "whether the denial deprives an owner of the use of the property, compliance would be unnecessarily burdensome, or granting a variance would do substantial justice to the owner." *Norman Corp*, 263 Mich App at 203. The use of the term "or" indicates that Pegasus need only meet one of these standards. See *Paris Meadows, LLC*, 287 Mich App at 148. However, practical difficulties cannot be self-created. *Norman Corp*, 263 Mich App at 202. Therefore, the issue is whether the denial of the variance deprived Pegasus of the use of the property or whether compliance would be unnecessarily burdensome. In addition, even if Pegasus has shown entitlement under either of these standards, this Court must consider whether the practical difficulty was self-imposed.

In its determination that Pegasus had not shown that a literal interpretation or enforcement of the height requirements could result in a practical difficulty for Pegasus with respect to the eight proposed turbines, the AZBA stated:

> In particular, Pegasus Wind has not provided sufficient evidence to establish that the wind project is not financially viable if shorter wind turbines are used or if fewer

> wind turbines are used and has not established the unavailability of shorter turbines with anything more than conclusory statements. Pegasus Wind has also failed to provide sufficient evidence that potential, alternate locations are not viable options for these eight (8) proposed turbines. Pegasus Wind has also failed to show that denial of the variances would deprive it of use of the property. The property at issue has other uses, particularly agricultural issues.
>
> Any practical difficulty to Pegasus Wind from its claimed inability to meet its obligations under a Power Purchase Agreement without the variances and/or based on expenditures made by Pegasus Wind on wind turbine construction is self-created and not a proper basis to grant a variance.
>
> Finally, the practical difficulty on which Pegasus Wind bases its application for variances is not inherent in the land and not the result of a unique characteristic of the land.

The circuit court concluded that the AZBA's denial of the variances based on Pegasus's failure to establish that there was a practical difficulty in the literal enforcement of the ordinance was supported by competent, material, and substantial evidence. Because there appears to be confusion between the requirements of practical difficulty and unnecessary hardship, we use this case as an opportunity to distinguish those requirements in the application of variances.

1. INHERENT IN THE LAND

Considering the third basis first, the AZBA found that the practical difficulty on which Pegasus relied was neither inherent in the land nor the result of a unique characteristic of the land. However, the requirement of showing unique circumstances inherent in the property is not an element of practical difficulty

but of unnecessary hardship. See, e.g., *Detroit v Detroit Bd of Zoning Appeals*, 326 Mich App 248, 261; 926 NW2d 311 (2018) (setting forth the requirements for proving a hardship); *Norman Corp*, 263 Mich App at 203 ("Alternatively, this Court has granted variances where an unnecessary hardship existed that was unique to the property."). However, because Pegasus was seeking a nonuse variance, it was only required to establish a practical difficulty. See MCL 125.3604(7); *Norman Corp*, 263 Mich App at 203; *Heritage Hill*, 48 Mich App at 769.

The county asserts that "practical difficulty" relates to problems inherent in the property itself, citing a footnote in *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 403 n 1; 534 NW2d 143 (1995), which provides:

> Defendant's concession that a "practical difficulty" exists under plaintiffs' circumstances is limited solely to these proceedings. Usually, the concept of "practical difficulty" in zoning law relates to problems inherent in the property itself, not to the personal conditions of its occupants. See Crawford, Michigan Zoning and Planning (3d ed), § 6.03, pp 164-165.[6]

The county then argues that "the practical difficulties asserted by Pegasus are all personal to Pegasus and its desire to use the properties for a unique purpose," not any unique aspect of the properties themselves.

In affirming the AZBA's determination, the circuit court adopted this position:

> It is Appellees['] contention that Pegasus' arguments relate solely to their financial bottom line, when Pegasus argued that using shorter turbines would be "less effi-

[6] We note that *Davenport* predates the 2006 enactment of the Michigan Zoning Enabling Act.

> cient" and requiring Pegasus to "site more turbines" would be "at the very least, unnecessarily burdensome, and at the most, detrimental to the Project's overall economic vitality." [The] AZBA states that these arguments are not related to any practical difficulty with the property.
>
> * * *
>
> Appellees insist that Pegasus does not identify anything unique about the parcels for which the variances are being requested. . . .
>
> The Appellees cite to case law which states[,] "The concept of 'practical difficulty' in zoning law relates to problems inherent in the property itself, not to the personal conditions of its occupants." "The hardship must be unique or peculiar to the property for which the variance is sought." [Citations omitted.]

Accordingly, the circuit court expressly adopted the position found in the *Davenport* footnote. However, in doing so, the court confused practical difficulty with unnecessary hardship. Indeed, this is even more clear from its second quotation which expressly notes that it is *hardship*, not practical difficulty, that must be unique to the property for which it is sought. Further, although an unpublished opinion of this Court has indicated that this is a consideration when analyzing practical difficulty, see, e.g., *Jacques v Dep't of Environmental Quality*, unpublished per curiam opinion of the Court of Appeals, issued August 23, 2007 (Docket No. 268016), p 5, unpublished cases are not binding on this Court, MCR 7.215(J)(1).

We recognize that *Davenport* is published. Therefore, appellees and the circuit court were not without some support for their contention that Pegasus was required to establish that "the practical difficulty [was] unique to the property itself." However, the law is clear that practical difficulty and unnecessary hardship are

two separate things, and being unique to or inherent in the property is a requirement of hardships, not practical difficulty. See *Norman Corp*, 263 Mich App at 203; *Heritage Hill*, 48 Mich App at 769. Further, the Michigan Zoning Enabling Act, which provides that "practical difficulty" applies only to nonuse variances while "unnecessary hardship" applies only to use variances, further supports our conclusion that practical difficulty and unnecessary hardship are two distinct and separate standards. MCL 125.3604(7). Accordingly, we reject the arguments relying on the conflated standards. Moreover, because the AZBA cannot require Pegasus to establish the hardship requirements, the last reason provided by the AZBA, as well as its contention that all of Pegasus's arguments are financial and, therefore, do not apply to the land, cannot support its denial of the variances on the basis of "practical difficulty."

2. DEPRIVATION OF USE/UNNECESSARILY BURDENSOME

We note that neither the AZBA's findings nor the circuit court's opinion addressed the "deprivation of use" and the "unnecessarily burdensome" factors separately. Therefore, we address both factors together.

The AZBA determined that Pegasus had not provided sufficient evidence to establish that the wind project was not financially viable if shorter or fewer turbines were used and did not establish that shorter turbines were unavailable "with anything more than conclusory statements." However, the record from the previous variance denial appeal was part of the instant record, and that record clearly established both of these things as recognized in the trial court's order in the prior appeal regarding the 33 variances. In addition, Pegasus noted that it was not required to establish that the use of alternative turbines or other locations was impossible.

In affirming the AZBA, the circuit court held:

> Pegasus argues that to comply with the Ordinance by using shorter turbines "would be unnecessarily burdensome and possibly detrimental to the Wind Project's economic viability." Pegasus explained that it could not use shorter turbines because "virtually all commercial wind turbines sold on the market and used by developers like Pegasus Wind today are in excess of 400 feet" and would be in violation of the height limitations in the Ordinance. Pegasus is purchasing turbines from GE and the shortest commercial turbine actively produced by GE has a height of 486 feet at the tip. Further, the shorter "special purpose" turbines are taller than 400 feet.
>
> Pegasus also notes that the turbines that are shorter than 400 feet would be less efficient than the taller counterparts, which would require Pegasus to site more turbines to produce the megawatt total needed for compliance with its Power Purchase Agreements (PPAs). The township zoning ordinance limits the distances between turbines and turbines being in proximity to homes and property lines. For Pegasus to be in compliance with the Ordinance in this manner would be unnecessarily burdensome, and at most, detrimental to the Project's overall economic viability.
>
> Further, using fewer turbines is not a viable option because "Pegasus Wind cannot comply with its Power Purchase Agreements (PPAs) and its Interconnect Agreement if these variances are not granted." This means that Pegasus Wind would not be able to meet its output requirements. If Pegasus Wind cannot meet the output requirements of these PPAs, Pegasus Wind customers have the right to unilaterally and completely cancel the PPAs.
>
> It is Appellees['] contention that Pegasus' arguments relate solely to their financial bottom line, when Pegasus argued that using shorter turbines would be "less efficient" and requiring Pegasus to "site more turbines" would be "at the very least, unnecessarily burdensome, and at the most, detrimental to the Project's overall economic

> viability." AZBA states that these arguments are not related to any practical difficulty with the property. [Citation omitted.]

However, by connecting Pegasus's arguments to whether they were related to practical difficulties unique to the property, the AZBA and the circuit court have undercut any utility of their findings because, as previously noted, caselaw contains no "unique to the property" requirement for practical difficulties.

Although not in its resolution, on appeal, the AZBA argues that Pegasus was not unnecessarily burdened by the ordinance because it could "use each of the parcels in the exact same manner after the variance was denied as it could before the variance was denied." However, this statement has no value to the AZBA's position, because it is merely a truism that applies to almost any denial of a variance, unless it was sought for a prior nonconforming use. That is, if a party has no viable use before a variance request, it still has no viable use after its denial. That is the entire point of the question whether there is any economic viability to the property. Here, Pegasus has no use for the land without the variance because its lease agreements all relate to the placement and use of turbines. The AZBA has relied on the agricultural nature of the parcels to assert continued economic use. However, Pegasus does not own those parcels, and its leases do not permit alternative uses for the properties. Therefore, the AZBA's truism only highlights Pegasus's position—the denial of the variances has rendered its lease agreements valueless and prohibited any use of its interest in the various properties.

3. SELF-CREATED DIFFICULTY

Lastly, the AZBA concluded that any practical difficulty was self-created by Pegasus. A person seeking a variance is required to show that the condition giving rise to the need for the variance was not self-created. See *Detroit Bd of Zoning Appeals*, 326 Mich App at 261. In affirming the AZBA's determination that any hardship that existed in this case was self-created, the circuit court held:

> Appellees argue that, in this case, Pegasus complains that it cannot use these parcels of land in the manner it chooses, and that use is driven by the Power Purchase Agreements that it chose to enter into before it sought the necessary variance. The Power Purchase Agreements are unrelated to the subject parcels. The AZBA found that if the agreements create a hardship, that hardship was created by Pegasus.
>
> . . . Pegasus Wind has explained this project requires that a developer enter into agreements at the outset of the project to ensure financial viability, and requires the local zoning requirements be met, which requires a developer to have a site plan based on finalized lease agreements before obtaining permits.
>
> Appellees present case law which states that a hardship is deemed self-created, and an applicant is not entitled to a variance, if the property in question has a reasonable use under the ordinance but the acts of the applicant render the property unfit for the desired use. It further states that to determine if a hardship is self-created, one should examine if the hardship which the variance is seeking to remedy is created by the applicant, or by the current zoning ordinance, [and] if the property can "reasonably be used in a manner consistent with existing zoning," then the hardship is created by the applicant.
>
> Appellees conclude that there is no question that the property has an economically viable use as it is currently

> zoned for agricultural use. Therefore, any hardship that Pegasus alleges in its variance application is self-created by Pegasus' desire to use the property in a different manner. [Citations omitted.]

The circuit court cited *Detroit Bd of Zoning Appeals* as support. However, *Detroit Bd of Zoning Appeals* does not support this result.

We first address the county's argument (which mirrors that adopted by the circuit court). The county argues that a hardship[7] can be deemed self-created when the disputed parcels can be used in a manner that is consistent with the existing zoning even if the use is not the use desired by the applicant. The portion of *Detroit Bd of Zoning Appeals* on which the county and the circuit court rely is this Court's consideration of two previous cases: *Cryderman v Birmingham*, 171 Mich App 15; 429 NW2d 625 (1988), in which a denial was upheld, and *Janssen v Holland Charter Twp Zoning Bd of Appeals*, 252 Mich App 197; 651 NW2d 464 (2002), in which an approval was upheld. *Detroit Bd of Zoning Appeals*, 326 Mich App at 264-265.

In *Cryderman*, the plaintiffs had purchased a lot on which they resided, with two adjacent unplatted lots used as a side yard and lawn for their residential lot. *Detroit Bd of Zoning Appeals*, 326 Mich App at 264. When the plaintiffs later created a proposal to develop the property, they sought a hardship variance to permit them to sell the two unplatted lots as building sites, which the zoning board of appeals denied. *Id*.

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[7] We note that in *Detroit Bd of Zoning Appeals*, this Court considered the grant of a use variance based on unnecessary hardship, not practical difficulty. See *Detroit Bd of Zoning Appeals*, 326 Mich App at 252. Although *Detroit Bd of Zoning Appeals* considers the self-creation of hardships, because practical difficulties are also not permitted to be self-created, *Norman Corp*, 263 Mich App at 202, these cases are applicable for the self-creation analysis.

This Court upheld the denial, concluding that the unplatted properties retained their usefulness as a side yard and lawn under the current zoning ordinance and that it was only the plaintiffs' proposal to develop the property in contravention of the zoning ordinance that resulted in the hardship, rendering it self-created. *Id*.

Although this initially appears to support the county's position, there is a significant difference. When the plaintiffs in *Cryderman* first purchased their lot, the adjacent unplatted lots had value and use to them *at that time*—as a side yard and lawn. That the plaintiffs *later* sought to change the nature of the use of the unplatted lots is what rendered their hardship self-created. In this case, Pegasus entered into the leases with the landowners *solely* for the purpose of creating a wind farm. The parcels have no other utility to Pegasus, and the parcels have never had any other use to Pegasus. Therefore, Pegasus is in an entirely different position from that of the plaintiffs in *Cryderman*.

The second case considered in *Detroit Bd of Zoning Appeals* is *Janssen*, 252 Mich App 197. In *Janssen*, the landowners sought to rezone 100 acres of property and successfully argued to the zoning board of appeals that the current agricultural zoning created an unnecessary hardship "because rising property taxes caused the land's zoned uses to no longer be economically viable such that the land could not 'reasonably be used in a manner consistent with existing zoning.' " *Detroit Bd of Zoning Appeals*, 326 Mich App at 265, quoting *Janssen*, 252 Mich App at 199, 201. This Court determined that the evidence supported the finding that the hardship was not the result of the landowners' own actions. *Detroit Bd of Zoning Appeals*, 326 Mich App at 265. " 'The increasing taxable value of the property and

the comparatively low rental income derived are not "self-created" burdens.' " *Id*., quoting *Janssen*, 252 Mich App at 202-203. The outcome in *Janssen* is more akin to the current situation. That the land within the airport's zoning area sits precisely in the one area where all the requirements for a wind farm can be found is not a self-created burden. Accordingly, the cases in *Detroit Bd of Zoning Appeals* on which the county relies actually support a determination that the practical difficulties in this case were not self-created.

Turning to the AZBA's position, its entire argument is that Pegasus entered into the agreements with the landowners without seeking the variances first and that, even if Pegasus was somehow required to do so, it entered into the agreements "fully aware of the existing [o]rdinance." However, this argument lacks merit. Although *Detroit Bd of Zoning Appeals* considered unnecessary hardships rather than practical difficulties, *Detroit Bd of Zoning Appeals* explicitly held that simply purchasing land, or an interest therein, with knowledge that the land is subject to an ordinance's applicable restriction *is not* a self-created hardship. *Detroit Bd of Zoning Appeals*, 326 Mich App at 261-262. Rather, this Court concluded that "a zoning board must deny a variance on the basis of the self-created-hardship rule when a landowner or predecessor in title partitions, subdivides, or somehow physically alters the land *after* the enactment of the applicable zoning ordinance, so as to render it unfit for the uses for which it is zoned." *Id*. at 261. There is no evidence in the record that the landowners or Pegasus have partitioned, subdivided, or physically altered the parcels in some way that rendered them unfit for their uses. Therefore, denial on the basis of the self-created-hardship rule was not mandated. See *id*.

To reiterate, this is not a case in which Pegasus purchased the lots for agricultural use and subsequently sought to use the lots some other way. Pegasus leased these properties because they sit in the sole place where all the conditions necessary for building a wind farm are found together. Pegasus entered into the agreements for the sole purpose of being able to use the land for the wind farm. Neither Pegasus's awareness of the ordinance nor the ability of the landowners to use their properties for agricultural purposes under the current zoning is relevant. The question is whether Pegasus has any use for this land under the current zoning—it does not—and whether entering into the agreements with knowledge that the land was subject to the zoning ordinance rendered these hardships self-created—also no. Accordingly, none of the AZBA's three stated reasons for concluding that Pegasus failed to establish a practical difficulty is supported by the record, let alone supported by substantial evidence, and the circuit court misapplied the practical-difficulty standard. Therefore, we conclude that the circuit court erred by affirming this determination.

C. PUBLIC INTEREST

We conclude that the circuit court also erred by affirming the AZBA's determination that the variances would be contrary to the public interest and approach protection.

In support of its determination that granting the eight variances would be contrary to public safety and approach protection, the AZBA's resolution provided:

> Although approach protection was part of the consideration undertaken by the FAA's study of the turbines at issue, the FAA Determinations of No Hazard are not dispositive. The FAA looks only at substantial impacts

taking into account the frequency of certain flights and approaches. Risks and flight limitations not deemed substantial or significant by the FAA will result from the proposed wind turbines, including:

a. The wind turbines pose a danger to pilots during in-flight emergencies which are by nature unpredictable.

b. VFR [Visual Flight Rules] pilots will be unable to comply with 14 CFR 91.155 VFR visibility and cloud clearance criteria in the vicinity of the wind turbines when the flight visibility is less than 3 statute miles or the cloud ceiling is less than 1400 feet, while remaining in compliance with the minimum flight altitudes specific in 14 CFR 91.119. This would require VFR pilots flying in those conditions to circumnavigate the wind turbines and approach the airport from another direction, resulting in a choke point, as well as causing a conflict with IFR[8] pilots conducting a published RNAV instrument approach procedure to the airport for landing. This adversely affects VFR operations and is a safety issue.

c. The wind turbines require a 300-foot increase in minimum descent altitude for the VOR/DME-A approach and landing, requiring pilots using this approach to visualize the runway from a greater distance and creating additional risk. While the VOR/DME-A approach is not frequently used, not all IFR certified aircraft are equipped to conduct more precise approaches preferred by the FAA.

d. Primary radar transmitted from an air traffic control facility is impacted by wind turbines. Since many VFR general aviation aircraft are not equipped with a transponder or ADS-B surveillance technology, air traffic control must rely on primary radar to locate these VFR aircraft. The wind turbines' interference with primary radar will impact air traffic control's ability to determine if these non-equipped VFR aircraft are airborne near the Tuscola Area Airport.

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[8] "IFR" refers to pilots using instrument flight rules, meaning that the pilot flies the aircraft by referring to instruments, including those that measure the plane's heading and altitude.

> Additionally, the variances are not in the public interest because they jeopardize the Tuscola Are Airport's ability to meet current or future federal grant assurances. Grants issued pursuant to the National Plan of Integrated Airport Systems and the Airport Improvement Plan require grant recipients to provide certain assurances when accepting a grant, including that the airport will take the actions necessary to protect instrument and visual operations, to protect approaches and prevent the establishment of future airport hazards. The Tuscola Area Airport has received federal grants requiring these assurances and plans to seek additional grants in the future.
>
> There is also no evidence that the energy that will be generated by the Project is needed or would be utilized in the surrounding community.

In affirming the AZBA's denial, the circuit court stated, in part:

> Pegasus presented evidence that the FAA conducted a study involving technicians from more than 10 different government offices who each reviewed the project to ensure that it will not interfere with their specific area of air navigation and safety. The FAA conducted an additional aeronautical study over a period of more than 1 year and considered and analyzed the impact on "existing and proposed arrival, departure, and en route procedures for aircraft operating under both visual flight rules and instrument flight rules, the impact on all existing and planned public-use airports, military airports, and aeronautical facilities, and the cumulative impact resulting from the studied structure when combined with the impact of other existing or proposed structures." The FAA concluded that "the structures would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities," and issued DNHs for the project.
>
> The DNHs state[,] "Therefore, it is determined that the proposed construction would not have a substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or [on] any navigation

> facility and would not be a hazard to air navigation providing the conditions set forth in the determination are met." [Citation omitted.]

The circuit court then quoted the AZBA's resolution. The court acknowledged the FAA's determination but noted that one of Pegasus's experts explained that the term "hazard" is a term of art used by the FAA to "differentiate between what the FAA deems to be acceptable and unacceptable risks" and that the FAA would not find a hazard "unless the 'adverse effect' exceeds one operation per day, or 365 operations in a year." Appellees acknowledged the FAA's determination that the turbines would require a 300-foot increase in circling minimum descent altitude (MDA) but argued that the FAA did not consider this significant "because other more precise instrument procedures are preferred by the FAA." Appellees contended that the higher MDA "makes it much more difficult to see the runway in reduced visibility conditions and that the turbines will limit when pilots can fly, as pilots will not be able to land in lower visibility conditions."

Appellees also cited concerns that VFR pilots would be "forced to circumnavigate the turbines in reduced visibility conditions . . . creat[ing] a 'choke point' near the airport" that would "conflict with IFR pilots and create a safety issue." The circuit court explained that public comment by Josh Heinlein formed the basis of this finding. Heinlein was a commercial pilot who frequently used the Caro Airport to pilot a private plane. Heinlein "presented evidence regarding the difficulties that these turbines would present to a pilot utilizing VFR," and the circuit court noted that 85% of flights into and out of the Caro Airport were under VFR. The circuit court also found that the AZBA's concerns about primary radar being impacted by the

turbines, affecting air traffic control's ability to determine if VFR aircraft without transponders were flying near the airport, were expressed during public comment by local pilot Richard Koerner. The circuit court, citing *Polktown Charter Twp v Pellegrom*, 265 Mich App 88, 94; 693 NW2d 170 (2004), acknowledged that zoning boards of appeals are permitted to "consider public comments as relevant evidence, but public comments that are unsubstantiated, speculative, or unauthoritative do not provide competent evidence to deny the variance."

The circuit court noted that Pegasus refuted that the turbines would jeopardize any current or future ability to meet grant assurances, arguing that because federal grant money came from the FAA and the FAA had determined that the turbines were not hazardous to the airport, the FAA would not claim that the turbines constituted a violation of the assurances. Further, Pegasus agreed that if grants were affected, it would indemnify the airport for up to five years for the $2.6 million in grant money that the airport received from the FAA. Nevertheless, the circuit court concluded that the AZBA's decision was supported by competent, material, and substantial evidence on the record.

1. STANDARD OF REVIEW DISPUTE

On appeal, Pegasus argues that the circuit court erred in its analysis because it "engaged in little substantive analysis" to reach its conclusion and instead "repeat[ed] the parties' respective arguments without explaining which argument prevailed or the strength and weaknesses of each argument." The AZBA contends that Pegasus "would prefer this Court give weight to only its experts and the FAA and none to the arguments made by members of the public" and

that Pegasus incorrectly framed the circuit court's role, "which is not to evaluate the weight or credibility of the record evidence, but to determine whether substantial evidence exists." The AZBA further argues that there is no requirement that the circuit court independently weigh each side's argument and determine "which one prevails."

This Court must give deference to the AZBA's factual findings. *Norman Corp*, 263 Mich App at 198. However, this Court must determine whether the circuit court applied the correct legal standard or "misapprehended or grossly misapplied the substantial-evidence test" to the AZBA's findings. *Hughes*, 284 Mich App at 60 (quotation marks and citation omitted). Moreover, according to our Supreme Court, the circuit court was required to

> consider[] the whole record—that is, both sides of the record—not just those portions of the record supporting the findings of the administrative agency. Although such a review does not attain the status of *de novo* review, it necessarily entails a degree of qualitative and quantitative evaluation of evidence considered by an agency. [*In re Payne*, 444 Mich at 693 (quotation marks and citation omitted).]

This Court has also recognized that the substantial-evidence test includes a qualitative component. *Hughes*, 284 Mich App at 61. Thus, both the circuit court and this Court must engage in some weighing of the evidence. Further, a determination that the record contains substantial evidence is a determination that a *reasonable person* would accept that evidence as sufficient to support a conclusion. *Id*. As stated, the substantial-evidence test is equated with the "clearly erroneous" standard. *Id*. at 60. "A finding is clearly erroneous if the reviewing court, on the whole record,

is left with the definite and firm conviction that a mistake has been made." *Id*. Likewise, the evidence is not substantial if a reasonable person, on the whole record, would not accept that evidence as sufficient to support a conclusion. *Id*. at 61.

2. REVIEW OF THE EVIDENCE

Pegasus notes that the only evidence the circuit court analyzed was the public comments made by two local pilots, and Pegasus refutes the circuit court's determination that those comments constituted competent evidence. More specifically, Pegasus challenged Heinlein's allegation that VFR pilots would have to circumnavigate the turbines in reduced-visibility conditions, causing a choke point near the airport that would create a safety issue. According to Pegasus, Heinlein provided no data to support his assertions, while Pegasus's expert from Capitol Airspace, who formed his opinion on the basis of statistical analysis and "his unique expertise in analyzing the impact of tall structures on aviation safety," explained that, using Capitol Airspace's historical analysis, VFR pilots did not fly in reduced-visibility conditions, so there would be no change in operations that would create the alleged choke point. Pegasus's wind expert also explained that even if VFR pilots were flying in reduced-visibility conditions, the eight variances (turbines) would have no impact on VFR pilots because the pilots would already have to circumnavigate the existing structures and turbines in the northwest quadrant of the airport area. Lastly, the expert explained that air-traffic-control processes are in place to ensure that safety is not affected in the event that VFR pilots must circumnavigate the turbines.

Pegasus also challenges Koerner's assertion that the primary radar would be impacted by the turbines, which allegedly would then affect air traffic control's ability to determine if VFR aircraft without transponders were flying near the airport. First, counterintuitively, "primary" radar is a "backup" type of radar, while "secondary" radar is the "primary tool for providing air traffic services in the United States." (Quotation marks and citation omitted.) Second, Koerner admitted that his concerns were speculative and deferred to Capitol Airspace's expertise in the area. Capitol Airspace stated that the FAA had studied the turbines' impact on multiple radar systems, including primary radar, and concluded that although the turbines would create "clutter" on the radar, the clutter would not impact operations at the airport for VFR aircraft or otherwise. In addition, VFR aircraft without a transponder rely on "counter traffic advisory frequency," or radio, "not radar, for the safe separation from themselves from other VFR aircraft or IFR aircraft." (Quotation marks and citation omitted.) Thus, Pegasus asserts, the only competent evidence in the record demonstrates that the turbines' impact on primary radar would not affect approach protection, while the public comments were speculative and unsubstantiated. Pegasus also contends that the circuit court had expressly rejected the AZBA's other arguments related to in-flight emergencies and risk from raising the MDA in its decision to reverse the denial of the 33 variances.

The AZBA argues that it was "free to give weight to the possibility that the wind turbines will create additional risks for student pilots" because the FAA does not consider student pilots possibly violating the FAA's established procedures or rules. However, this argument has no evidentiary support. The AZBA relies on Pegasus's expert, Ben Doyle. The AZBA alleges that

Doyle stated that there might be "a situation where [a] pilot without those turbines might have been able to get into the airport, and might have been able to safely land, and now all of a sudden, they can't because of the existence of the turbines." However, the AZBA has taken the statement out of context. Doyle stated:

> I know that there was concern that was expressed that pilots taking off or landing at the airport might get into a bad situation and lose an engine. They ice up. They declare an emergency, whatever it might be, and these turbines might create a situation where that pilot without those turbines might have been able to get into the airport, and might have been able to safely land, and now all of a sudden, they can't because of the existence of the turbines. *I understand that's a concern, and I don't think it's—I don't think it's rooted in any sort of—it doesn't have any real basis to it*. And the reason I say that is that these turbines are going to be in amongst—in and amongst an existing wind farm, first of all. The routes that pilots are going to take in and out of that airport . . . the likelihood that that pilot's going to make a right turn toward the wind farm in trying to get back to the airport is not—it's not—it's not considered viable in my mind. There is a requirement to see and avoid. When we start talking about emergency operations in air traffic, the reliance really, the biggest factor that's going to separate . . . a live pilot from a dead pilot in an emergency really comes down to pilot training. It's the number one requirement. The FAA does not protect for emergencies for the very reason that they are unpredictable. You don't know where they're going to happen. . . . There's been published papers on it and others coming out of FAA flight standards. So . . . to me, the safety argument here, there is no safety argument, because the FAA has addressed that. *This emergency argument is not rooted in any kind of real factual evidence*. *So that's my position on that*. [Emphasis added.]

Doyle's conclusion is exactly the opposite of what the AZBA claims. Therefore, the AZBA's arguments re-

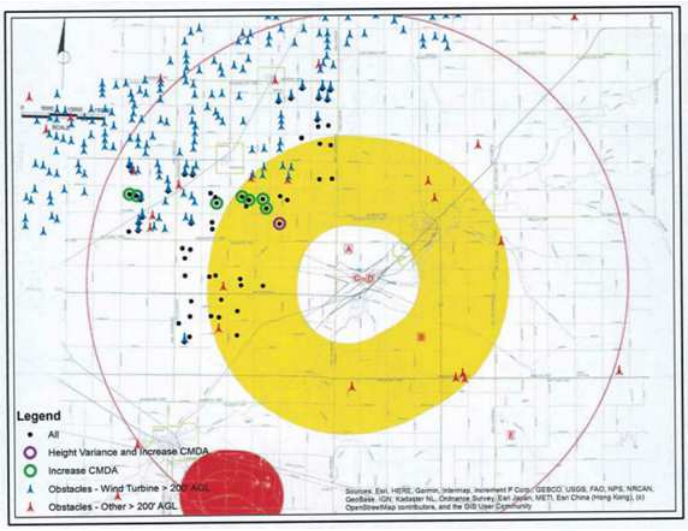
garding risks created by emergencies and student pilots lack substantial evidence in the record.

With respect to VFR visibility and cloud-clearance requirements, the county notes that VFR pilots "cannot fly at all during those times [when visibility is less than three miles or there are clouds] if the wind turbines are in their flight path." The county asserts that the testimony of Pegasus's expert that any alleged choke point was not a hazard because VFR pilots have not historically flown often at the airport in the lower-visibility conditions that are affected by the presence of the turbines was insufficient because "VFR pilots may legally fly in the weather and visibility conditions at issue . . . ." The county then calculated that if VFR pilots did choose to fly at times of low visibility, using weather data to estimate those occurrences, VFR pilots would lose 447 daylight hours over 141 days if the turbines were permitted.

However, based on the statistical analysis of the expert and his testimony, the record indicates that VFR pilots are already not utilizing those hours, and no one in the record has explained why. Without any evidence regarding why VFR pilots were already choosing not to fly during periods of low visibility, even though legally permitted to, the calculation of lost hours is meaningless.

The county argues that both Pegasus's expert and a pilot agreed that pilots would not try to weave in and out of the turbines. Accepting this argument as true, the testimony about a potential choke point carries no weight because the Variance Map, included below, makes clear that there are already numerous turbines in and around the airport. In the map, the black dots represent all of Pegasus's turbines, and the circled dots represent the eight turbines for which variances were

requested. The blue rocket shapes represent turbines that are already existing, which was also established through Pegasus's expert.



The AZBA asserts that the record evidence "is replete with witness testimony and evidence showing the wind turbines would present a danger to pilots experiencing in-flight emergencies, create a conflict between visual flight rules (VFR) and cloud clearance requirements, and that primary radar would be impacted by the turbines." Although the record contains many assertions of things that "could" or "might" occur, and accepting all this evidence regarding things that could occur from the proposed turbines, there is still one very large, very significant hole in the record. Pegasus's wind expert explained that even if VFR pilots were flying in reduced-visibility conditions, the eight turbines would have no impact on those pilots because the

pilots *would already* have to circumnavigate the existing structures and turbines in the northwest quadrant of the airport area.

Along these same lines, the Variance Map calls into question the AZBA's argument regarding issues related to minimum flying altitudes and a potential choke point. According to the AZBA, "[t]he placement of wind turbines within [the] 6.6 mile radius [of the airport] would require VFR pilots to fly" in different airspace, which would trigger different flight-visibility requirements. According to the Variance Map, there are a large number of wind turbines that already exist or will soon exist within that radius. Presumably, those "future" conditions have already come to pass, and pilots have been dealing with them in relation to the other turbines for some time now. That there was no evidence placed in the record of an actual choke point occurring highly suggests that the AZBA's concerns regarding this possibility lack merit. Moreover, if a choke point has yet to occur from the existing turbines in that area, and given that these eight turbines will be interspersed among those others already existing, it is unclear what it is about these eight turbines that will create the choke point. The record does not contain any evidence supporting a finding that the addition of these eight turbines would or could create risks and situations different from what already exists as a result of the numerous wind turbines already built. Therefore, on this record, no reasonable person could conclude that the addition of these eight turbines would create the risks and concerns that the AZBA and the county have identified.[9] *Hughes*, 284 Mich App at 60-61. Thus, the circuit court erred when it concluded that the

[9] This is not to say that the existence of numerous turbines in this area requires all future variance requests for turbines to be approved.

AZBA's determination that Pegasus had not shown that the variances would not impact public safety or approach protections was supported by substantial, competent, and material evidence.

3. SUBSTANTIAL JUSTICE

Finally, appellees assert that the circuit court erred when it concluded that granting the variances would do substantial justice, that there would be no adverse impact on the airport, and that there would be substantial benefit to the county. Generally, an appeal is limited to the issues raised by the appellant unless the appellee files a cross-appeal. MCR 7.207; *Kosmyna v Botsford Community Hosp*, 238 Mich App 694, 696; 607 NW2d 134 (1999). Although appellees did not file a cross-appeal, they "need not file a cross[-]appeal in order to argue an alternative basis for affirming the trial court's decision, even if that argument was considered and rejected by the trial court." *Kosmyna*, 238 Mich App at 696.

In support of its position that the circuit court erred, the AZBA relies on an unpublished opinion from this Court for the premise that a showing of substantial justice requires a variance to be issued when no development can occur on the property because the owner has no economically viable use. See *Swiecicki v Dearborn*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 2006 (Docket Nos. 262892 and 263066), p 3. The AZBA contends that it has cited an unpublished case "because it squarely addresses the standard for determining whether 'substantial justice' requires a variance to be issued—an issue directly in contention in this case." However, this

There may be a point when the addition of more turbines will cause additional problems and risks or be detrimental to the area.

argument lacks merit because nothing in *Swiecicki* sets forth a standard for a determination of "substantial justice" in the context of a nonuse variance; accordingly, the unpublished case is not persuasive on this issue. MCR 7.215(C)(1). Additionally, the county merely "suggests" that the circuit court's affirmance in all other respects is inconsistent with its reversal on the substantial-justice factor. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims; nor may an appellant give an issue only cursory treatment with little or no citation of authority." *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015). By failing to provide any legal argument or analysis, the county has effectively abandoned any claim of error on this question. Lastly, neither the AZBA nor the county has actually addressed the basis of the circuit court's reversal on this issue. Therefore, we need not review appellees' claim. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) ("When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting plaintiffs the relief they seek.") (quotation marks, citation, and alterations omitted).

D. SPIRIT OF THE ORDINANCE

Lastly, we conclude that the circuit court erred when it affirmed the AZBA's determination that the variances were not in the spirit of the ordinance.

According to the resolution, the spirit of the ordinance at issue is to "promot[e] the health, safety, and general welfare of the inhabitants of the County of Tuscola by preventing the establishment of airport hazards, restricting the height of structures and objects of natural growth and otherwise regulating the

use of property in the vicinity of Tuscola Area Airport; [and] providing for the allowance of variances from such regulations[.]" See Tuscola Ordinance, § 1.2. The AZBA's decision provides, "In light of the aviation limitations and risks posed by the wind turbines, denial of the eight (8) variance applications is most consistent with the spirit of the Ordinance." In affirming the AZBA's decision, the trial court noted that

> [t]he limitations and risks posed by the proximity of wind turbines did not "promote the health, safety, and welfare" of the County's inhabitants in the way that the Ordinance identifies for promoting those values: "by preventing the establishment of airport hazards" and by "restricting the height of structures" in the vicinity of the Tuscola Area Airport.

However, we conclude that there was no substantial evidence to support the finding of "aviation limitations and risks posed by the wind turbines" on this record. The closeness of the eight proposed turbines to the numerous existing turbines and the lack of any evidence from anyone that any of these alleged concerns had come to pass as the result of the placement or use of the previously installed turbines within the airport's 6.6 mile radius precluded these alleged risks and limitations from supporting the AZBA's conclusion, and the AZBA provided nothing more in support of its position.

Although appellees assert that the ordinance provides for outright prevention of hazards rather than their minimization, the plain language of the ordinance expressly provides for the provision of variances, rendering the grant of variances equally within the spirit of the ordinance. In this case, other turbines had received variances, those turbines were sited within the airport's 6.6 mile radius, and no evidence was

provided that their existence had created any of the purported "future" risks the AZBA used to justify its decision. Given that the variance being requested was entirely consistent with other land uses in the area, which also had to have met this standard, it is hard to think of a circumstance in which, once the other requirements for a variance are met, the spirit of the ordinance does not include granting the variance. Because the record does not show any substantial, material, or relevant evidence in support of the AZBA's assertion that the turbines create risks and limitations that somehow do not already exist from all the other turbines, the AZBA's decision is without support, and the circuit court erred by affirming it.

Reversed in part and remanded for proceedings that are consistent with this opinion. We do not retain jurisdiction.

SHAPIRO, J., concurred with RICK, P.J.

MURRAY, J. (*dissenting*). The Airport Zoning Act, MCL 259.431 *et seq*., provides that a variance can be granted from airport zoning regulations "if a literal application or enforcement of the regulations would result in practical difficulty or unnecessary hardship and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of the regulations." MCL 259.454(1). The Tuscola Area Airport Zoning Ordinance provides the same criteria as the statute except that it adds a requirement that addresses "approach protection" and requires that the Federal Aviation Administration and the Michigan Aeronautics Commission issue determinations of no hazard before a variance can be granted.

As the majority aptly describes, the airport zoning board of appeals (AZBA) heard testimony over two days and issued an eight-page resolution denying the request for variances for the eight wind turbines. The circuit court affirmed that decision, and in doing so it accurately summarized the parties' positions and evidence, but it was somewhat short on explaining why it affirmed. Nevertheless, the court set forth the correct legal principles governing its review, accurately recounted the arguments and evidence, and reached a conclusion. For that reason, I cannot conclude that the trial court applied incorrect legal principles or that it misapprehended or grossly misapplied the substantial-evidence test to the AZBA's factual findings. *Hughes v Almena Twp*, 284 Mich App 50, 60; 771 NW2d 453 (2009).

This is a close case. The majority sets out detailed explanations for why several of the reasons articulated by the AZBA may not be solidly embedded in a factual foundation. However, the record before the zoning board did contain testimony and evidence supporting many of its conclusions, including that the wind turbines could cause dangers to pilots experiencing in-flight emergencies and that the placement and height of the wind turbines would cause visual flight rule (VFR) pilots to fly in a different airspace (Class E airspace, instead of Class G airspace), which triggers different flight visibility requirements, which in turn can cause a "choke point" for those pilots also seeking to circumnavigate the wind turbines.[1] Additionally, it appeared undisputed that at least when flying under VFR and over the wind turbines, the primary radar transmitted from air traffic control would be interfered

[1] Evidence indicated that approximately 85% of the planes utilizing the airport were VFR flights.

with by the turbines. Again, Pegasus disputes some—or most—of these findings, or the frequency with which some of these events may occur, but there is no doubt that there was evidence setting forth these (and other) facts and that those facts supported the reasonable conclusion of the AZBA.[2]

Because the record contains evidence supporting these propositions and the AZBA made specific findings on the pertinent factors, it is difficult to reverse given the deferential standard of review. After all, there only needs to be "more than a scintilla" of evidence supporting the findings, and that level of evidence does not necessarily rise to even a preponderance. *In re Payne*, 444 Mich 679, 692-693; 514 NW2d 121 (1994).[3] Judges must be careful to not substitute their judgment for that of the administrative body that has the expertise to address these matters. *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995) (Courts "must give due deference to the agency's regulatory expertise and may not 'invade the province of exclusive administrative

[2] Importantly, the airport zoning board has a lesser standard when it comes to concerns for hazards than does the FAA. When considering hazards, the FAA focuses on a "substantial aeronautical impact to air navigation," 14 CFR 77.31(d) (2022), and will not even consider hazards with respect to emergency situations, because emergencies are unpredictable and isolated. The airport zoning board looks more broadly to any "airport hazards," including the potential hazards relating to emergencies. Thus, it would not necessarily be inconsistent for circumstances to satisfy the FAA that no hazards exist while also supporting the opposite finding by the airport zoning board.

[3] Pegasus makes much of the fact that it presented expert testimony and evidence on many of the relevant criteria and that the AZBA improperly dismissed that evidence, instead relying in part on public comments from several pilots who have flown into the airport. But one of the duties of the AZBA is to determine the credibility of the witnesses, and the board was free to rely upon the pilots who actually have flown into the airport over experts who had not. *In re Payne*, 444 Mich at 693.

fact finding by displacing an agency's choice between two reasonably differing views.' ") (quotation marks and citation omitted).

Here, in light of the competing evidence and arguments, I would hold that the circuit court did not err in affirming the decision of the airport zoning board, which was entitled to substantial deference, that Pegasus did not establish practical difficulties or unnecessary hardship such that a variance had to be granted. Based on the relative strength of each side's evidence and arguments, the AZBA could have decided either way with regard to the variances. Its choice between two reasonable but differing views was properly deferred to by the circuit court, as it should be by this Court. I would affirm.[4]

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[4] As the majority makes clear, that this same circuit court reversed the AZBA's prior denial of a variance for 33 other wind turbines is of no moment. Given that the record regarding these turbines contained additional testimony and/or public comments, and given that the AZBA offered more detailed findings in support of its decision, the circuit court was dealing with a different case this time around.

TUSCOLA AREA AIRPORT ZONING BOARD OF APPEALS
v MICHIGAN AERONAUTICS COMMISSION

Docket Nos. 357209 and 357210. Submitted February 8, 2022, at Detroit. Decided February 24, 2022, at 9:30 a.m. In Docket No. 357209, leave to appeal denied 511 Mich 1038 (2023). In Docket No. 357210, reversed in part and remanded to the Ingham Circuit Court 511 Mich 1024 (2023).

The Tuscola Area Airport Zoning Board of Appeals (the AZBA) (Docket No. 357209) and the Tuscola Area Airport Authority (Docket No. 357210) filed separate actions in the Ingham Circuit Court, challenging the decision of the Michigan Aeronautics Commission to issue 33 tall-structure permits to Pegasus Wind, LLC, that would allow Pegasus to construct wind turbines around the Tuscola Area Airport. Pegasus sought to construct a commercial wind energy system in Tuscola County, with some of the planned turbines being located within the airport's zoning area. In April 2019, the Federal Aviation Administration (the FAA) issued Pegasus determinations of no hazard (DNH) for some of its proposed wind turbines that were in the airport zoning area; specifically, the FAA concluded that the turbines would have no adverse effect on the safe and efficient use of the navigable airspace or on the operation of the air navigation facilities. However, the turbines would require an increase in the minimum descent altitude for flights using a particular technology for instrument flight. The FAA later denied a petition by Tuscola County residents to review the DNH. The Department of Transportation's Office of Aeronautics concurred with the DNH and stated that a tall-structure permit could be issued once the office received certificates of local variance approval. Thereafter, Pegasus applied to the Tuscola Airport Zoning Administrator for permits for 40 wind-turbines to be located within the airport zoning area. The administrator approved seven permits but denied the other 33 on the basis that those turbines would violate certain airport zoning ordinances. After the AZBA denied Pegasus's request for variances for the 33 turbines, Pegasus appealed the denials in the Tuscola Circuit Court; the Tuscola Circuit Court, Amy Grace Gierhart, J., reversed the AZBA's denial, reasoning that Pegasus had established the requirements for the variances. In March 2020, the

AZBA issued the variance certificates as ordered by the court, and the commission thereafter issued the tall-structure permits under the Tall Structure Act, MCL 259.481 *et seq*. The AZBA and the airport authority separately appealed that decision in the Ingham Circuit Court (the circuit court), arguing that they were aggrieved parties for purposes of MCL 259.489 and MCR 7.103(A), such that they could challenge the denials. Pegasus moved to expand the record and moved to dismiss the appeal, arguing that (1) the circuit court lacked jurisdiction because the commission's issuance of the permits was not an act or order appealable under the Tall Structure Act and (2) regardless, neither the AZBA nor the airport authority were aggrieved parties able to pursue the appeal. The circuit court, James S. Jamo, J., first concluded that it had jurisdiction over an appeal related to the grant of the permits and then granted the motion to dismiss, reasoning that neither the AZBA nor the airport authority were aggrieved parties such that they could appeal the commission's grant of the permits. With regard to the airport authority, the circuit court noted that the authority had failed to provide any evidence about how the wind turbines would affect its current flight paths, how many airplanes might cease using the airport in the future because of the change in flight paths, and how those reductions might affect the airport financially. The circuit court thus concluded that the airport authority failed to state a concrete, particularized injury in the form of actual losses of flights, fuel sales, or use of the airport. The AZBA and the airport authority appealed.

The Court of Appeals *held*:

1. Under MCR 7.103(A)(3), a circuit court has jurisdiction over an appeal of right filed by an aggrieved party from a final order or decision of an agency from which an appeal of right to the circuit court is provided by law. Applicable here, MCL 259.489 provides that within 10 days after the issuance of an order or rule of the commission, a person aggrieved by the order or rule may appeal to or have the action of the commission reviewed by the Ingham Circuit Court in the manner provided for the review of orders of other administrative bodies of Michigan. An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency; an interest in the proper enforcement of a statute is not sufficient to confer standing because it does not constitute a

concrete and particularized injury. The Legislature may permissibly limit the class of persons who may challenge a statutory violation.

2. Townships have no inherent powers; instead, they possess only those powers expressly granted them by the Legislature or the Michigan Constitution or fairly implied therefrom. A zoning board of appeals is a municipal administrative body, charged with interpreting the ordinance, hearing appeals, granting variances, and performing various other functions that may arise in the administration of the zoning ordinance. Under the relevant Tuscola Area Airport Zoning Ordinances, the AZBA had the power to issue certificates of variance, or to otherwise decide appeals from any order, requirement, rule, regulation, decision, or determination made by the Airport Zoning Administrative Agency/Zoning Administrator under the powers conferred upon it by the ordinance. Thus, the airport ordinance authorizes the Airport Zoning Administrative Agency/Zoning Administrator, *not* the AZBA (which is a separate entity), the authority to file suit over issues related to the ordinance. The AZBA's argument that the statutory appeal right was meaningless if the local agencies charged with regulating structures near airports do not have standing to appeal the erroneous issuance of a tall-structure permit for wind turbines beside an airport was without merit; the AZBA had the opportunity under MCL 259.482a(1) to regulate the turbines *before* the permits were issued (through the grant or denial of the variance requests) because tall-structure permits are generally not issued unless the AZBA had issued the necessary variances. In addition, it would give the AZBA an unwarranted second bite at the apple if the AZBA were allowed to be an aggrieved party to the commission's issuance of tall-structure permits given that the permits were issued in the first place in reliance on the AZBA's certificates of variance approval. Stated differently, it would be illogical and inconsistent to conclude that the AZBA has authority to appeal the commission's issuance of a tall-structure permit given the commission's determination is premised on the AZBA's issuing certificates of variance approval. Accordingly, the circuit court did not err when it concluded that the AZBA was not an aggrieved party for purposes of challenging the commission's issuance of the 33 tall-structure permits.

3. The airport authority's assertion of three potential harms from issuance of the tall-structure permits—(1) loss of revenue to the airport caused by fewer pilots using the airport, (2) injury to its safety interests resulting from alteration of flight paths to a steeper and riskier approach angle, and (3) revocation of federal

grants by the FAA—were without merit. The alleged loss of revenue, the method of calculating those losses, and the potential exclusion of certain airplanes were speculative at best and unsupported by evidence. The airport authority's safety-interests arguments were similarly unsupported by the evidence given that the FAA not only issued its DNH but expressly concluded that the turbines would not have an adverse effect in the safe and efficient use of the navigable airspace by aircraft and would not be a hazard to air navigation. Because the FAA explicitly determined the turbines were not a hazard, there was no evidence that the airport authority might lose FAA funding because of the turbines. For those reasons, the circuit court did not err by concluding that the airport authority was not an aggrieved party for purposes of challenging the commission's issuance of the tall-structure permits.

4. The circuit court properly granted the commission's motion to dismiss because neither the AZBA nor the airport authority were aggrieved parties.

Affirmed.

MURRAY, J., concurring in part and dissenting in part, agreed with the majority that the AZBA was not an aggrieved party for purposes of MCL 259.489 and MCR 7.103(A). However, the airport authority was an aggrieved party because (1) the airport and its customers are the ones affected by the permits being issued and the airport authority's statutory duties—which includes being responsible for all aspects of the airport, including landing facilities—could be impacted by wind turbines being built and (2) record evidence demonstrated the high likelihood that the airport authority would lose revenue by the permits being issued. On that basis, the airport authority demonstrated that it would suffer special damages different from those of others in the community. Judge MURRAY would have held that the airport authority was an aggrieved party and that the circuit court erred by not addressing the merits of its appeal.

Foster, Swift, Collins & Smith, PC (by *Michael D. Homier* and *Laura J. Genovich*) for the Tuscola Area Airport Zoning Board of Appeals.

Barnes & Thornburg LLP (by *Scott Dienes* and *Aaron D. Lindstrom*) for the Tuscola Area Airport Authority.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Michael J. Dittenber*, Assistant Attorney General, for the Michigan Aeronautics Commission and the Department of Transportation.

Warner Norcross + Judd LLP (by *Jonathan E. Lauderbach*, *Daniel P. Ettinger*, and *Ashley G. Chrysler*) for Pegasus Wind, LLC.

Before: RICK, P.J., and MURRAY and SHAPIRO, JJ.

RICK, P.J. In these consolidated appeals, appellants the Tuscola Area Airport Zoning Board of Appeals (the AZBA) and Tuscola Area Airport Authority (Airport Authority) appeal as of right the order of the Ingham Circuit Court granting appellee Pegasus Wind, LLC's motion to dismiss, with concurrence by appellees the Michigan Aeronautics Commission (MAC) and the Michigan Department of Transportation (MDOT), on the ground that neither appellant was an aggrieved party. This case raises an issue of first impression regarding what constitutes an aggrieved party for purposes of MCL 259.489 of the Tall Structure Act (the Act), MCL 259.481 *et seq*., and MCR 7.103(A). See MCR 7.215(B)(2).[1] For the reasons explained in this opinion, we affirm.

I. BACKGROUND

This controversy has an extensive procedural and factual history involving local regulatory authorities' decisions on a commercial wind energy system being

[1] MCR 7.215(B)(2) provides that a Court of Appeals opinion must be published if it "construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule."

built by Pegasus in Tuscola County. Some of the planned wind turbines are within the Tuscola Area Airport zoning area. Airport Authority owns the airport and is responsible for maintenance and operation of the landing, navigational, and building facilities. See MCL 259.622. The AZBA is responsible for deciding whether to grant variances from airport zoning regulations. See MCL 259.454.

In April 2019, Pegasus received "Determinations of No Hazard" (DNH) from the Federal Aviation Administration (the FAA) for some of its proposed wind turbines within the Tuscola Airport zoning area. The FAA report stated that the turbines "would have no substantial adverse effect on the safe and efficient utilization of the navigable airspace by aircraft or on the operation of air navigation facilities." The report noted that the turbines would require an increase in the minimum descent altitude for flights using a Very High Frequency Omni-Directional Radio Range System, known as VOR. VOR is an older technology for instrument flight. A pilot using a VOR approach must stay above the minimum descent altitude until the aircraft is in position to descend to the runway and the pilot has a visual reference point for the runway.[2] The DNH also addressed seven letters of objection that the FAA had received in response to its 2018 studies. Although some Tuscola residents petitioned the FAA to review its DNH, the FAA denied the petition for review, reiterating that the proposed turbines would not have an adverse effect on the safe use of the airspace and would not be a hazard to air navigation. While the FAA petition for review was pending, MDOT's Office of

[2] Federal Aviation Administration, *Descent to MDA or DH and Beyond* <http:/faasafety.gov/gslac/ALC/libview_normal.aspx?id=17273> (accessed January 26, 2022) [https://perma.cc/YE9T-MBFB].

Aeronautics held a meeting to review the project and subsequently issued a letter in which it concurred with the FAA's DNH and stated that a "Michigan tall structure permit could be issued" once it received certificates of local variance approval.

Pegasus applied to the Tuscola Airport Zoning Administrator for 40 wind-turbine permits within the airport zoning area. The administrator approved seven permits but denied the other 33 because the turbines would violate certain airport zoning ordinances, such as aircraft descent minimums. Pegasus then sought variances from the AZBA for those 33 turbines.

The AZBA denied all 33 variances, and Pegasus appealed in the Tuscola Circuit Court. In late November 2019, the Tuscola Circuit Court concluded that Pegasus had established the requirements for the variances and reversed the AZBA's denial of the variances.[3] On March 6, 2020, the AZBA issued the 33 variance certificates. The certificates were sent to MAC and, after they were reviewed, MAC issued the tall-structure permits (the Permits). Ten days later, the AZBA and Airport Authority each initiated an appeal in the Ingham Circuit Court (hereinafter, the circuit court), alleging that it was an aggrieved party of MAC's order issuing the Permits.

In May 2020, Pegasus moved to expand the record and moved to dismiss the appeal. Pegasus alleged that the circuit court lacked jurisdiction because MAC's issuance of the Permits was not an order or rule that was appealable under the Act. Pegasus further argued

[3] The AZBA's subsequent applications for leave to appeal in both this Court and our Supreme Court were denied. *Pegasus Wind, LLC v Tuscola Area Airport Zoning Bd of Appeals*, unpublished order of the Court of Appeals, entered February 26, 2020 (Docket No. 351915), lv den 506 Mich 941 (2020), recon den 507 Mich 871 (2021).

that, even if MAC's issuance of the Permits was appealable, neither the AZBA nor Airport Authority were aggrieved parties. MDOT and MAC filed a joint brief concurring in both the motion to dismiss and the motion to expand the record. Electing not to hold oral argument, the circuit court granted Pegasus's motion to dismiss. Although the court concluded that it had jurisdiction over an appeal of the Permits, it determined that neither the AZBA nor Airport Authority were aggrieved parties.

These appeals followed.

II. STANDARD OF REVIEW

This Court reviews de novo as a question of law whether a party has standing to invoke appellate review of an administrative ruling. *Olsen v Chikaming Twp*, 325 Mich App 170, 180; 924 NW2d 889 (2018). This Court also reviews de novo "whether a matter is properly placed before a court by a person with standing," as well as "the interpretation of statutes and court rules." *Matthew R Abel, PC v Grossman Investments Co*, 302 Mich App 232, 237; 838 NW2d 204 (2013).

III. ANALYSIS

The sole issue before this Court is whether either the AZBA or Airport Authority is an aggrieved party under MCL 259.489 and MCR 7.103(A). We hold that the circuit court properly concluded that neither the AZBA nor Airport Authority was an aggrieved party.

The AZBA and Airport Authority filed their appeals in the circuit court pursuant to MCL 259.489, which provides:

> Within 10 days after the issuance of an order or rule of the commission,[4] a person aggrieved by the order or rule may appeal to or have the action of the commission reviewed by the circuit court of Ingham county in the manner provided for the review of orders of other administrative bodies of this state.

Under MCR 7.103, a circuit court has jurisdiction over an appeal of right "filed by an aggrieved party from . . . a final order or decision of an agency from which an appeal of right to the circuit court is provided by law." MCR 7.103(A)(3); *MCNA Ins Co v Dep't of Technology, Mgt & Budget*, 326 Mich App 740, 744-745; 929 NW2d 817 (2019). Thus, under MCL 259.489, a party seeking relief from a decision from MAC must establish to the circuit court that they are "an aggrieved" party. See MCL 259.489. "An aggrieved party is not one who is merely disappointed over a certain result. Rather, to have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006). "To be aggrieved, one must have some interest of a pecuniary nature in the outcome of the case, and not a mere possibility arising from some unknown and future contingency." *Id*. at 291 (quotation marks and citation omitted).

A. DOCKET NO. 357209 (AZBA)

The AZBA argues that the trial court erred by concluding that it was not an aggrieved person with standing to appeal MAC's decision to issue permits to Pegasus. We disagree.

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[4] "Commission" refers to MAC. See MCL 259.481(d).

The circuit court concluded that the AZBA had not established that it would suffer a concrete and particularized injury or that it had an interest of a pecuniary nature beyond mere possibility. The court rejected the AZBA's argument that its role in enforcing the Airport Ordinance by hearing and deciding requests for variances gave it a "substantial interest in limiting the height of structures and regulating the use of property in the vicinity of the airport." The circuit court noted that the variances in this case had already been issued, the Tuscola Circuit Court had already issued orders with respect to the conditions the variances could contain, and that once those variances were obtained, the Act allowed MAC to issue the Permits. The circuit court concluded that "[t]he AZBA's role in this matter has already been resolved, and the actions of the MDOT and the MAC based on the variances already issued do not present a concrete or particularized injury or an interest of a pecuniary nature."

On appeal, the AZBA contends that using the circuit court's reasoning, no entity would be able to appeal a permit in this matter, even though the Act permits aggrieved parties, not simply applicants, to appeal. However, the fact that the AZBA is not an aggrieved party in this case, or that no one else could be considered an aggrieved party in this case, does not automatically render the circuit court's decision erroneous. The Legislature "may permissibly *limit* the class of persons who may challenge a statutory violation." *Miller v Allstate Ins Co*, 481 Mich 601, 607; 751 NW2d 463 (2008). As MAC points out, the Legislature can make that limitation very strict, as it did in MCL 324.35305(1), which limits those who can contest a permit or decision to the applicant or the "owner of the property immediately adjacent to the proposed use . . . ." Thus, in some instances there may not be an entity that constitutes an

aggrieved party after an administrative body renders a decision. That this may have occurred here does not evidence that the appeals process provided for in the Act is being circumvented or rendered moot.

Appellees argue that the AZBA lacks any authority to file an administrative appeal, noting the limited nature of its authority delineated in MCL 259.457 and the Tuscola Area Airport Zoning Ordinance (the Airport Ordinance). We agree.

"Townships have no inherent powers; they possess only those powers expressly granted them by the Legislature or the Michigan Constitution or 'fairly implied' therefrom." *Hughes v Almena Twp*, 284 Mich App 50, 61; 771 NW2d 453 (2009) (citation omitted). A zoning board of appeals "is a municipal administrative body, charged with interpreting the ordinance, hearing appeals, granting variances, and performing various other functions that may arise in the administration of the zoning ordinance." *Sun Communities v Leroy Twp*, 241 Mich App 665, 670; 617 NW2d 42 (2000) (citation omitted). Under the Airport Ordinance, "[t]he Board of Appeals has the powers set forth in Section 27 of the Airport Zoning Act, being MCL 259.457,[5] and shall

[5] MCL 259.457 provides:

> All airport zoning regulations adopted under the provisions of this act shall provide for a board of appeals to have and exercise the following powers:
>
> (a) To hear and decide appeals from any order, requirement, decision, or determination made by the administrative agency in the enforcement of the zoning regulations, as provided in [MCL 259.459];
>
> (b) To hear and decide any special exceptions to the terms of the airport zoning regulations upon which such board may be required to pass under such regulations;
>
> (c) To hear and decide specific variances under [MCL 259.454].

exercise such powers as are conferred upon it in the Airport Zoning Act and in this Ordinance." Airport Ordinance, § 5.2. Airport Ordinance § 5.2(D), titled "Powers," provides:

> The Board of Appeals, by the concurring vote of a majority of its members, shall have the power to issue certificates of variance under the provisions of this Ordinance, or to otherwise decide appeals from any order, requirement, rule, regulation, decision or determination made by the Airport Zoning Administrative Agency/Zoning Administrator *under the powers conferred upon it by this Ordinance*. [Emphasis added.]

Thus, under the Airport Ordinance, these are the sole powers conferred on the AZBA.

The AZBA attempts to rely on the purpose of the Airport Ordinance, which is to "prevent[] the establishment of airport hazards, restrict[] the height of structures and objects of natural growth and otherwise regulate[] the use of property in the vicinity of the Tuscola Area Airport . . . ." Airport Ordinance, § 1.2. However, that is the stated purpose of the Airport Ordinance, not the stated purpose of the AZBA. Two additional purposes stated for the Airport Ordinance are "designating the Airport Zoning Administrative Agency/Zoning Administrator charged with the administration and enforcement of such regulations; [and] establishing an airport zoning board of appeals[.]" Airport Ordinance, § 1.2. Therefore, according to the Airport Ordinance, administration and enforcement of the regulations does not sit with the AZBA, but with the Zoning Administrative Agency/Zoning Administrator.

Moreover, Airport Ordinance, § 6.4, "Civil Action Available," gives the authority to initiate an action in Tuscola Circuit Court to "[t]he Airport Zoning Admin-

istrative Agency/Zoning Administrator, on behalf of and in the name of the County of Tuscola" in order to "prevent, restrain, correct or abate any violation of this Ordinance or under the Airport Zoning Act . . . or of any order or ruling made in connection with their administration or enforcement . . . ." Furthermore, the AZBA and the Airport Zoning Administrative Agency/Zoning Administrator are entirely separate entities. Article 2 defines "Airport Zoning Administrative Agency" as "[t]he Tuscola County Airport Zoning Administrator or its Agent, the local zoning administrator," which is distinctly separate from the AZBA, "[a]n independent, five (5) member board appointed by the Tuscola County Commissioners." Airport Ordinance, §§ 2.9, 2.10. Accordingly, the Airport Ordinance does *not* authorize the AZBA to file suit in relation to issues related to the ordinance. Rather, the Airport Ordinance expressly grants and limits that authority to someone other than the AZBA.[6]

The AZBA also relies on *Dep't of Consumer & Indus Servs v Shah*, 236 Mich App 381, 386; 600 NW2d 406 (1999), arguing that it is an aggrieved party because it has a "statutory duty to protect the Airport against hazards and therefore has an interest in ensuring that the Tall Structure Act is properly applied." However, *Shah* does not support the AZBA's position.

In *Shah*, the petitioner, the Department of Consumer and Industry Services, appealed the final order of dismissal issued by the Disciplinary Subcommittee of the Board of Medicine. *Id*. at 384. The petitioner had charged the respondent with multiple violations of the

[6] Notably, even the agency/administrator's power to bring suit is limited and permitted only "if the local unit's administrative body or the County Board of Commissioners, respectively, shall have authorized a civil action." Airport Ordinance, § 6.4.

Public Health Code. However, after a hearing, the disciplinary subcommittee adopted the hearing referee's recommendation and dismissed the charges against the respondent. On appeal, the respondent argued that the petitioner lacked standing to appeal the subcommittee's decision. *Id*. This Court held that the petitioner, "[a]s an agency charged with enforcing the Public Health Code," had a "cognizable interest in ensuring that a hearing referee properly applies the law in an administrative proceeding." *Id*. at 385-386. Further, this Court concluded that the petitioner had "an interest in the litigation because misconstruction or improper application of the law would hinder [the petitioner's] ability to enforce the law as the Legislature intended." *Id*. at 386. In contrast, the instant case involves issuing a permit under MCL 259.482a, which MAC, not the AZBA, is tasked with enforcing. Further, our Supreme Court has recognized that "an interest in the proper enforcement of a statute has never before been thought sufficient to confer standing; instead, a concrete and particularized injury is required to confer standing." *Federated Ins Co*, 475 Mich at 291 n 4.

The AZBA contends that the statutory appeal right is "meaningless if the local agencies *charged with regulating structures near airports* do not have standing to appeal the erroneous issuance of a Tall Structure Permit for wind turbines beside an airport." However, as the circuit court noted, the AZBA has the opportunity to regulate the structures *before* any tall-structure permit ever gets issued. That is, a tall-structure permit is generally not issued unless the AZBA has already authorized the variances necessary. See MCL 259.482a(1). To permit the AZBA to be an aggrieved party to MAC's issuance of tall-structure permits, particularly in this case in which the Permits were

issued in reliance on the AZBA's certificates of variance approval, would give the AZBA an unwarranted second bite at the apple.

This interpretation is further supported by Airport Ordinance, § 6.1. This provision grants MAC the authority, as an aggrieved party, to appeal a determination by the AZBA.[7] This provision flows logically from the fact that MAC's preliminary determinations can essentially be "overruled" by the AZBA, rendering MAC an aggrieved party. MAC, on the other hand, does not have the authority to "overrule" the AZBA. MAC generally has already provided notice that a permit can be issued if variance certificates are received. Therefore, there is little for MAC to do but issue a permit after it receives variance certificates.

Considered in context, it would be both illogical and inconsistent for us to conclude that the AZBA has the ability, let alone the authority, to appeal MAC's issuance of a tall-structure permit. By the time the issues reach MAC, the AZBA has already reviewed all of the evidence, held hearings, and created whatever record it believes is necessary to support its variance decision. The AZBA can hardly be an aggrieved party under such circumstances. Indeed, the only conceivable times the AZBA would want to appeal the issuance of a tall-structure permit after it had already issued the requested variance would necessarily be times when it was simply displeased by the result, i.e., when the courts overrule its denial, as occurred in this case, or when the makeup of the AZBA changes between issu-

[7] Airport Ordinance, § 6.1 provides, "Any person, including the [MAC] on behalf of and in the name of the State, aggrieved by any decision of the [AZBA], may appeal to the Circuit Court of the County of Tuscola as provided in [MCL 259.460]."

ance of the certificates and issuance of the permit so that the minority that wanted to deny a variance is now a majority.

Lastly, the AZBA contends that for MDOT to grant a tall-structure permit, it must satisfy certain requirements "including an opinion by MDOT that the Michigan Tall Structure Permit could be issued." The AZBA argues that "MDOT making such [an] opinion requires an airspace study or finding of noninterference, which is lacking in the present case." However, this argument relates to the substantive merits of the case, not whether the AZBA has standing. Accordingly, we conclude that the circuit court did not err when it determined that the AZBA was not an aggrieved party.

B. DOCKET NO. 357210 (AIRPORT AUTHORITY)

As with the AZBA, the circuit court concluded that Airport Authority was not an aggrieved party because it had not established that it would suffer a concrete and particularized injury or that it had an interest of a pecuniary nature beyond mere possibility. More specifically, the circuit court determined that Airport Authority failed to provide any evidence about how the wind turbines "will affect its current flight paths, how many airplanes might cease using the airport, or any financial data related to those flights" to support its assertion that it will lose money if fewer airplanes use the airport because of the wind turbines. The circuit court noted that the record was filled with concerns from pilots of things the turbines " 'may' " do. The court likewise acknowledged that the administrative record reflected departure paths " 'potentially' " excluding aircrafts from departing under certain weather conditions. Ultimately, however, the court explained that "these potential risks were specifically not considered

by the FAA in its determination because the FAA determined they did not constitute a 'substantial adverse effect' on safety at the airport." Thus, the circuit court concluded that Airport Authority was "not able to state, as a matter of concrete, particularized injury, that there will be actual losses of flights, fuel sales, or use of the airport."

The circuit court also rejected Airport Authority's concerns regarding loss of federal grants from the FAA because it "presented no evidence or authority to suggest that the FAA, having determined that the wind turbines present no substantial safety risk, will subsequently revoke a grant to the airport based on a safety risk presented by the wind turbines." In reaching these decisions, the circuit court noted that the Tuscola Circuit Court had "already rejected several of these arguments," and although it was not bound by those decisions, it found that Airport Authority's "arguments, testimony, and evidence have not changed in any way that would bring this Court to a separate conclusion."

The determination whether Airport Authority is an aggrieved party centers on whether Airport Authority's alleged harms are "concrete and particularized." See *Federated Ins Co*, 475 Mich at 291. Airport Authority argues that "there is a substantial risk that [it] will lose revenue because of the steeper flight paths imposed by the grant of the Tall Structure Permit" to the extent that it "has shown a sufficient likelihood of harm." It further argues that certainty is not required and cites *Detroit Downtown Dev Auth v US Outdoor Advertising, Inc*, 480 Mich 991, 992 (2007), for the

premise that any "potential" cause of economic damage is sufficient.[8]

In that case, an advertising agency had sought a variance from the Detroit Board of Zoning Appeals (ZBA) to allow them to place large advertisements on a variety of buildings. *Detroit Downtown Dev Auth v US Outdoor Advertising Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2007 (Docket No. 262311), pp 1-2, rev'd 480 Mich 991 (2007). Because the Detroit Downtown Development Authority (DDA) owned a parking garage located within 300 feet of one of the buildings, it received notice of the advertising agency's request for a variance, and the DDA opposed the advertising plans. *Id*. at 2. The ZBA granted the requests for two buildings, but denied requests for two other buildings. *Id*. The DDA appealed the decision in the circuit court, arguing that the decision was not supported by competent, material, and substantial evidence. *Id*. The advertising agency argued that the DDA lacked standing, but the circuit court disagreed and reached the merits. *Id*. On appeal in this Court, in a split opinion, the advertising agency again argued that the DDA lacked standing. *Id*. This Court held that the DDA's opinion "that the super graphics will harm its overall development plan of the downtown area" was "unsupported by evidence" and, therefore, was insufficient to satisfy the requirement of a "concrete" "injury in fact." *Id*. at 3. Our Supreme Court reversed this Court, holding:

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[8] Although *Detroit Downtown Dev Auth*, 480 Mich 991, was a "standing" case and not an "aggrieved party" case, this distinction is of no consequence here even though the former governs the right to bring suit and the latter the right to appellate review of an administrative decision; in either case, a particularized and concrete injury must be shown, i.e., that the injury arose from the actions of a court judgment or the underlying facts of the case. See *Olsen*, 325 Mich App at 181.

> [P]laintiff has shown that it has made substantial investments in the area surrounding the variance, that it owns nearby buildings, and that it has a supervisory authority over the development district that encompasses the variance. Further, plaintiff has shown that the variance will potentially cause economic injury to its interests. Because a judgment in favor of plaintiff will eliminate these injuries, plaintiff has established standing to challenge the variance. [*Detroit Downtown Dev Auth*, 480 Mich at 992.]

The Airport Authority argues that the Supreme Court's order in *Detroit Downtown Dev Auth* should be read broadly to mean that a showing of "potential" for any economic injury to its interests is sufficient to constitute a concrete, particularized, and actual or imminent injury. We disagree. The instant case is distinguishable because the DDA's interests were greater than mere ownership of property near the buildings that would show the advertisements and because the degree of the "potential" injury was far greater in that case than has been suggested here. The DDA had invested over $65 million in the "affected area" that was statutorily created to "eliminate the causes of property value deterioration," *Detroit Downtown Dev Auth* (METER, J., dissenting), unpub op at 4 (quotation marks, citation, and brackets omitted), and held "supervisory authority over the development district that encompasse[d] the variance," *Detroit Downtown Dev Auth*, 480 Mich at 992. Therefore, the potential injuries the DDA was likely to incur were not simply the loss of renters in the garage, but loss of value to its millions in investments to the larger area and negative impacts related to its statutory obligations. This is a far more concrete and particularized injury than those alleged by Airport Authority, as explained more fully later in this opinion. Moreover, the instant case is further distinguishable from *Detroit*

Downtown Dev Auth because, unlike in the instant case, the DDA sought to challenge the grant of a variance by the ZBA—not the issuance of a permit from another agency after variances had already been granted by the ZBA. Nonetheless, we consider the Airport's Authority's arguments in turn.

Airport Authority has alleged three potential harms: loss of revenue to the airport caused by fewer pilots using the airport, injury to its safety interests resulting from alteration of flight paths "to a steeper and riskier approach angle" resulting from the building of the turbines, and revocation of federal grants by the FAA.

Looking first at the loss of revenue to the airport, Airport Authority relies on MDOT reports to establish that "the average visitor to the airport spends $262" and contends that the loss of even one visit would establish a pecuniary interest. There are multiple problems with this argument. First, given that the number of visitors to an airport varies from year to year, even without turbines, the loss of multiple visitors, let alone a single one, is not enough to establish that the loss—if any—was created by the installation of turbines. Rather, weather conditions, the economy, the personal finances of individual pilots, and any number of other factors necessarily affect the number of visitors to an airport in any given year. Absent some way to correlate the loss of revenue to the installation of turbines, this assertion of harm is nothing more than speculation. See *Federated*, 475 Mich at 291.

Second, MDOT's method of calculating the spending of the "average" visitor to the airport is nothing more than dividing revenue by the number of visits to the airport. Airport Authority has provided no evidence to establish that this number can or should be used to

represent what the average pilot, who might not make a particular visit because of the turbines, spends. There is no evidence to indicate what types of revenue, such as fuel sales and hangar rental, make up the $262 figure, nor is there any evidence to establish whether a typical pilot who might be affected by the changes in descent altitude makes any of these types of expenditures when they use the airport. Further, although it is reasonable to conclude that the weather will cause the cancellation of some flights, this does not automatically translate into a loss of revenue. Just because a pilot does not make a flight on a particular day because of the weather does not establish that the visit is lost forever—it may simply be deferred to a different day when weather conditions are better. Indeed, weather conditions prevent pilots from being able to fly even without the presence of turbines. However, these losses are unpredictable and entirely caused by unexpected weather conditions.

Although Airport Authority argues that inclement weather is all but certain to occur, inclement weather is affected by so many different variables that its occurrence is extremely difficult to predict and cannot constitute anything other than a mere possibility arising from multiple unknown and future contingencies. See *Truman v J I Case Threshing Machine Co*, 169 Mich 153, 158; 135 NW 89 (1912) (holding that anticipated profits from anticipated use of a threshing machine were "too conjectural and uncertain" because threshing "is conducted in the open air and subject to contingencies of weather, breakages, delays, . . . and skill and energy in operating the machine, which make it impracticable definitely to ascertain . . . the profits") (quotation marks and citation omitted). Further, although pilots expressed concerns that the wind turbines could create navigational hazards or pose a

threat to the safety of the airspace, not a single pilot stated that the addition of the turbines would definitely cause them to stop using the airport or that they had intended to fly under VFR during periods of low visibility but would now be prevented from doing so as a result of the turbines.

Airport Authority contends that the circuit court erred by faulting Airport Authority for failing to provide evidence of how the turbines would affect current flight paths, how many airplanes might cease using the airport, or any financial data related to those flights. Airport Authority notes the " 'higher than standard minimum climb gradient,' " which could " 'potentially exclude[] aircraft from departing Tuscola Area Airport . . . .' " This evidence only supports the circuit court's determination that Airport Authority failed to prove anything concrete, given that the statement specifically provides that it only *potentially* excludes aircraft. The vague potential of this outcome is enough to render this harm a mere possibility arising from some unknown and future contingency. See *Federated*, 475 Mich at 291.

Airport Authority's next purported harm is "a concrete and particularized injury to its interests in safety [because it would be] required to alter its flight paths to a steeper and riskier approach angle . . . ." However, the record does not support that there is any injury to Airport Authority's safety interests from the building of the turbines. Not only has the FAA issued its DNH, but it also rejected these exact arguments when raised in the petition requesting a discretionary review of the determinations, concluding that "the structures would not have an adverse effect on the safe and efficient use of the navigable airspace by aircraft and would not be a hazard to air navigation."

Notably, the circuit court relied, in part, on the Tuscola Circuit Court's determination in the reversal opinion that " 'no evidence was presented by an expert to substantiate the contention that the turbines would negatively affect airport operations, nor did the members of the public cite any reliable authority which would contradict Pegasus'[s] evidence.' " (Brackets omitted.) The FAA already considered the pilot testimony regarding the concerns and arguments being raised by Airport Authority before it issued its affirmation of the DNH's conclusion that the turbines "would not be a hazard to air navigation." No new evidence has been added to the record since that time. There is no support in the record for Airport Authority's contention that there is an injury to its safety interests created by MDOT's issuance of the Permits in reliance on the certificates issued by the AZBA.

MAC argues that even if turbines in general could cause such harms, "it is entirely speculative that *these* turbines will specifically harm [Airport] Authority." Indeed, when Airport Authority sought to challenge the FAA's DNH, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]he area already contains numerous other turbines." *Tuscola Area Airport Auth v Dickson*, 831 F Appx 511 (DC, 2020). The record does not indicate that Pegasus's turbines are taller, closer, or somehow more obstructive of flight navigation than the hundreds already in existence. In fact, the FAA concluded that "the aggregate impact on air safety would be negligible." *Id*.

Airport Authority argues that the public comments from pilots related only to the new turbines—not those already constructed. Airport Authority also argues that the existing turbines did not change the flight altitude or potential for inclement weather. Neither the issu-

ance of the Permits nor the actual construction of the turbines will alter the potential for inclement weather any more than the existing turbines. Further, as discussed, the FAA repeatedly concluded that Pegasus's turbines do not create a safety risk, either individually or in aggregate with the ones already in existence.

Lastly, Airport Authority contends that it might lose FAA funding because the turbines pose a hazard. The FAA has already determined that the turbines will pose no hazard to air navigation. To argue that the FAA would revoke funding on a conclusion that those same turbines now constitute a hazard is counterintuitive at best. On this record, there is no evidence to conclude that Airport Authority bears any real risk of losing future funding from the FAA as a result of Pegasus building turbines that the FAA has explicitly determined are not a hazard. This purported harm is nothing but a mere possibility arising from some unknown and future contingency. *Federated*, 475 Mich at 291.

Affirmed.

SHAPIRO, J., concurred with RICK, P.J.

MURRAY, J. (*concurring in part and dissenting in part*). The majority opinion correctly concludes that the Tuscola Area Airport Zoning Board of Appeals is not an aggrieved party under MCL 259.489 of the Tall Structure Act, MCL 259.481 *et seq*., and MCR 7.103(A). However, for the reasons briefly set out below, I depart from the conclusion that the Tuscola Area Airport Authority (Airport Authority) is not an aggrieved party, and I therefore would reverse in Docket No. 357210.

As the majority notes, an aggrieved party for purposes of this statute and court rule requires that a party " 'have some interest of a pecuniary nature in the outcome of the case and not a mere possibility arising from some unknown future contingency.' " *Olsen v Chikaming Twp*, 325 Mich App 170, 181; 924 NW2d 889 (2018), quoting *Federated Ins Co v Oakland Co Road Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). As the *Federated Ins Co* Court stated:

> [T]o have standing on appeal, a litigant must have suffered a concrete and particularized injury, as would a party plaintiff initially invoking the court's power. The only difference is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case. [*Federated Ins Co*, 475 Mich at 291-292.]

Here, the Airport Authority is an aggrieved party because (1) the airport and its customers are the exclusive groups the permitting decision is concerned with, and the Airport Authority's statutory duties could be impacted by the decision to allow the wind turbines to be built, (2) record evidence shows the high likelihood that the issuance of the permits will cause the Airport Authority to lose revenue, and (3) the combination of (1) and (2) show that the Airport Authority will suffer damage in a way unlike others in the community.

First, with respect to the Airport Authority's duties, there is no doubt that it has broad statutory responsibility over all aspects of the airport, including the landing facilities. MCL 259.622. It also has the power to sue, tax, and otherwise control the entirety of airport operations. *Id*. The safety of planes landing and taking off from the airfield governed by the Airport

Authority is of paramount concern to the Airport Authority. Thus, the decision to issue a tall-building permit that allows for the placement of wind turbines in the immediate vicinity of the airport, and which may have real consequences to certain planes seeking to use the airport, causes the Airport Authority a particularized injury. Evidence from the administrative record presented to the circuit court shows that with the placement of these wind turbines, certain planes seeking to use the airport will be required to enter a higher airspace, which in turn requires those planes to utilize a steeper decline to land at the airport, and a steeper incline to take off. This change in flight patterns causes actual, particularized safety issues for the Airport Authority.

Indeed, tied directly to the issues of airspace and airplane descents to, and takeoffs from, airports, and the placement of tall structures that could affect those descents and ascents is the Tall Structure Act. The stated purpose of the Tall Structure Act is, in part, to "promote the safety, welfare, and protection of persons and property in the air *and on the ground* by regulating the height, location and visual and aural identification characteristics of certain structures[.]" 1959 PA 259, title (emphasis added). Because of that purpose, the act contains detailed guidelines on what the Michigan Aeronautics Commission (MAC) must evaluate to determine the effect, if any, a tall structure will have on airspace surrounding airports, including alterations to descents and ascents. See MCL 259.482a(2)(b) and (g), and MCL 259.481(e). Thus, the Legislature has recognized that there is a direct corollary between the permitting of tall structures near airports and "the safety, welfare, and protection of persons and property in the air and on the ground . . . ." 1959 PA 259, title. This alone shows that the Airport Authority's concern

for safety on the grounds it has jurisdiction to oversee, and for the planes and passengers flying into the airport, is real, particularized, and substantial.[1]

Second, the likely potential that some planes may no longer use the airport because of the undisputed need to enter higher airspace and then engage in a steeper descent to land (and steeper incline to take off), will cause the airport to lose revenue. Evidence presented showed that, on average, each plane landing at the airport spends $262. Thus, even if one less plane that would have otherwise used the airport diverts to another, the airport will have suffered a pecuniary loss. Because it is not the amount of pecuniary loss, but the fact of it occurring that counts, the Airport Authority established a pecuniary loss.[2]

These two factors together establish that the Airport Authority also has "special damages different from those of others within the community." *Olsen*, 325 Mich App at 193. Quite simply, Congress and the Michigan

[1] Supporting the legislative determination that tall structures can have an effect on safety in the air and on the ground was public comments from several experienced pilots who have used the airport. That evidence showed that a new decline for landings (and inclines for takeoffs) resulting from the use of a higher airspace, and the likely need to circumnavigate the wind turbines by certain planes, may either decrease the safety of landing on the airport runway or cause planes to divert to another airport to avoid these concerns. There was also undisputed evidence that the airport's radar would be impacted if and when certain planes flew over the turbines. Additionally, the Federal Aviation Administration (FAA) determined that the wind turbines would interfere with air navigation and the use of instrument flight rule procedures but concluded the interference would not be substantial.

[2] It is true that, unlike in a typical case where a money judgment is entered against a party, there is no absolute certainty as to the extent of any pecuniary loss the Airport Authority may experience. But under these circumstances, where the challenge is to permits that would allow future development of the turbines, it would be impossible to prove with absolute certainty a pecuniary loss.

Legislature required these statutory investigations by the FAA and MAC regarding these wind turbines precisely to ensure that the safety of *the airport*, and the planes and passengers that use it, is not jeopardized. Because the Airport Authority is *the* legal entity charged with control over the airport, and a decision to grant these permits only impacts the airport and the customers that use it, I would hold that the Airport Authority is an aggrieved party and that the circuit court erred in not addressing the merits of the Airport Authority's appeal.